THE INDIAN DECISIONS, NEW SERIES.

ALLAHABAD, VOL. I.

THE

INDIAN DECISIONS

(NEW SERIES)

Being a re-print of all the Decisions of the Privy Council on appeals from India and of the various High Courts and other Superior Courts in India reported both in the official and non-official reports from 1875.

EDITED BY

THE LAWYER'S COMPANION OFFICE

TRICHINOPOLY AND MADRAS

ALLAHABAD, VOL. I

(1875—1880)

I.L.R., 1 and 2 Allahabad

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

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INTRODUCTION.

THE learned public may remember that the first five volumes of the Allahabad section of the INDIAN DECISIONS, NEW SERIES, as originally published by us before the Government of India granted us permission to use their copyright in the INDIAN LAW REPORTS SERIES (1876—1900), reproduced, in chronological order, all the cases reported in the first nine volumes of the Allahabad Series of the INDIAN LAW REPORTS and in the contemporary private law journals of the province; but that, after the grant to us, in May 1913, of the said permission, we devoted ourselves to the publication of the *verbatim* and *seriatim* reprints of each series of the INDIAN LAW REPORTS only. We then made an announcement to the effect that, after finishing the work of reprinting the INDIAN LAW REPORTS, we would, in substitution for the old first five volumes of the Allahabad section of our INDIAN DECISIONS, NEW SERIES, reprint an equal number of five new volumes, containing a *verbatim* reproduction exclusively of the cases reported in volumes 1 to 9 of the INDIAN LAW REPORTS, Allahabad Series, and that we would supply the new five volumes free of cost, though at a sacrifice of our legitimate profits, only to those gentlemen who should by this time be in possession of the old five volumes by right of purchase from us.

In fulfilment of our promise, we now beg to place before the learned public volume I of the Allahabad section of our INDIAN DECISIONS, NEW SERIES, containing the *verbatim* and *seriatim* reprints of the cases reported in volumes 1 and 2 of the INDIAN LAW REPORTS, Allahabad Series. We need scarcely add that, in this volume as in the other volumes of our INDIAN DECISIONS, NEW SERIES, generally, we have taken care to prominently indicate the original

pagination of the INDIAN LAW REPORTS, given corresponding references to the other reports in which any INDIAN LAW REPORTS case might also have been reported and have also appended notes of subsequent cases under the head-note of each main case. A copious subject-index and two tables of cases are also added to the volume for facilitating reference.

We would particularly urge those of our learned constituents that have been waiting to become subscribers to our INDIAN DECISIONS, NEW SERIES, only after the publication of these five volumes, to get their names registered at the earliest practicable opportunity, as we are striking off only a few copies more than we are bound to supply free of cost and thus to save themselves from disappointment.

The delay in the publication of this volume, though we much regret it, is due to the difficulty, caused by the present war, of securing a free and adequate supply of paper. To the same cause has also to be attributed the slight variety that may be observed in the kind of paper used in the get-up of this volume. We earnestly trust that better conditions may soon prevail and enable us to uniformly maintain the superior quality of our publications.

We beg leave to prefix to this volume our prefaces to volumes 1 and 5 of the Allahabad section of the INDIAN DECISIONS, NEW SERIES, which will give a connected view, from the very commencement, of our attempts, now successful through the kindness of the Government of India, to serve the learned public by placing before them cheap reprints of the INDIAN LAW REPORTS SERIES.

THE LAWYER'S COMPANION OFFICE,
MADRAS,
Dated 22nd December, 1915.

T. A. VENKASAWMY ROW.
T. S. KRISHNASAWMY ROW.

PREFATORY NOTE TO

THE 5TH VOLUME OF INDIAN DECISIONS, NEW SERIES, ALLAHABAD SECTION.

We owe an explanation to the learned subscribers to the INDIAN DECISIONS, NEW SERIES, for the delay in issuing this fifth volume of the Allahabad section thereof.

The copyright in the INDIAN LAW REPORTS belongs to the Crown, and we realized that the publication of the INDIAN DECISIONS, NEW SERIES, could not be proceeded with without obtaining from the GOVERNMENT OF INDIA their license to reproduce and publish the copyright matter in those Reports.

The publication of the first four volumes of the INDIAN DECISIONS, NEW SERIES, ALLAHABAD SECTION has, we freely admit, involved an infringement by us of the copyright in the INDIAN LAW REPORTS, and for this we express our sincere regret, and apologise to the GOVERNMENT OF INDIA.

Negotiations have taken some time, and we are now glad to be able to announce to the public that the GOVERNMENT OF INDIA have been graciously pleased to accord to us their license to use their copyright in the INDIAN LAW REPORTS up to the year 1900 on certain terms and conditions which we gratefully recognize as eminently just and liberal and for which we beg to tender them our respectful thanks.

We take it that this privilege has been granted to us more for the sake of our learned constituents than for ourselves. Having the resources and the facilities which our own fully equipped and up-to-date LAW PRINTING HOUSE places at our entire disposal and command, we now have also the advantage of the grant of this privilege by the GOVERNMENT OF INDIA. This combination of facilities emboldens us to assure the learned public that we can very soon place in their hands *verbatim* re-prints of all the four series of the INDIAN LAW REPORTS in a very small compass and for a very low price.

We have made the most satisfactory arrangements in our Press for the rapid progress of this work; and we have also commenced to make the re-prints without any further loss of time.

In consequence of the permission granted to us by the Government of India to make *verbatim* re-prints of all the four series of the INDIAN LAW REPORTS and in deference to the wishes of the large body of our subscribers, we propose to change the present plan of the INDIAN DECISIONS, NEW SERIES, which till now consolidated and re-printed the decisions reported in both the official and the non-official reports from 1875 in the chronological order of their dates. But, hereafter, we will

divide the INDIAN DECISIONS, NEW SERIES, into two sections. The first will be devoted to, and will proceed with, the *verbatim* re-prints of the cases reported in the official reports, now to wit, the INDIAN LAW REPORTS, in the order and manner in which they are printed there, separating them from the cases reported in the private reports. And the second will be devoted to the re-print of the cases reported in the private reports, in respect of which further information and particulars will be given to subscribers in due course.

The learned public are aware that the first four volumes of the INDIAN DECISIONS, NEW SERIES, re-print cases contained in the first eight volumes of the Allahabad Series of the INDIAN LAW REPORTS along with other cases relating to the same province reported in the non-official reports.

This volume finishes the re-production of cases from such of the official and non-official reports as have been begun in the fourth volume and not completed therein. Thus, in the fourth volume, the subscribers will observe that cases from the sixth volume of the Allahabad Weekly Notes and from the eighth volume of the Allahabad Series of the INDIAN LAW REPORTS have been left incomplete. In this volume, therefore, we have finished the re-production of all the remaining cases from the sixth volume of the Allahabad Weekly Notes and the eighth volume of the Allahabad Series of the INDIAN LAW REPORTS and have also begun and finished the *verbatim* re-print of cases from the ninth volume of the Allahabad Series of the INDIAN LAW REPORTS. The sixth volume of the INDIAN DECISIONS, NEW SERIES (Allahabad section), will commence to exclusively re-print the cases from the tenth volume of the said Allahabad Series of the INDIAN LAW REPORTS.

For the sake of the learned public, who are already subscribers to the INDIAN DECISIONS, NEW SERIES, as well for the sake of those who will become subscribers hereafter, the cases reported in the first nine volumes of the Allahabad Series of the INDIAN LAW REPORTS will be separately printed in an equal number of five volumes and will be supplied to them *free* at a later date. But this consideration can be availed of only by gentlemen who immediately become subscribers to the INDIAN DECISIONS, NEW SERIES, as a whole, and also purchase the first five volumes thereof as published under the original plan. It cannot be availed of by those who elect to wait and to take only the proposed *verbatim* re-prints of the first nine volumes of the Allahabad Series of the INDIAN LAW REPORTS. To such gentlemen, these five volumes will not be given free but sold at Rs. 7 per volume (Postage, V.P. charges, etc., *extra*).

We further beg to announce that we have also begun to re-print the cases reported in the Calcutta Series of the INDIAN LAW REPORTS and that we will publish the first volume of the Calcutta section of the INDIAN DECISIONS, NEW SERIES, by the end of this month,

We will do our best to take on hand the other series of the INDIAN LAW REPORTS, Madras and Bombay, as early as possible.

The plan of these *verbatim* re-prints will be as follows. The cases from the INDIAN LAW REPORTS will be re-printed in the order in which they appear there and will be literally *verbatim* re-prints, giving the authoritative head-notes, the statements of facts, the arguments of counsel and the judgments as fully and completely as reported in the INDIAN LAW REPORTS without the omission of even a single syllable.

In order to facilitate the citations of pages of the INDIAN LAW REPORTS, such pages are and will be indicated by means of thick types enclosed in thick rectangular brackets in the body of the book. Further, where a case found in the INDIAN LAW REPORTS is also reported in a private report or reports, it will be pointed out by the familiar equal to (=) symbol. Reference showing at a glance how each case has dealt with the previous cases and has been affected by subsequent cases will be noted. A copious subject-index will also be given at the end of each volume. Also, two tables of cases, one by the volume and page of each report from which the cases have been re-produced in this volume, and the other in the alphabetical order of the names of the parties, will be furnished to facilitate reference. Thus, no pains will be spared to make these re-prints of the INDIAN LAW REPORTS as complete and as useful as possible. We believe we need no further dilate on this point, as the learned subscribers all over the country are not unfamiliar with our publications.

We thank the learned profession for the very great patience and consideration they have shown towards us in respect of the long delay in the publication of this volume and also for their uniform esteem and patronage.

THE LAWYER'S COMPANION OFFICE, MADRAS.
10th May, 1913.

T. A. VENKASAWMY ROW.
T. S. KRISHNASAWMY ROW.

PREFACE TO

The 1st Volume of the Indian Decisions, New Series, Allahabad Section, as originally published.

I beg hereby to offer the legal profession in India the first volume of the Indian Decisions, New Series. As announced by me elsewhere, the Indian Decisions, New Series, is devoted to the *verbatim* re-print of all the judgments of the several High Courts in India and of the Judicial Committee of the Privy Council, since the year 1875, reported both in the official and in the non-official reports of the country. The volume now placed before the learned public is the first volume of the Allahabad section of the Indian Decisions, New Series, and comprises the judgments of all the cases decided by the Allahabad High Court from January, 1875 up to May, 1880 and by the Judicial Committee of the Privy Council on appeal from the Allahabad High Court and from the Judicial Commissioner of Oudh and reported in the official, as well as in the private, reports relating to that period. All the cases reported in volumes I and II, and a few cases—not more than 8—reported in volumes III and IV, of the I.L.R., Allahabad Series, will be found among the cases re-printed in this volume, which contains, also, such of the Allahabad cases as are not reported in the I.L.R., Allahabad Series, but are to be found in the Allahabad Weekly Notes, the I.L.R., Calcutta Series, the Bengal Law Reports, the Calcutta Law Reports, Sutherland's Weekly Reporter, the Law Reports Indian Appeals, Baldev Ram Dave's P.C. Judgments, Sutherland's P.C. Judgments, Saraswati's P.C. Judgments, and the Indian Jurist pertaining to the period specified above.

The imperfections of our legal Codes have justly enhanced the value of judge-made law, which is every day developing, and, side by side with its growth, a knowledge of the law is also rapidly spreading among the people. Judges and practitioners alike keenly feel the necessity of keeping themselves abreast of the current of modern case-law. But, the cost of acquiring a complete collection of all the decisions of the highest judicial tribunals of the land, even commencing from the date of the establishment of our present High Courts up-to-date, is becoming very prohibitive, at least to the majority of the learned profession. Many of the back numbers of the I.L.R. Series and of the private reports, relating to so recent a period as that covered by the years 1875 to date, are difficult to obtain and the chances of their being re-printed have become problematic. There is abundant evidence of the fact that the majority of the learned public are anxious to possess themselves of a comprehensive and cheap publication, which will bring together all our modern case-law, now scattered in the bewildering multitude of official and non-official reports, if any publisher should resolutely

and earnestly come forward to supply this long-felt need. This want of a consolidated and comprehensive edition of the decisions of the several High Courts is all the more intensely felt from the circumstance, that the I. L. R. Series do not report all the important cases decided by our High Courts, the total number of cases decided by our High Courts being greater than that which any particular report, official or private, publishes, and, also, from the circumstance already referred to that such cases are scattered over a large number of different reports.

The publication, therefore, of a consolidated and moderately priced edition of all the decisions of our High Courts, reported in the various official and private journals, was the *magnum opus* which, with the sole object of obviating the difficulty abovementioned of a considerable portion of the members of the legal profession, personally witnessed by him during his long practice at the Bar, my revered uncle, the late Mr. T. V. SANJIVA ROW, had set to himself to accomplish, and which he, in the midst of his manifold duties, had been slowly conserving all his resources to realise. My uncle's aim in this respect was threefold: to publish a *verbatim* re-print of all the Privy Council decisions published in the Moore's Indian Appeals and in the several reports of Acton, Knapp, etc., decided up to the year 1873; to publish, also, a *verbatim* re-print of the rare decisions of the old Supreme Courts and Sudder Dewanny Adawlats in India; and, further, to bring out a consolidated and comprehensive, but yet a cheap, edition of all the modern reported case-law. The first of these objects he endeavoured to realise in the publication hitherto known as the INDIAN REPORTS, but which has now ceased to exist, owing to the dissolution, in consequence of his death, of the partnership under which the publication was begun. The second object, my late uncle had in view, I have diffidently attempted to carry out in my recently started publication, the INDIAN DECISIONS, OLD SERIES, the first volume of which has already been placed before the profession. But, the third and last object aimed at by him was the one he most dearly cherished, and most ardently worked for, and, with the view of eventually taking up this work it was that he started the LAW PRINTING HOUSE, two years ago. And, though his untimely death has prevented him from carrying out his most important object, I have, as previously announced by me, resolved for the sake of the learned constituents to accomplish that object also.

The chief object of inaugurating the present publication, and, at the same time, the justification for issuing it, are in the words of my late lamented uncle, "to place within the easy reach of all practitioners, high or low, opulent or otherwise, a publication containing *in extenso* all the decisions of the highest judicial tribunals of the land in such a manner as would meet" all their requirements and for a fair and moderate price.

The present volume, it will be observed, collects together all the Allahabad cases scattered in 35 volumes of private and official reports

relating to the period between 1875 and 1880. The advantages of such a consolidation cannot be too highly valued. This feature, taken into consideration along with the chronological order in which these cases are arranged, *i.e.*, according to the dates of the judgments, and irrespective of the order in which they are found in the original reports, will, it is hoped, greatly conduce to a historical study of our case-law, a study, which, under a legislature which periodically amends, repeals and re-enacts almost all the enactments in force in the country, must be very essential and important for a clear and useful knowledge of the law.

The facilities which this series will afford the practitioner will be that the original paginations of the various cases, as they are to be found in the respective reports, have been, to render citation easy, indicated in the body of the judgments by means of thick black figures enclosed in rectangular brackets; where the decisions are reported in the I.L.R. as well as in the private reports, the original pages of the I.L.R. only are indicated, and, where more than one private journal reports a case or cases, the original pages of the report more frequently cited in the Courts, are indicated; and the reports thus preferred are underlined by thick lines. Again, where the same case is reported in more than one report, the repetition is pointed out at the top of each case and in the margin by the familiar (=) equal to symbol.

The novel feature about this publication is that each case is provided with an analytical, exhaustive and original head-note, the various points dealt with in the decision being split up into separate paragraphs, wherever possible, and printed with appropriate catch-words. The head-notes specially prepared for the LAWYER'S REFERENCE series, which have long ago earned the approval of the learned public, have been adopted for this publication, as far as possible. The late Mr. Sanjiva Row prayed the Government of India to grant him permission to make a *verbatim* re-print of the back numbers of the I. L. R. Series up to a certain period, and, after his death, a similar memorial was submitted to them by me also. But, they have not as yet designed to make any reply; and, from the pressure of the heavy work always before them, and from the important issues involved in the prayer, it would seem to be unreasonable to trouble them for a speedy answer. This circumstance, together with the fact that a very large section of the learned public are earnestly pressing me to bring out a publication of this kind, has compelled me to depart from the time-honoured practice of reproducing the head-notes of the official reporter, a departure, which, I trust, the profession will have no reason to complain of, and which, if reasonably considered, may not be without its own advantages, but which, however, will not preclude me from availing myself of the official head-notes, etc., should the Government of India graciously deem it fit to grant me, in future, the permission I have prayed for. The same consideration has induced me to omit the official statement of facts and the arguments of counsel, a further reason therefor being that the facts of the

case and the arguments of counsel are generally discussed in the judgments of the learned Judges themselves; though, wherever quite necessary, a brief statement of the facts of the case is also given.

At the end of the head-note of each case, the previous cases that have been considered in, and the subsequent cases that may have considered, the particular case have been noted. A copious and exhaustive general index has been appended to the volume which is calculated to serve as a complete digest of the case-law in the volume.

Two tables of cases, one by the volume and page of each report from which the cases have been re-produced in this volume, and the other in the alphabetical order of the names of the parties, have been furnished to facilitate reference. These tables will be consolidated at the end of the series relating to each province, when such consolidated table will serve as a key to the volumes of each province.

Particular attention is invited to the price of the volume, Rs. 7, which, considering the labour and research it has cost, its size, which covers more than a thousand pages, its printing and binding and general get-up, specially designed to make the work a permanent and enduring book of reference, I hope, the learned public will recognise to be only too moderate.

It is proposed to issue the volumes of this series at the rate of one volume every month and effective arrangements have been made for it. I wish, also, to say that, if a large number of subscribers earnestly require it, the publication of the judgments relating to the other provinces will also be simultaneously taken up.

In conclusion, I beg to state that the legal profession will only recognise in this publication an earnest desire on my part to serve them more than anything else and, if it should, even in the smallest measure, facilitate the work of the judge and the lawyer in the administration of justice, I shall feel amply rewarded.

I wish to avail myself of this opportunity to express my sense of indebtedness to Mr. M. M. MURZBAN, Bar-at-Law, Bombay, who has been so kind as to transfer to me the rights he acquired from Mr. W. K. PORTER of the ALLAHABAD WEEKLY NOTES, to re-produce *verbatim* the head-notes, statements of facts, etc., etc., of all such cases reported in the Allahabad Weekly Notes, as have not been reported in the Indian Law Reports Series, for the purposes of this series, which goes a great way to facilitate my work in this great undertaking, and to other professional gentlemen who have been rendering me unfailing assistance in the publication of this work.

THE LAWYER'S COMPANION OFFICE,
MADRAS,
Dated, 25th October, 1911.

T. A. VENKASAWMY ROW.

JUDGES OF THE HIGH COURT OF ALLAHABAD DURING 1875—1880.

Chief Justice:

HON'BLE SIR ROBERT STUART, KT., Q.C.

Puisne Judges:

HON'BLE F. B. PEARSON.

" C. A. TURNER, C.I.E.

" R. SPANKIE.

" R. C. OLDFIELD.

" D. STRAIGHT.

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THE

INDIAN DECISIONS

NEW SERIES.

ALLAHABAD—VOL. I.

I.L.R., 1 ALLAHABAD.

1 A. 1 (F.B.).

BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

1875
JULY 2.

FULL BENCH.

1 A. 1 (F.B.).

QUEEN *v.* GHOLAM ISMAIL AND ANOTHER. [2nd July, 1875.]

Act X of 1872, *ss.* 4, 297—*Judicial Proceeding—High Court—Powers of Revision.*

An appeal having been preferred to the High Court against a judgment of acquittal of the Court of Session, the persons who had been acquitted were arrested by the police and brought before the Magistrate, who illegally directed that they should be detained in custody pending the decision of the appeal.

TURNER, OFFG. C.J., and PEARSON, J., were of opinion that the High Court had no power, as a Court of Revision, to interfere with the order.

SPANKIE and OLDFIELD, JJ., *contra.*

GHOLAM ISMAIL and Miran Baksh were tried by the Judge of Allahabad on a charge of murder and were acquitted. The Local Government instructed the Government Advocate to present an appeal to the High Court praying that a new trial might be ordered. Oldfield, J., to whom the application for the admission of the appeal was presented, passed an order calling for the record. The officer whose duty it was to issue the precept, misapprehending the effect of the order, issued notices to the Magistrate of the District and to Gholam Ismail and Miran Baksh that the appeal had been admitted, and that it would be heard on a date mentioned in the notices. The District Superintendent of Police, having, presumably, been informed that the appeal had been admitted, directed the apprehension of Gholam Ismail and Miran Baksh. They were arrested by an Inspector on the 20th of June at 6 P. M., and on the 21st were sent to the Superintendent with the following report :—

"To the Superintendent of Police.—It is submitted that having arrested Miran Baksh and Gholam Ismail, the accused (implicated in the case of the murder of Minhaj-ud-din committed at mauza Basehri) on the 20th of June 1875, at 6 P. M., in the evening, [2] in obedience to your order, I beg to forward them with this report."

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On the report being received by the Superintendent he sent Gholam Ismail and Miran Baksh to the Magistrate of the District, who when they were brought before him passed an order in the following terms:—" Whereas an appeal has been preferred in the case, it is therefore ordered that both these persons remain in custody until the decision of the appeal —21st June 1875." Gholam Ismail and Miran Baksh were accordingly sent to *havalat* with a warrant. A special warrant was not drawn out. The Magistrate's clerk took a printed form and filled it in with a special addition. It was in this form :—

"Form of warrant of commitment for intermediate custody (*ss. 196, 197, 303*) :

" To the Court Inspector, Allahabad.—Whereas Gholam Ismail and Miran Baksh, defendants, residents of Basehri and mauza Sobhna, are charged with the offence of murder, *keep them in your custody till the decision of the appeal*, and the said defendants have been committed to the High Court for trial. You are therefore hereby directed to keep the said Gholam Ismail and Miran Baksh in your custody and to produce them when required by the Court.—(Signed) J. Robertson, *Magistrate.*"

It will be seen that the clerk took a warrant of commitment in the ordinary form, filled it up as if a commitment had been made to the High Court, and inserted the special addition italicized.

On the 23rd of June 1875, application was made on behalf of Gholam Ismail and Miran Baksh to the Court of Session, praying that it would refer the proceeding to the High Court under the provisions of s. 296 of the Criminal Procedure Code, and pending the decision of such reference to admit them to bail under the provisions of s. 390 of the same enactment, or to quash the Magistrate's order as illegal and *ultra vires*, as the Court of Session might deem meet. The Court directed the Magistrate to instruct the Government pleader to appear on the 24th of June and show cause. On the 24th of June the Court passed the following order :—"After hearing the arguments of counsel on both sides the Court is of opinion that the arrest of the applicants is contrary to law. They [3] have already been tried and acquitted on the charge of murder, and the fact that the Government has appealed the order of acquittal is not a sufficient ground for their re-arrest. The applicants must be held to be innocent men, at perfect liberty, until they have have been pronounced guilty on appeal. Under s. 296 the case is forwarded to the High Court for orders, and in the meantime, under the powers vested in this Court under s. 390, I order the Magistrate to release the applicants on their producing two sureties for Rs. 1,000 each."

On the 25th June, the reference made by the Court of Session was laid before Oldfield, J., who called on the Magistrate to send the order passed by him for the arrest of Gholam Ismail and Miran Baksh, and for any record relating thereto, and for an explanation of the circumstances under which he directed their arrest. The Magistrate, accordingly, forwarded the proceedings already referred to, and submitted a report in the following terms :—"In reply to your No. 384, dated the 26th June, I have the honour to inform you that it was not until the appeal had been admitted in the High Court that Gholam Ismail and Miran Baksh were arrested. As soon as the appeal was submitted they appeared to me to be in the position of persons against whom a reasonable suspicion existed of their having been concerned in a cognizable offence, and consequently to be liable to arrest—cl. 2, s. 92, Code of Criminal Procedure. It also seems to me useless to appeal a case in which the accused

were at large, and certainly would not surrender themselves, supposing the decision of the Sessions Court to be reserved. Unless there is some guarantee that the accused will be present to undergo the punishment awarded, the reversal of the Sessions Court's decision, supposing it to be made, would take effect on no one."

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On the 30th June, the reference was laid before Turner, Offg. C. J. The learned Judge, entertaining doubt whether the proceeding of the Magistrate was a judicial proceeding, and consequently whether the Court had power to interfere under the provisions of s. 297 of the Code of Criminal Procedure, and considering that the question was of importance as bearing on other cases than the one before the Court, referred it to the Full Bench.

[4] Mr. *Raikes* and Mr. *Colvin*, for Gholam Ismail and Miran Baksh.

The Government Advocate (*Mr. Warner*), for the Crown.

Mr. *Raikes*.—The Court has not admitted the appeal directed by the Local Government. It has only called for the record of the case. There is a distinction between admitting an appeal and calling for the record—s. 278 of the Code of Criminal Procedure. The Magistrate must be taken to have acted under color of his office. He says himself that he acted under s. 92 of the Code, but he could not have acted under that section. He must be taken to have acted under s. 142. [TURNER, OFFG. C. J.—But he issued no process.] The petitioners were brought before him under a warrant, and he could not lawfully detain them without sufficient reason—*In the matter of Moonshee Syud Abdul Kadir Khan* v. *The Magistrate of Purneah* (1). He should have asked them what they had to say. Had he done so, they would have pleaded a previous acquittal. The Magistrate's proceeding was one therefore in which evidence might have been taken, and was consequently a "judicial proceeding" as defined in s. 4 of the Code.

Mr. *Colvin*, on the same side, contended that the High Court had power to interfere whether the order was a final order or not, and cited—*In the Matter of Moonshee Syud Abdool Kadir Khan* v. *The Magistrate of Purnea* (1). There is no distinction in the Code between "order" and "final order." The terms are convertible. If "order" meant "final order" the words "sentence or order" in s. 294 of the Code would be unmeaning tautology. When the word "orders" is meant to be restricted to "final order," the word "final" is used—ss. 463, 464 of the Code.

The Goveenment Advocate contended that the appeal must be taken to have been admitted, as s. 278 of the Code did not apply to the Government, but only to private individuals. He also contended that the proceeding of the Magistrate was not one in which evidence could have been taken. The word "case" used in ss. 294, 297 of the Code means a case in which there has been a trial. If the High Court interferes it will act in contravention of s. 82 of [5] the Code, as the order will amount to the issue of a writ of *habeas corpus*. The case of *Moonshee Syud Abdul Kadir Khan* v. *The Magistrate of Purneah* (1) is not in point, as evidence might have been taken in that case. The orders referred to in s. 297 are final orders.

JUDGMENTS.

TURNER, OFFG. C.J. (who, after setting out the facts as above, continued).—In the course of the argument the learned Government Advocate has contended that the Court has no discretion to admit or reject an

(1) 11 B.L.R. Ap. 8.

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appeal duly preferred by an officer on behalf of Government, under the provisions of s. 272, Code of Criminal Procedure, and that consequently the order of this Court calling for the record is tantamount to an admission of the appeal. I believe the Court is agreed that the provisions of s. 278 apply equally to appeals presented under s. 272 against judgments of acquittal, as to other appeals. The point is, however, immaterial because whether the Court merely calls for the record, which is the effect of Mr. Justice Oldfield's order in the present case, or whether the appellate Court decides to hear the appeal, the Magistrate has no greater power in the one case than in the other to order the detention of the accused. Whether he has or has not the power in the view I take of s. 297, this Court is not now called upon to determine. For the purpose of the argument it may be assumed the order of detention is illegal, but has this Court the power to interfere with it? If it possesses such power, it is only in virtue of the provisions of s. 297, Code of Criminal Procedure. In England the legality of an order for the detention of a person can be determined by the issue of certain writs. It was at one time doubtful whether this Court possessed the powers of issuing such writs, but that doubt has been set at rest by the 82nd section of the Code, which expressly declares that neither the High Court nor any Judge of such High Court shall issue any writ of *habeas corpus* mainprise, *de homine replegiando*, nor any other writ of the like nature, beyond the Presidency towns. To European British subjects, and to such persons only, the 81st section of the Code accords the privilege, if they are detained in custody, and consider their detention illegal, of applying to the High Court for relief.

[6] The legislature having thus clearly manifested its intention of preventing the summary interference of this Court in cases in which natives of this country might complain of illegal detention, it appears to me that the Court would establish a precedent at variance with the spirit and letter of the law, if it ordered the release of the petitioners without being satisfied that it had powers to deal with the case under the provisions of s. 297, Code of Criminal Procedure. Whether a case is called for by itself or reported for orders, or comes to its knowledge, the High Court, as a Court of Revision, has only powers to deal with it under the provisions of that section, and the powers of the Court are defined in these terms:—"If it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit." Thus the interference of the High Court under this section is limited to judicial proceedings. Can it be said that the Magistrate's order is such a proceeding within the meaning of that term in the Code? The 4th section of the Code defines it to mean "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence." By the expression "a proceeding in which evidence is or may be taken," I understand "a proceeding in which evidence is or may be legally taken." The Magistrate did not pass any order on recorded evidence, nor was any evidence recorded. Was his proceeding a proceeding in the course of which evidence might be taken? He certainly did not contemplate taking any evidence, and in my judgment he was not competent to take any evidence; he was not holding an enquiry with a view to commitment, nor did he contemplate any such inquiry, nor did he make any commitment except to the custody of the jailor. He did not make an order sending the petitioners for trial to a superior Court, and at the same time, give

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directions for their intermediate custody. He simply gave an order to the jailor to detain them until the result was known of proceedings he believed to be then pending. The Magistrate knew his judicial functions had been fulfilled by the commitment to the Sessions Court. In order to prevent the petitioners from absconding in the event of the appeal being decided against them, he ordered their detention to custody, and he did not contemplate any other [7] proceeding of any kind. It is argued that Mr. Robertson issued the order for the detention of the petitioners under color of his office as Magistrate. That may be, but it does not necessarily follow that his proceeding was therefore a judicial proceeding within the meaning assigned to that term in the Code.

The learned counsel for the petitioners cited *Moonshee Syud Abdool Kadir Khan* v. *The Magistrate of Purneah* (1). I need not advert to the doubts expressed by Mr. Justice Pearson during the argument, and felt by me, as to the soundness of the ruling in that case, that s. 297 applies to any interlocutory as well as to a final order, because I believe we are agreed that the Magistrate's order in the present case was intended to be a final order; but I would point out that the case cited is clearly distinguishable from the case before the Court. In the case cited the orders with which the High Court interfered were passed in proceedings in which evidence might be taken. The Court consequently had before it a judicial proceeding which fell within the definition. It may appear strange that the Court has no power to interfere as a Court of Revision if a Magistrate illegally orders the detention of persons in custody without holding any judicial proceeding, and yet that the Court should be authorized to interfere where the Magistrate has passed such an order in the course of a judicial proceeding; but the legislature may have had in view emergencies in which it would be essential to the preservation of the public peace to debar the interference of this Court, and may have legislated to provide for such emergencies at the risk of some hardship to individuals.

For the reasons I have given I would inform the Judge that this Court has no power to set aside the order.

PEARSON, J.—On the question whether the Magistrate's order directing the two men to be detained in custody pending the appeal in the High Court is a judicial proceeding or not, my opinion is it is not such a proceeding within the terms of the definition contained in s. 4, Act X of 1872.

It was not a proceeding in the course of which evidence was or could be taken. The Magistrate did not contemplate any enquiry, [8] nor was he competent to make any enquiry in the case, which had passed out of his jurisdiction and was not before him. The High Court being for this reason unable to interfere with the Magistrate's order under the provisions of s. 297, the case was not one which could properly be reported by the Sessions Judge under s. 296 of the Act; nor could that officer properly admit the men to bail under s. 390 of the same.

The order passed by him under the last-mentioned section cannot, however, be set aside as null for want of jurisdiction by the High Court, not being a judicial proceeding within the terms of the definition contained in the law.

SPANKIE, J.—In my opinion, we have the power to set aside the Magistrate's order as illegal.

(1) 11 B.L.R. Ap. 8.

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Under s. 297 of Act X of 1872 if in any case either (1) called for by itself, or (2) reported for orders, or (3) which comes to its knowledge, it appears to the Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

There are thus three ways in which cases of irregularity and material error may come before the Court, but the material error must have occurred in a judicial proceeding.

By s. 4 of the Act a judicial proceeding means any proceeding in the course of which evidence is or may be taken, or in which any judgment or final order is passed on recorded evidence.

It has been argued, first, that the interference of the Court can only be exercised where the order referred to in s. 297 has been final; and secondly, that the order in the case before us was not made in any proceeding in which any evidence was or might have been taken, or in which any final order was passed on recorded evidence.

In order to determine whether or not the Court's interference is limited to those cases only in which a judgment, sentence or (final) order has been passed, it is necessary to consider those sections which lead up to s. 297.

[9] Section 293 directs that all subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such Courts as the High Court prescribes, exhibiting the offences charged, the offences of which the accused persons are convicted, and the sentences or orders passed upon them.

Under s. 294, and probably upon the examination of any such periodical statements, as well as on any motion directly made to itself, the Court may call for and examine the record of any case tried by any subordinate Court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.

Now the language here is explicit enough. The record called for is the record of any case (actually) *tried* by any subordinate Court and consequently disposed of, and the High Court is to satisfy itself, (1st) as to the legality, (2ndly) or propriety, and (3rdly) as to the regularity of the proceedings. This section appears to give to the Court supervising power. It is not only to satisfy itself as to the legality or propriety of the sentence or order passed, but as to the regularity of the proceedings in the case. Assuming that it may satisfy itself that there has been material error in any judicial proceeding of the Court, the High Court would be acting rightly in noticing it.

Section 295 empowers any Court of Session or Magistrate of the District, at all times, to call for and examine the record of any Court subordinate to such Court or Magistrate, for the purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court.

Here the Sessions Judge, as the judicial head of the district, has conferred upon him large powers to supervise the proceedings of the officers subordinate to him, and the Magistrate of the District has the same power as regards those directly subordinate to himself; and both the Court of Session and the Magistrate of the District, when they do exercise this power, are to satisfy themselves as to the legality of any sentence or order passed, and as to the regularity of the proceedings of the subordinate Courts. But **[10]** though the words "sentence or order passed" may

at the first glance, appear to be the sentence or final order passed referred to in s. 294, yet on closely considering the language of the section a wider supervision seems at least not to be forbidden. The interference may be exercised *at all times*. It has been argued that this may mean that the Court of Session is not to wait until it has an opportunity of examining the statements, nor the Magistrate to wait until he has seen the outturn of the work for the month ; but that he may call for any case, whenever he pleases, for the purpose of examining it, either as to the sentence or order passed, or the regularity of the proceedings. This doubtless is so, but the words may have another meaning as well, when the other words " call for and examine the record " are read with them.

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Section 294 is clearly directed to cases absolutely tried and disposed of, and the words " record of any case tried " are used. But this is not so in s. 295, the words there used being "at all times call for and examine the record," not of any case tried, but of any Court; and as those words were not in the former Act, I regard them as having been deliberately used for a deliberate purpose. Under s. 434 of Act XXV of 1861, the Sessions Court and Magistrate had power to call for and examine the record of any Court immediately subordinate to such Court or Magistrate for the same purpose that a Court of Session or Magistrate may do so now. The words that have been added appear to me to give the Court of Session a larger power, and that extends beyond interference limited to cases which have been tried and disposed of. It is not only the record of any case that has been tried that may be examined, but it is " the record of any Court," and it may be called up not only when the case has been disposed of, but "at all times," and when, at least so I think, the record may not have been completed, but may be in course of formation, before a case has been actually disposed of, and whilst it is under trial. It is not only the legality of the sentence or final order that may be looked at, but also the legality of any order that may be in any sense final as it affects the person under trial though it may not be the final order disposing of the case. In fact the legality and regularity of the proceedings are to be looked at, whilst a case may be pending [11] so that they may be checked before it is too late, or before injustice has been suffered for which it may be difficult to obtain redress.

It cannot be denied, I believe, that this Court has been in the practice of calling up cases before they have been actually disposed of. We have the authority of a learned Judge of the Presidency Court that there " the Court has, since the date when the new Criminal Procedure Code came into force, been almost daily, I may say, acting upon the general power of revision, which hitherto has been supposed to be conveyed by this first clause. And if it has power by this clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation, for the purpose of correction and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to suspend proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the legislature to call up the record and the proceedings in a case for the purpose of looking at them, revising them, correcting material

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(1) 11 B.L.R., Ap. 8.

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errors, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the subordinate Court which required to be set right."

So far then I am not alone in thinking that the "order" need not necessarily be the final order disposing of the case. I have already pointed out that when the Court itself calls for any case under s. 294, it is, in my opinion, the record of any case that has been actually *tried* and disposed of. But when the Session Court or the Magistrate, when exercising the power conferred by s. 295, has been satisfied either that some order in any case, either final or in some sense final as to its effects on a party under trial, is illegal, or that some material error has occurred in the proceedings, the Court of Session or Magistrate may report the proceedings. The words, to be sure, used in the section refer to the "judgment or order as being contrary to law," to the punishment as being "too severe or inadequate;" but the course to [12] be followed is that the proceedings may be reported for the orders of the High Court. The order may have been illegal, the judgment may have been based upon no evidence or in defiance of all evidence, and the proceedings may have been irregular from beginning to end, or materially so in fact. Though the section does not expressly say that, if the Court of Session is satisfied that the proceedings have been irregular, it is to report them, it may be inferred from the fact that, under s. 295, it is part of the duty of a Court of Session to satisfy itself of the regularity of proceedings in the Courts below, and from the fact that, in a case reported for orders to the High Court under s. 297, a material error is to be noticed, the Court of Session may bring any irregularity before this Court by reporting the proceedings for orders.

The case now before us has come up to this Court on the report of the Court of Session, and, under the first clause of s. 297, "if it *appears* to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it *shall* pass such judgment, sentence or order thereon as it thinks fit."

It has been argued that the order to be passed must be one of the nature referred to in the classes succeeding the first clause of s. 297. These clauses are certainly directed to cases where there is a record, or a final order has been passed. But I am not prepared to admit that they limit the construction to be put upon the first clause. We have to deal with the legality or propriety of the sentence or the order, and with the regularity of the proceedings. The subsequent clauses provide for what is to be done in particular cases, and where the accused person has been improperly discharged. When this has been the case, the order is certainly not a final order in a case *tried*. There has been no trial, and the Court can order a person so discharged to be tried, or to be committed for trial, nor, it will be observed, to be *re-tried*. So where the facts show that the prisoner ought to be convicted of an offence other than that of which he was convicted, the Court shall pass sentence for the offence of which he ought to have been convicted. Again, a material error in the charge that has misled and prejudiced the person accused *shall* lead to the annulment of the conviction, [13] and a remand to the subordinate Court on an amended charge. I need not repeat all the clauses. It is enough for my purpose to say that they provide particular remedies for particular cases and circumstances. In some it is optional to adopt the course laid down, as in the case where a person has been convicted of an offence not

triable by the Magistrate who has convicted the accused person. In other cases the course to be followed is imperative. These clauses providing a special course to be followed in special cases cannot, I think, be said to control cl. 1, which gives the High Court a general power of revision, and makes it obligatory on the Court to notice any material error in any judicial proceeding by passing such judgment, sentence or order relative to that judicial proceeding, as it shall think fit. It is not, it will be seen, bound to pass any particular judgment, sentence or order, but it must notice the material error, though it may do so as it thinks fit.

We now come to a more difficult part of the case. Was or was not the material error reported to this Court by the Court of Session an error in any judicial proceeding? I have already given the definition of the words a "judicial proceeding," namely, any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence.

The prisoners released by order of the Sessions Judge were recaptured, as far as I am to judge from the record, for there is one, by order of the District Superintendent of Police. The officer who arrested them reports his having done so, and forwards the men to the Magistrate, whereupon the Magistrate, acting judicially, as appears from the heading to his proceeding, commits them to jail as persons implicated in a charge of murder, whose case was pending in appeal before the High Court, and he orders that they shall be detained in jail until the appeal has been disposed of. There was a formal warrant of commitment to jail drawn up in the Form C, sch. ii of Act X of 1872, and signed by the Magistrate, such as prescribed by s. 303. The warrant used is that which is used when a Magistrate acts under s. 196 of the Code, when the evidence given before a Magistrate justifies his sending [14] the accused person to take his trial for an offence triable exclusively by the Court of Session or High Court, or which he thinks ought to be tried by such Court. The Magistrate has subsequently explained that he acted under s. 92 of the Act, and also with a view to secure the attendance of the prisoners, when the High Court should have disposed of, and passed orders on, the appeal. The order passed by the Magistrate was after he had received notice of the appeal to be served on the accused. I am aware that there is great doubt whether the appeal to this Court can be said to have been actually admitted. But the Magistrate, when he received notice that the appeal had been admitted and would be heard on a certain day, had every reason to assume that the appeal had been properly admitted, and therefore the consideration whether it had or had not been actually admitted does not affect the question now before us.

With regard to s. 92, under which the Magistrate acted, it may be at once admitted that the section refers to those cases in which a police officer may, without orders from a Magistrate and without a warrant, arrest any person. It may be conceded that the Magistrate could not have been acting under that section, which relates to primary arrest and not to a commitment to prison to await trial, or pending investigation and trial. But we have the Magistrate's assurance that he was acting under the Code, and this is apparent from his proceeding and commitment of the parties to the jail, that he believed himself to be acting judicially. It is not in my opinion a matter of any consequence, whether he followed this or that course under the Code, or how absurd or extravagant the course he adopted may have been. If it has been an illegal one, and if his order has been illegal, we are bound, assuming that it was made in a judicial

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proceeding, to annul it or to pass such order on his material error as we may deem fit.

There is certainly no evidence of witnesses recorded in the proceeding which followed the capture of the men released by the Sessions Judge. There is however the report of the police officer, and the proceeding of the District Superintendent of Police, and the Magistrate notifies his own knowledge of the fact that they were implicated in a charge of murder, in which, as he believed, there was ample evidence on record to justify their conviction, [15] and he appears to have regarded this evidence as guaranteeing the order of detention. He probably regarded the men as still in the position of accused persons committed for trial, for he had received notice of appeal, and therefore may have thought that the case was still open and that the Judge's order would not be regarded as a final order in the case, which had still to be heard and determined on the merits by the Court of appeal. With those considerations before him, and having regard to what was before him, I am not prepared to say this order may not be viewed as one coming within the definition of a judicial proceeding. It is true of course that the case of murder was no longer before him, and that in that case he could have passed no orders. But, in my opinion, his taking up the charge against the men sent to him in custody by the District Superintendent of Police should be looked upon as the initiation of a new case against them, and as being the commencement of a judicial proceeding (for a judicial proceeding need not necessarily be a criminal trial), and one too in which evidence might have been taken: as, for instance, one or more of the arrested persons might have denied that he was the person released by the Sessions Judge, and the Magistrate might have, under those circumstances, examined witnesses to prove that he or they were the same men as those who had been committed and released. I admit that the Magistrate's proceedings do not disclose any intention of calling any witnesses. But if he admits that he was acting judicially, and as is the case, it would only have been when he was acting judicially as a Court of enquiry that he could commit the accused to jail, to await the result of pending proceedings, and it appears that he considered that there was some evidence before him that the accused were guilty of murder, I am of opinion that we must regard his proceeding as a judicial proceeding, however inapplicable that evidence may be, or however, wrong his course may have been. The error he committed in re-committing to jail one who had been released by the Sessions Judge was a material error. He had no power to make the order, which was final as far as they were concerned, as regards the matter before him, as to whether they should or should not be detained in custody pending the determination of the appeal. But having made it, on some show of evidence, on the report of the District Superintendent and [16] from matters within his own knowledge, and under the supposition that he was acting judicially, I think that we have jurisdiction to deal with the order under cl. 1, s. 297 of Act X of 1872, and I would annul it.

OLDFIELD, J.—This case has been referred under s. 296, Act X of 1872, by the Sessions Judge for the orders of this Court. It appears the petitioners were committed by the Magistrate to the Sessions on charges of murder, were tried and acquitted, and an application of appeal was then presented to this Court, under s. 272, which now awaits disposal. After this application had been presented and before the appeal had been allowed, the Magistrate, upon the petitioners being brought up before him

by the police, issued his warrant to the jailor that they be kept in custody until decision of the case in appeal.

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The Magistrate's order is no doubt illegal. It is argued that this Court cannot interfere under its powers of revision under s. 297, Act X of 1872, on the ground that they do not extend to revise interlocutory orders, and that they are confined to errors in judicial proceedings, which is not the nature of the proceedings of the Magistrate in this case.

In my view the argument fails, and this is a case which falls within the scope of the Court's revising powers under s. 297.

There is nothing in s. 297 which excludes interference in interlocutory orders, assuming the order in this case to be one. The words of the section are plain :—" If, in any case, it appears to the High Court that there has been a material error in any judicial proceedings of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit. "

These terms are wide, and to construe them, as it is argued they should be construed, is to import restrictions which I think we have no right to do; moreover, the present reference comes from the Judge, who acts under s. 295, which in its terms does not restrict revision to orders in cases finally tried and disposed of.

I think also the Magistrate's proceedings must be held to be judicial. A judicial proceeding is defined to be "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence.

[17] The Magistrate's explanation shows that in the present case he looked on the petitioners as persons still suspected of offences whom the police might arrest under s. 92, Act X of 1872, and on their being arrested he treated them as still charged with murder, and committed them to prison on that charge, on a warrant in regular form. He seems to me to have considered himself acting judicially, under his powers as Magistrate, and though the circumstances do not justify his so acting, the fact will nevertheless remain, and I think it cannot be said that a proceeding, in which a Magistrate commits to prison charged with an offence a person brought up by the police, is not one which constitutes a judicial proceeding, for it will at least be one in which evidence may be taken. I would cancel the Magistrate's order.

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BEFORE A FULL BENCH.

(*Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield*).

BARKAT-UL-LAH KHAN (*Petitioner*) v. RENNIE AND ANOTHER (*Opposite parties*).* [3rd July, 1875.]

Act X of 1872, ss. 468, 469—*Prosecution—Sanction—Jurisdiction.*

Held, that the sanction referred to in ss. 468 and 469 of Act X of 1872, when given by any of the Courts empowered under the Act, cannot be disturbed by a superior Court.

Per TURNER, OFFG. C.J., and PEARSON and OLDFIELD, JJ.—When sanction is refused by one of the Courts, the refusal does not deprive the other Courts of the discretion given to them.

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* Miscellaneous Application No. 23-B of 1875.

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Per SPANKIE, J.—When sanction is refused by one of the Courts, the refusal does not deprive the superior Courts of the discretion given to them.

[Diss., 26 B. 785 (786) ; F., A.W.N. (1882) 84 ; Rat. Unrep. Cr. Cas. 683 ; D., 6 C. 440 (442) = 7 C.L.R. 330.]

AFTER the Munsif of Shahjahanpur determined a suit between Messrs. Carew and Co., and Barkat-ul-lah Khan, the former applied to him for sanction to prosecute the latter in respect of a document which he gave in evidence suit, and which they believed to be a forgery. The application was made in reference to s. 469 of Act X of 1872, which enacts that a "complaint of an offence relating to documents described in ss. 463, 471, 475, or 476 of the Indian Penal Code, when the document has [18] been given in evidence in any proceedings in any civil or criminal Court, shall not be entertained against a party to such proceedings, except with the sanction of the Court in which the document was given in evidence, or of some other Court to which such Court is subordinate." The Munsif refused the application, not being satisfied that the document was a forgery ; upon which application was made to the District Judge. The Judge was of opinion that an investigation should be made into the charge made against Barkat-ul-lah Khan and directed the Munsif to send the case to the Magistrate.

Barkat-ul-lah Khan presented an application to the High Court praying that it would set aside the Judge's order as made without jurisdiction, under the provisions of s. 25, of Act XXIII of 1861. It was contended on behalf of the petitioner by Babu Jai Gopal Ghose that the sanction prescribed by s. 469 of Act X of 1872 was one which the Court in which the document was given in evidence had discretion to give or withhold ; that no other Court could interfere when this discretion had been exercised; and that if the Court in which the document had been given in evidence had not been moved for sanction, then any Court to which it was subordinate could give sanction, but that there could be no appeal or interference by the superior Court where discretion had been exercised by the lower Court, there being no provision in the Codes of Civil or Criminal Procedure for anything of the kind. On behalf of the opposite parties it was contended by Mr. Ross that the Munsif being immediately subordinate to the Judge, the Judge had power to sanction the prosecution, and sanction having been given, the High Court could not entertain a petition to set aside the order granting it. The learned counsel cited the following authorities :—*Dinobundhoo Chuckerbutty* (1) ; *Ram Pershad Hazaree* v. *Soomuthra Dabee* (2) ; *In the matter of Balwant Rai* (3) ; *In the matter of Wahid Husain* (4) ; and *In the matter of Bujan Lal* (5).

The Court (Spankie, J.) referred the following questions to the Full Bench :—

" Whether, when the Court in which the evidence has been given, which is to form the basis of a criminal prosecution, has [19] exercised its discretion, either by withholding its sanction from, or giving sanction to, a criminal prosecution, the Court to which it is subordinate has any authority to interfere with the order, and if it has authority, to what extent can it interfere? Can it, where the first Court has refused to grant sanction, reverse its order and itself sanction a prosecution ;

(1) 5 W.R. *Mis. Ap.* 6. (2) 5 W.R. *Mis. Ap.* 24.
(3) N.W.P. H.C.R. (1874), p. 124.
(4) Mis. Appl. No. 86B. of 1874, dated the 30th November, 1874.
(5) Mis. Appl. dated the 14th August, 1874.

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can it reverse that order and forbid the prosecution and where the first Court and the Court superior to it defer, can the High Court exercise any interference, and to what extent?"

The reference was accompanied with these remarks:

SPANKIE, J.—(who, after stating the facts and the arguments as above, continued).—Mr. Ross cited several decisions of the Calcutta High Court and of this Court in support of his contention. In the first case the Sadar Amin refused to give the sanction asked for, because he saw no reason to impugn the *prima facie* authenticity of the document and for putting the petitioner on his trial for forgery. The Judge was then applied to and he sanctioned the prosecution. An application was then made to the Presidency High Court to set aside the Judge's order. It was contended that the sanction contemplated by s. 170 of Act XXV of 1861, the former Criminal Procedure Code, can only be given by that Court in which the evidence is actually (for the first time) given in the suit, or by some superior Court before which the suit has come in regular course and which has thus before it all the materials of the case at the time when the application for its sanction is made. Mr. Justice Phear was of opinion that any Civil Court which has the power of calling before it the proceedings and evidence of the suit, after satisfying itself (by preliminary enquiry if necessary) that the charge is proper for investigation, can give sanction to a criminal prosecution, and that when one such Court has once given its sanction, a Magistrate is bound to proceed with the prosecution. It was a matter of indifference in Mr. Justice Phear's opinion that other subordinate Courts including, it may be, the Court of first instance, should have previously refused their sanction to the prosecution. Mr. Justice [20] Bayley concurred, and the Court refused to interfere with the Judge's order.

Dinobandhoo Chuckerbutty, Bayley and Phear, JJ. (1).

A Full Bench of five Judges had subsequently the following case before it. The petitioner produced a copy of an order of a Division(?) Bench of the Court in a previous case, staying the proceedings of the Court below in regard to the committal of a party till the result of a special appeal then pending was known, and as it appeared questionable whether the High Court has authority to interfere with the proceedings directing the commitment of a party for perjury or forgery, the referring Judges thought that the question should be submitted for the decision of a Full Bench. It was held that the High Court cannot, in the event of a regular or special appeal being lodged against the decision of the lower Court, interfere to stay criminal proceedings until the appeal shall have been heard and determined. The order, if treated as an order in a civil case, is not, in Sir Barnes Peacock's opinion, appealable under Act VIII of 1859. No appeal is given either by the Civil or Criminal Procedure Code against orders which are left to the discretion of the Civil Court, either granting or withholding sanction to a criminal prosecution under s. 169 or 170 (Act XXV of 1861), or against an order sending a case for investigation before a Magistrate under s. 171. But the learned Chief Justice went beyond this, and lays down that as a Court of Revision the High Court could not interfere and reverse such sanction or order upon the ground that it was not warranted by the facts; for as a Court of Revision, it could not reverse an order except for error in law. In the case before the Full

Ram Pershad Hazaree v. Soomuthra Dabee(2).

(1) 5 W.R. *Mis. Ap.* 6.

(2) 5 W.R. *Mis. App.* 24.

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FULL BENCH.

1 A. 17 (F.B.).

Bench the application was not by way of appeal, but merely by way of motion to postpone the committal. But if the Court, as one of Appeal or as one of Revision, cannot reverse or alter such an order, then there was no inherent authority that it had to stay proceedings. In this opinion of Sir Barnes Peacock, the other members of the Court concurred.

In the matter of Balwant Rai, Pearson and Turner, JJ. (1).

The ruling of the Full Bench just referred to was cited by a Division Bench of this Court. In this case the petitioner obtained sanction from the Court of the Subordinate Judge to a criminal prosecution under s. 193 of [21] the Penal Code. There was an appeal against the order to the Judge. The petitioner's counsel argued that the Judge had no jurisdiction to entertain the appeal, but the Judge held that he had, and he reversed the Subordinate Judge's order. The petitioner then applied to the High Court, urging that there was no appeal from an order of a Civil Court *sanctioning* a criminal prosecution, and he therefore prayed that the Court would send for the record and pass thereon such orders as might seem fit. The Judge held that if a Judge could give sanction when a Court subordinate to him had refused it, the natural deduction was that he could withhold sanction when the lower Court had awarded it. The Division Bench remarked that it had been already ruled by a Full Bench of the Calcutta High Court, that, under the former Code of Criminal Procedure, no appeal lay to the Zila Judge from a sanction accorded by a subordinate Court of first instance to the institution of a prosecution, in cases in which such sanction is required. There was no difference in the language of the former or present Code on the point. The Court therefore, under s. 35, Act XXIII of 1861, set aside the Judge's order. The Court further remarked :—"We are much pressed to go further and set aside also the sanction. Had it not been for the illegal assumption of jurisdiction by the Zila Judge, we should not have been empowered to do so, for it is shown that the subordinate Court fairly exercised the discretion which the law commits to it; and where a discretion has been so exercised, whether it has been wisely exercised or not, we have no authority to interfere. On these grounds we limit our order to the setting aside of the Judge's order.

In the matter of Wahid Hussain, Brodhurst, J. (2).

Another case came before a single Judge. In this case the Judge refused to sanction a criminal prosecution. The petitioner prayed the Court to sanction the prosecution. This Court held that the application could be entertained; but having regard to the circumstances of the case, there appeared to be no grounds for interference.

In matter of Bujan Lal, Pearson, J. (3).

In another case before a single Judge the petitioners stated that they had applied to the Zila Judge for sanction to prosecute one Kunhia Lal [22] criminally; failing to get a clear order, they went to the Court of first instance. But that Court thought that it was precluded by the Judge's order from giving sanction. This Court remarked that, as it appeared from the proceeding of the Subordinate Judge that, in his opinion, ample grounds existed for sanctioning the prosecution under s. 469 of the

(1) N.W.P.H.C.R. (1874), p. 124.
(2) Mis. Appl. No. 86B. of 1874, dated the 30th August, 1874.
(3) Mis. Appl. dated the 14th August, 1874.

Criminal Procedure Code, but that he considered himself to be precluded by some not very intelligible order, passed by the Zila Judge, it would be right and proper in the interests of public justice to grant the sanction applied for by the petitioners. In this case the Judge, when applied to for sanction to prosecute Kunhia Lal for forgery, is stated by the Subordinate Judge to have passed this order:—" I cannot give sanction." If so, Mr. Justice Pearson's order seems to have practically, though not in so many words, reversed the Judge's order withholding sanction.

It appears to me that there is some confusion and uncertainty as to the extent of interference which the Court has a power of exercising.

The case now before me is the exact converse of that which came before the Division Bench and has been cited. That decision is based upon the Full Bench decision of the Calcutta Court also cited. But the judgment of that Full Bench appears to me to hold that neither as a Court of appeal or Revision can the High Court reverse or alter an order granting or withholding sanction to a criminal prosecution, and further that it has no inherent authority, by which it can interfere in such cases. Sir Barnes Peacock remarked that in some of the cases cited "the question as to reversing such sanctions was brought before the Court by motion. I asked how the case came before the Court by motion. The answer was that the motion was in the nature of a petition of appeal. But I am clearly of opinion that, in cases in which no appeal lies to this Court, relief cannot be given indirectly by motion in the nature of an appeal." According, therefore, to the Full Bench decision, there does not appear to be any power of interference. But the Division Bench of this Court, whilst acting on the judgment of the Full Bench, adds:—" We are much pressed to go further and set aside also the sanction. Had it not been for the illegal assumption of jurisdiction by the Zila Judge, [23] we should not have been empowered to do so, for it is shown that the subordinate Court fairly exercised the discretion which the law commits to it; and where a discretion has been so exercised, whether it has been wisely exercised or not, we have no authority to interfere." But though the Court was doubtless right to set aside a jurisdiction illegally assumed by the Zila Judge, it does not follow that it had itself authority to question the order passed by the first Court. The record was sent for by this Court to see whether the Judge had or had not exercised illegal jurisdiction. If the Calcutta judgment be correct, there is no authority to interfere at all. If the Division Court's judgment here be correct, the Court can interfere (though it has the record before it for one special object), but will only do so where discretion has not been fairly exercised.

Mr. Justice Brodhurst's order is one on a petition in the nature of an appeal from the Judge's order, and he considered that it could be entertained.

Mr. Justice Pearson's order, as I have observed, practically ignores the Judge's order refusing sanction, and grants it as the act of this Court.

I do not wish at the present stage to express any opinion as to the power of the Court to interfere. I think that it is desirable that the Full Bench should consider the subject and record an opinion that will remove all uncertainty.

Babu *Jai Gopal Ghose*, for petitioner.

Mr. *Rose* and Mr. *Conlan*, for opposite parties.

1875 JULY 3. — FULL BENCH. — 1 A. 17 (F.B.).

OPINION.

TURNER, OFFG. C.J. and PEARSON and OLDFIELD, JJ., concurred in the following opinion :—

Section 469 of the Criminal Procedure Code, in declaring that the Magistrate shall not entertain a prosecution of any of the offences therein specified without the sanction of the Court before which the offence was committed, or of some Court to which it is subordinate by implication gives the Court before which the alleged offence has been committed, and to the Courts to which that Court is subordinate, a discretionary power to sanction the prosecution. If this discretionary power is exercised and sanction accorded, the [24] law gives no appeal from such an order. This was ruled by this Court in the case of *Balwant Rai*, decided on the 4th April 1874 (1) : and there being no appeal, the Court cannot interfere on motion in the nature of an appeal; this was ruled by the High Court of Calcutta in the case of *Ram Pershad Hazaree* (2). But the refusal of one Court to exercise its power does not deprive the other Courts of the right to exercise the same power. If the Court before which the alleged offence is committed refuses to exercise its power, the application to the superior Court is in the nature of an original application and not of an appeal. It is an application to one of two or more Courts which are vested with independent powers of sanction. If the law declares that a person may act with the consent of A. *or* B. *or* C, although A. and B. may refuse to give consent, the consent of C. will be sufficient. In placing a restriction on the right of prosecution in respect of certain offences, the legislature has not confined the power of sanction to the Court before which the offence is committed, but has conferred it on that Court and on any other Court to which that Court is subordinate, and the sanction accorded by any one of those Courts satisfies the restriction. This view of the law is supported by the rulings of the High Court, Calcutta, *Dinobundhoo (Chuckerbutty)*, (3), and of this Court, and we are aware of no ruling to the contrary. But it is contended that sanction can only be given by a superior Court when the case in which the offence was committed comes before it in appeal. To accede to this contention would be to import into the Act a condition which we do not find there, and which we cannot find any thing in the Act itself to warrant us in introducing. Again, it has been objected that in the view here taken of the existence of independent powers of sanction in two or more Courts, it may happen that a Subordinate Court may grant sanction after it has been refused by a superior Court. Doubtless this is so, but to obviate the unseemliness of such procedure, it has been the practice of this Court, and we think it should be the practice of all superior Courts, to refuse to entertain the application until it is shown that an application has been made to the subordinate Court and that by that Court sanction has been refused. In reply to the [25] reference made to us, we answer that in our judgment, a sanction given by any one of the Courts empowered under the Act cannot be disturbed by a superior Court, and that where sanction is refused by one of those Courts the refusal does not deprive the other Court of the discretion given to them.

SPANKIE, J.—I cannot agree with the entire draft of the proposed judgment. I think that there is force, and great force too, in the objection that, in the view taken of the existence of independent powers of sanction

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(1) N. W. P. H, C. R. (1874), p. 124. (2) 5 W.R. *Mis. Ap.* 24.
(3) 5 W. R. *Mis. Ap.* 6.

with two or more Courts, it may happen that a subordinate Court may grant sanction after it has been refused by a superior Court. The objection to such a course is on the surface, and it is met with the reply that it has been the practice of this Court, and should be the practice of all superior Courts, to refuse to entertain an application until it is shown that an application has been made to the subordinate Court and that by that Court sanction has been refused. But, in my opinion, there is no need of any such practice in order to get rid of any such objection. It appears to me that the words of s. 469, Criminal Procedure Code, do not admit of the suggestion that there are two or more Courts with independent powers, and that if one refuses, the other can grant sanction. The words are that a complaint "shall not be entertained against a party to such proceedings except with the sanction of the Court in which the document was given in evidence, or of some other Court to which that Court is subordinate." These words signify, I think, that the Court to which such Court is subordinate may, by virtue of its superiority, grant the sanction withheld by the lower Court. At the same time, I hold that sanction, once given by the Court to which the first Court is immediately subordinate, cannot be withheld by any Court superior to that Court. When no sanction has ever been applied for in the two Courts below, it may, I think, be given by this Court as the superior of both, and so, where no sanction has been granted by the first, it may be given by the second Court.

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There is no appeal from one Court to the other. But an application may, I apprehend, be made on what is known as the miscellaneous side of the superior Court, and sanction, if not already given, may be granted.

[26] With these remarks, I may say that I agree in substance with the proposed reply to the reference made; that is to say, sanction given by any one Court cannot be disturbed by a superior Court, and that when sanction is refused by one of those Courts, the refusal does not deprive the superior Courts of the discretion given to them.

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1 A. 26 (F.B.).

BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

RAM DIAL AND OTHERS (*Defendants*) v. GULAB SINGH AND OTHERS (*Plaintiffs*).* [17th August, 1875.]

Act XIX of 1873, s. 241, *cl. (i)—Revenue—Pattidar—Suit for Contribution—Jurisdiction—Civil Court—Revenue Court.*

The question in the case was whether the plaintiff, a pattidar who had paid a sum on account of a demand for Government revenue, should sue to recover from the defendants, his co-pattidars, the balance in excess of his own quota in the Civil or in the Revenue Court.

Held (SPANKIE, J., dissenting) that the Civil Courts were competent to entertain suits of the nature.

Per SPANKIE, J., *contra.*

[R., 3 A. 66 (F.B.); D., A.W.N. (1907) 156.]

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* Special Appeal No. 293 of 1875, from a decree of the Judge of Farukhabad, dated the 16th January 1875, reversing a decree of the Munsif of Chibramau, dated the 24th August 1874.

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THE plaintiff, a pattidar, who had paid a sum on account of a demand for Government revenue, not merely in respect of his own share, but also in respect of the shares of the defendants, his co-pattidars, sued to recover the sum paid in excess of his own quota. The suit was instituted in the Court of the Munsif of Chibramau. The Munsif dismissed the suit, deeming it to be a claim connected with or arising out of the collection of revenue, and that he was therefore prohibited by s. 241 of Act XIX of 1873 from entertaining it. On appeal by the plaintiff, the Judge held that there being no special provision for the trial of such a suit by the Revenue Court, the Civil Court had jurisdiction, and remanded it for disposal on the merits.

The defendants appealed to the High Court on the ground that the suit was not cognizable by the Civil Courts.

[27] The Court (Turner, Offg. C. J., and Spankie, J.) referred to a Full Bench the question whether the plaintiff should have sued in the Civil or in the Revenue Court.

The *Senior Government Pleader* (Lala *Juala Pershad*) and Munshi *Hanuman Pershad*, for appellants.

Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for respondents.

OPINION.

TURNER, OFFG. C. J., and PEARSON and OLDFIELD, JJ., concurred in the following opinion :—

We are of opinion that the Civil Courts are competent to entertain claims of this nature, and that the Munsif is in error in regarding it as a claim connected with or arising out of the collection of revenue within the meaning of that term in s. 241, Act XIX of 1873. Looking to the context, it appears to us that provision of the law may have been intended to apply to wrongs arising out of or connected with the collection of land revenue, such as suits against the revenue officers for the illegal exaction of revenue or for the illegal issue of process. In such cases, the claim arises out of a wrong done in the collection or connected with the collection. In the case before us the plaintiff seeks no remedy for a wrong done to him in the collection of revenue or arising thereout, because assuming the revenue to have been due, he suffered no wrong in its collection, and certainly no wrong at the hands of the defendants; he sues because he has been compelled to pay a debt for which they were all jointly liable, a payment which gives him the right to call on them for contribution.

It strengthens the view we have taken that, as pointed out by the Judge, neither in the sections of this Act nor in those of Act XVIII which declare what powers may be exercised by the several revenue authorities do we find any mention made of suits of this nature.

SPANKIE, J.—Until the passing of Act XIX of 1873 I am willing to admit that a suit of the nature of a claim for contribution, as this is, would be heard in the Civil Courts. But it appears to me that Act XIX which is one to consolidate and amend the law relating to land revenue and the jurisdiction of [28] the revenue officers, aims at keeping in the hands of those officers the settlement of every dispute connected with the collection of revenue, whether such disputes arise between the revenue-payers themselves, or between the Government officers and the revenue-payers.

The question that we have to determine is whether or not the suit involves a dispute regarding one of those matters included in s. 241 of the

Act, over which the section declares, in so many words, the Civil Courts shall exercise no jurisdiction.

Now clause (*i*) of the section provides for claims connected with or arising out of the collection of revenue (other than claims under s. 189) or of any process enforced on account of an arrear of revenue. The exception relates to proceedings taken under ch. V of the Act to enforce the recovery of any arrears of revenue against a person. He may pay the amount under protest to the officer taking the proceedings, and upon such payment the proceedings shall be stayed, and the persons against whom such proceedings were taken may sue the Government for the amount so paid in any Civil Court in the district where such proceedings were taken. Here, possibly, the party who brings the suit may contest altogether any liabilities to pay revenue to Government, or that only a portion of what was taken was due from him, because the latter part of the section allows him to give evidence of the account which he alleges to be due from him, notwithstanding the provisions of s. 149. This section declares that a statement of account certified by the tahsildar shall be conclusive evidence of the existence of the arrear, of its amount, and of the person who is the defaulter.

Clause (*i*) appears to provide generally for any dispute being a claim connected with or arising out of the collection of revenue or any process enforced on account of an arrear of revenue as in this case, in which the tahsildar enforced the joint and several responsibility of the proprietors declared by s. 146, by calling upon the plaintiff to pay Rs. 1,293, which sum was not the proportionate share due by himself, but included also the quota due by 38 other persons.

[29] This is not a case of a lambardar suing under Act XVIII of 1873 for arrears of revenue payable through him due by the co-sharers, whom he represents. It is the case of a pattidar who is known or supposed to be solvent, who is made to pay what other pattidars owe or refuse to pay contumaciously or from design, or by the reason of some dispute in the patti. The revenue officer has done no wrong to the plaintiff in getting the arrears out of him. It is not pretended that he has made the plaintiff pay more on his own account than he is bound to pay. He has simply enforced against him the common liability of the pattidars, for which he also made himself responsible.

It is contended that the plaintiff does not seek a remedy for wrong done to him in the collection of revenue, because, assuming the revenue to be due, he suffered no wrong in the collection and none at the hands of the defendants. But it is, I think, apparent that whatever he has suffered is owing to the conduct of the defendants, and the enforced payment by him of revenue due by them has given to him the right of forcing them in return by suit to reimburse him. In the course of such a suit it would not be sufficient for the plaintiff to produce the revenue officer's receipt for Rs. 1,293. He would have to show that was the amount due by each of the pattidars, and they would have to account for not having paid their quota. It may surely be assumed that existing disputes connected with or arising out of the collection of the revenue (very large and wide words) would be disclosed in the suit disputed, which, in my opinion, the legislature intended should be heard and determined by the revenue authorities.

Such a claim as the one before us seems to me to arise out of the collection of the revenue and the enforcement of the plaintiff's liability to pay the arrear due by his co-sharers, and it is, I think, included in cl. (*i*)

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of the section. If this be so, then, in the last words of the section, "in all the above cases, jurisdiction shall rest with the revenue authorities only."

Thus the first words of the section bar the jurisdiction of the Civil Courts in any of the matters included in the section, and its last words declare that the revenue authorities only shall have [30] jurisdiction. If the claim is one that will come under cl. (i) of the section, the Civil Courts can take no cognizance of it.

But the Judge finds that there is no special provision for the hearing of this particular class of suit by the revenue authorities, and that the prohibition entered in the last clause of s. 241 applies only to those cases for which there is a special provision. I do not understand whether the Judge means that a suit of this nature is not mentioned in s. 241, or whether he means expressly that no power is given to revenue officers elsewhere in the Act to hear suits of this nature.

As to the first point, some confusion is caused by regarding this case as a suit. It is sufficient that the dispute between plaintiff and defendants should be one connected with or arising out of the collection of the revenue. Being one of that description, it would be one of "the matters" over which Civil Court could not, and the revenue authorities alone could, exercise jurisdiction. As to the second point, the jurisdiction being with the revenue authorities, those authorities must be one or more of the officers named in s. 207, the Commissioner, Collector, Assistant Collector, officer in charge of a settlement or Assistant Settlement Officer, or a tahsildar. Any one of those officers can summon persons before him, if he considers their attendance necessary for the purpose of any investigation, suit, or other business before him (s. 208), so it is not only suits that may be tried under the Act. The Act recites the powers of Collectors and Assistant Collectors generally and also particularly, and Collectors, in addition to their own powers, may exercise the powers of Assistant Collectors, and Assistant Collectors in charge of a sub-division exercise the same powers that a Collector could if there was no sub-division, subject to the control of the Collector. It is true that there is no particular mention of claims under cl. (*i*), s. 241, outside that section. But s. 241 is a portion of ch. vii, which, amongst other matters, treats of the powers of Collectors and others. Section 241 expressly gives to those officers as revenue authorities alone the power of dealing with the matters contained in it. And where this is the case, it seems to me to be idle, in this particular reference, to raise any difficulty regarding the revenue officer who is to [31] determine any one of the matters contained in the section. If this is one of those matters referred to in cl. (*i*), s. 241, no want of clearer specification of the powers of the different revenue authorities, no omission of the class of case outside the section, and no ambiguity or defect in the Act, can give the Civil Courts the jurisdiction which the opening words of the section expressly bar.

I would answer that this case should be heard by the revenue authorities.

1 A. 31 (F.B.)=11 Mad. Jur. 221.

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BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

GHASI RAM (*Decree-holder*) v. MUSSAMMAT NURAJ BEGAM (*Judgment-debtor*).* [17th August, 1875.]

Letters Patent, cl. 10 *—Appellate Civil Jurisdiction—Appeal from Judgment of Division Court.*

To allow of an appeal to the High Court against the judgment of a Division Court, under the provisions of cl. 10 of its Letters Patent, there must be such a judgment on the part of all the Judges who may compose the Division Court as disposes of the suit on appeal before it.

APPLICATION was made on the 8th October 1874, to the Subordinate Judge of Cawnpore by Mussammat Nuraj Begam, on behalf of her minor daughters, to set aside the sale in execution of a decree of their rights and interests in certain villages on the ground that written notifications of the sale were not affixed in the villages, in consequence of which irregularity they were sold for a price inadequate to their value. The Subordinate Judge rejected the application, holding that no irregularity in the publishing of the sale was shown. The judgment-debtors appealed to the High Court. The appeal came on for hearing before a Division Court consisting of Stuart, C. J., and Spankie, J. It was contended by the appellant that notifications of the sale were not affixed in all the villages, whereby the judgment-debtors sustained substantial injury. The learned Judges differed in opinion.

[32] STUART, C.J.—This appeal was not satisfactorily maintained at the hearing, but it appears to me to be at least doubtful whether a fair price was obtained for the property sold, and it being the property of minors, it is our duty to see that no substantial injustice has been done, and to remand the case, in order to obtain more reliable data. Inadequacy of price is not only pleaded before us, but it appears from the record that a petition was presented in the execution department in behalf of the minors; that this objection was distinctly taken below; and there is evidence, although apparently not of much value, yet something like evidence, going to show that the price obtained at the sale was very much less than, according to one witness, about one-fourth of its true value.

Under these circumstances, I think it would be proper to remand the case under s. 354 for further and more distinct evidence on the point whether the property was sold for a price grossly inadequate, and also whether there was anything in the manner of the sale, with respect to the formalities, or otherwise, which could have conduced to such a result. On receipt of the record with this new matter, a week to be allowed for objections.

SPANKIE, J.—It was sufficiently established before the Subordinate Judge that the sale was properly notified in all respects, and indeed the petition of the judgment-debtor praying that the sale might be set aside does not dispute this fact. There has been no informality in the sale, and I agree with the Subordinate Judge in his finding on this point.

* Appeal under cl. 10 of the Letters Patent, No. 6 of 1875.

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There is no evidence worth consideration in support of the plea that the property was sold for an inadequate price. I should be sorry to injure the minors if the property sold be theirs. But we have nothing to do with inadequacy of price in the case before us. Under s. 256, Act VIII of 1859, a sale becomes absolute when confirmed by the Court directing it to take place. But it may set aside, if application should be made within thirty days to set it aside, on the score of any material irregularity in publishing or conducting the sale, and no sale shall be set aside on the ground of such irregularity unless the applicant shows to the satisfaction of the Court that he has sustained substantial injury by [33] reason of such irregularity. We cannot therefore go into the question whether the sale price was inadequate or not. I would dismiss the appeal and affirm the judgment with costs.

The decree-holder appealed to the Full Court against the order of the learned Chief Justice, under the provisions of cl. 10 of the Letters Patent, the grounds of appeal being that the order remanding the case under s. 354 of Act VIII of 1859 for further enquiry was invalid, inasmuch as there was nothing to show that there was any irregularity in conducting or publishing the sale, or that the judgment-debtors sustained any injury thereby; and that the mere allegation of inadequacy of price, unsupported by reliable evidence, did not justify a remand for further evidence into that question, as no sale, if otherwise shown to be valid, could be set aside only on that ground.

Pandit *Bishamhar Nath*, for appellants.

Pandit *Ajudhia Nath*, for respondents.

JUDGMENT.

The following judgment was delivered :—

It has been argued it is doubtful from the language of the honourable the Chief Justice whether, under s. 353, Civil Procedure Code, he intended to frame and remit issues for trial, or under s. 355 merely to direct the Court below to take further evidence. We think it unnecessary to determine this point, because we are of opinion that in either view this appeal cannot be entertained.

There has been no judgment in the sense in which we construe that term in cl. 10 of the Letters Patent. There must be such a judgment on the part of all the learned and honourable Judges who may constitute a Bench as disposes of the suit on appeal before it. The learned Chief Justice has as yet recorded no such judgment, and to enable the Bench to do so, he has considered it necessary to obtain further materials

Under the circumstances, we reject the appeal, and as the respondents have appeared, with costs.

1 A. 34 (F.B.).

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FULL BENCH.

1 A. 34 (F.B.).

[34] BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

DUBEY SAHAI (*Plaintiff*) v. GANESHI (*Defendant*).*
[21st August, 1875.]

Act IX of 1871, *ss.* 4 *and* 5 *b—Admission of Appeal after the period of Limitation—Single Judge and Division Court—Jurisdiction.*

Held that the order admitting an appeal after time, made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 and 25 Vic., c. 104, s. 13 and the Letters Patent of the Court, s. 27, was liable to be impugned and set aside at the hearing by the Division Court before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate.

[App. 12 A. 79; R., 9 A. 11; 10 A. 524; 6 B. 304; 34 C. 216; 9 M. 450; 5 C. L.J. 280.]

AN appeal was preferred to the High Court against a decree passed on the 8th of May 1874. The application for a copy of the decree, with a view to filing the appeal, was made on the 15th of May 1874. The copy was ready for delivery on the 30th of May 1874, and was taken by the appellant's pleader on the 2nd of June 1874. The period for presenting the appeal expired on the 22nd of August 1874, that is to say, before the High Court rose for the vacation. It was presented on the 16th November 1874, to Stuart, C. J., the Judge sitting out to receive applications for the admission of appeals under a rule of the High Court made in pursuance of 24 and 25 Vic., cap. 104, s. 13, and s. 27 of the Letters Patent of the Court. That day was the first day of the opening of the Court after the vacation, and the appeal was 84 days beyond time. With it was presented a certificate in the following terms:—"I hereby certify that Dubey Sahai has been under my treatment since 9th of August last. He was suffering from internal hemorrhoids and unfit to work, but now he is relieved." This certificate was dated the 22nd of September 1874, and on its face there was a note by the Civil Surgeon of Cawnpore that the writer of the certificate was an hospital assistant at one of the city branch dispensaries, and that it appeared to be correct. The appeal was admitted by Stuart, C. J., the order of the learned Chief Justice being as follows:—"Of the above 84 days, 60 are accounted [35] for by the vacation, leaving 24 days beyond time. Having regard to the medical certificates, and after hearing Mr. Howard in support of the application, I admit the appeal."

An objection was taken by the respondent to the hearing of the appeal on the ground that it should not have been admitted, as it was beyond time, and no sufficient cause for not presenting it within the period prescribed by law was shown. With reference to this objection, the Division Bench (Pearson and Oldfield, JJ.), before which the appeal came on for hearing, referred the following question to the Full Bench, *viz*:—

"Whether the order of a single Judge admitting an appeal after time is liable to be impugned and set aside at the hearing of the appeal by the

* Regular Appeal No. 147 of 1874, against a decree of the Subordinate Judge of Cawnpore, dated the 8th May 1874.

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Bench before whom it is brought on for hearing on the ground that the reasons assigned for admitting it are erroneous or inadequate?

Mr. *Howard* and Munshi *Hanuman Parshad*, for appellant.

The *Senior Government Pleader* (Lala *Jualu Parshad*) and the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for respondent.

The *Junior Government Pleader*, contended that the order admitting the appeal was not final, having been made *ex parte*. The party most interested in the admission, *viz.*, the respondent, who imagined that the decree of the lower Court had become final, is entitled to show that the admission was improper, and that, notwithstanding admission and registration—*The Secretary of State for India in Councilv. Mutu Sawmy* (1). The proviso in s. 5 of Act IX of 1871 as to admission of appeals after time only relates to admission with a view to registration. When an application for a review of judgment which is beyond time has been admitted, the respondent is entitled to show that it is beyond time, and a review can be refused on that ground. It is only equitable that the respondent should be allowed to point out at the hearing of an appeal that the Judge who admitted it was misled by the statements of the appellant. The learned pleader cited *Syed Jafer Hosein* v. [36] *Sheikh Mahomed Amir* (2) and *Mowri Bewa* v. *Surendra Nath Roy* (3).

Mr. Howard.—The order may be open to review—*Joy Koomar Dutta Jha* v. *Esharee Nand Dutta Jha* (4)—but only by the Judge who made it. It would be highly inconvenient if one Court could review another Court's order touching a question of fact. Illustration (*b*) to s. 4 of Act IX of 1871 is subject to s. 5 (*b*). The appeal has been admitted and registered and cannot be rejected on the ground that it was preferred after time—*Bharat Chunder Roy* v. *Issur Chunder Sircar* (5).

JUDGMENT.

STUART, C.J.—The question submitted in this reference is, whether, as a preliminary objection taken in behalf of the respondent, the order of a single Judge admitting an appeal after time is liable to be impugned and set aside by the Bench before whom it is brought for hearing, and my answer is in the affirmative. But I confess I have not derived much assistance from Act IX of 1871. The sections of that Act which bear on the subject are ss. 4 and 5, and appended to s. 4 are two illustrations, the latter of which (*b*) is in the following term :—" An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed." This appears to meet the present case, showing clearly, as it does, that, in the opinion of the person who prepared it, such a preliminary objection as the present might be entertained. But it is a mere illustration and not binding as law, and I can find no direct authority for it in either of the sections referred to. No doubt under s. 5 (*b*) it is provided that " any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period," and the words " appellant " and " the Court " appear to support the illustration. So far as they go, however, these quotations from the Limitation Act seem to me to favour the objection, or, in other words, the opinion that the order in the present [37] case by a single Judge may be

(1) 4 B.L.R. Ap. 84. (2) 4 B. L. R. Ap. 103. (3) 2 B. L. R. A. J. C. 184.
(4) 10 B.L. R. A. C. 155. (5) 8 W. R. C. R. 141.

impugned in the form stated before the Bench of the Court hearing the appeal.

To my mind, however, the right of a respondent to take such an objection may be allowed to rest on the very intelligible principle that the application to, and order by, the single Judge, is in the nature of an *ex parte* proceeding and behind the back of the respondent, who, until the appeal comes on for hearing before the Division Bench, has no opportunity of resisting the admission of the appeal, which it must be admitted he has every interest to do. Nor without express legal enactment to the contrary can a respondent be deprived of the right to plead any matter, whether preliminary or otherwise, which is relevant and germane to not only the merits of the appeal but to the hearing of it. Other preliminary objections, which may be competently considered on the application for admission and not in my opinion more entertainable than that in the present case, are constantly heard and disposed of on appeal; such as, for instance, on the ground of insufficiency of stamps, want of jurisdiction, and the like, and there seems to be no reason, on principle or by analogy, why a respondent should be less favourably situated as regards an objection of the nature in question.

My answer therefore is that, in my opinion, my order of the 4th December last may be impugned and set aside at the hearing of the appeal by the Bench before whom it is brought for hearing, on the grounds that the reasons assigned for admitting it are erroneous or inadequate.

PEARSON, J.—In answering the question referred to the Full Bench, it seems to me that a distinction must be made between an order admitting an appeal after time, after the other party to the case has had an opportunity of urging any objections he may have to make to its admission, and an order admitting an appeal after time merely on the strength of the explanation given or evidence adduced by the appellant himself of the cause of his delay in preferring the appeal.

In my opinion an order of the first kind passed by a single Judge cannot be impugned or set aside at the hearing of the appeal by the Bench before whom it comes to be heard. For although [38] under the rule of practice of the High Court, an appeal may be admitted by a single Judge and afterwards be heard by a Bench of which that Judge may or may not be a member, the Court which admits the appeal is not one Court, and the Court which hears the appeal another distinct Court, but both Courts are one and the same High Court; and the Bench cannot be held to have any power to review or interfere with the single Judge's decision between the parties on the point, whether sufficient cause was shown by the appellant for not presenting the appeal within the prescribed period.

On the other hand, an order of the second kind passed by a single Judge, inasmuch as it cannot bind the party who was not invited or allowed to show cause why it should not be passed, is, I conceive, on the ground of equity, liable to be impugned and set aside when the appeal is heard by the Bench before which it is brought, under illustrations (*b*), s. 4, Act IX of 1871.

TURNER, J.—It is the practice of the Court to delegate to a Division Bench composed of a single Judge its functions of admitting appeals. The Bench so constituted enjoys the full powers of the Court, and can determine when an appeal shall be admitted or rejected. It is incumbent on the Bench so appointed to consider (*inter alia*) whether the application is presented within due time, or if presented after time whether sufficient cause is shown for the delay. On these points the Bench composed of a

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single Judge ordinarily decides *ex parte*. At the presentation of a plaint it is incumbent on the Court to see that the suit is within time and to pass an *ex parte* decision on this point before bringing it on the register, yet it, nevertheless, permits the defendant when he appears to answer the suit to plead limitation. In like manner, I am of opinion that the Bench which hears an appeal ought to entertain and dispose of the respondent's objection that the appeal has been admitted after the time allowed by law, and that no sufficient cause was shown for the delay in presenting the application, notwithstanding the Court admitting the appeal may have held *ex parte* that sufficient cause for the delay has been shown.

That the Court may, nay must (except in the cases excepted), notwithstanding the admission of the appeal, dismiss it if it be shown to have been presented beyond time, is shown by the language of [39] the Limitation Act. The Court has therefore the power of dismissing an appeal at the hearing for a reason which would have justified it in refusing to admit the appeal, and I cannot see anything in the Procedure Code nor in the Limitation Act which prohibits us from adopting the same practice in respect of the plea of limitation when pleaded to the admission of the appeal, as we have followed without objection in respect of the plea of limitation in bar of suit. We are bound to afford to a respondent the same opportunity of urging the one plea as to a defendant of urging the other ; and we should take the ruling of the Bench admitting the appeal in the absence of the respondent as a decision subject to re-consideration on the appearance of the respondent, in the same manner as we in practice hold the admission of a suit on the register to be a decision subject to re-consideration on the appearance of the defendant. The term "if the Court be satisfied, &c," in s. 5, para. (*b*), applies in my judgment not only to the Court exercising its function in admitting the appeal but to the Court exercising its function in deciding the appeal. I would therefore reply that the Court hearing the appeal can and should dispose of the plea urged by the respondent.

Bharutt Chunder Roy v *Issur Chundur Sirkar*, (1).

SPANKIE, J.—During the argument several decisions of the Calcutta Court were cited, and amongst them, the ruling of a majority of the Court as delivered by Sir Barnes Peacock, to the effect that an appellate Court, after admitting and registering an appeal and serving notice on the opposite party, has no power, at the hearing, to reject the appeal, upon the ground that it was not preferred within the prescribed period.

The words of clause (*c*), s.5, as originally proposed are "that no Court after admitting and registering an appeal shall dismiss it on the ground that it was not presented within the prescribed period."

When the Bill for the limitation of suits was introduced into the Legislative Council on the 2nd December 1870, it was stated by Mr. Fitz-James Stephen that s. 5 "provides for the case where a period of limitation expires when the Court is closed, empowers the Court in proper cases to admit an appeal or an application for review after the period applicable thereto, [40] and declares, in accordance with a decision of Sir B. Peacock, that an appeal once admitted shall not be dismissed as late." The Bill as passed, Act IX of 1871, contains no such provision as that contained in cl. (*c*), s. 5 of the proposed Bill. Section 4 and s. 5 and cls. (*a*) and (*b*) remain as they were in the proposed Bill. It appears therefore that the Legislature in passing the Bill, as amended, no longer intended to declare that an appeal once

(1) 8 W.R.C.R. 141.

admitted shall not be dismissed on the ground that it was not presented within the prescribed period.

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Section 4 of the law as it is (Act IX of 1871) provides that—"subject to the provisions contained in ss. 5 to 26 (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." The provisions of s. 5, in so far as they affect the question before us, are as follows :—Clause (*b*). "Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period." It is the appellant who is to satisfy the Court. No procedure is laid down for calling upon the party, who would become respondent if the appeal was admitted, to show cause why it should not be admitted. It is enough if the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within the prescribed period. This is the only point upon which satisfaction is required. The Court admitting the appeal has to satisfy itself whether there is sufficient ground for admitting and registering the appeal, in order that it may be heard and determined. Until this has been done, no notice can issue under the law to respondent.

Under authority conferred by s. 13 of the High Courts Act of Parliament, this Court has made a rule by which a single Judge may receive and admit appeals. But any rule made by the Court is subject to the Laws and Regulations which may be made by the Governor-General in Council. By s. 23, Act XXIII of 1861, a regular appeal shall be *heard* and *determined* by a Court **[41]** of two or more Judges. This section amends s. 332 of Act VIII of 1859, and it clearly refers to the number of Judges who are to *hear* and *determine* the appeal. It does not touch the question of admission ; another section provides for the presentation of the memorandum of appeal. Appeals are to be preferred to the appellate Court and may be admitted or rejected, and if admitted they must be registered either by the Court or one of its officers ; after which follows the procedure by which they may be eventually heard and determined. A single Judge of the Court, so far, under the rules of the Court, appears to be competent to admit an appeal, though after time, if the person who presents it satisfies him that he had sufficient cause for not presenting the appeal within the prescribed period. But when the respondent, in obedience to notice, after registration, appears to answer the appeal (the case being then before the two Judges who must, by law, hear or determine it), and finds for the first time that the memorandum of appeal should have been presented at an earlier date and that it is barred by s. 4 of Act IX of 1871, he of course takes a preliminary objection to this effect, not so much against the admission as against the hearing and determination of the appeal. When he finds that the appeal should not have been admitted at all, an objection of this nature is the best answer that he can make to it, and one that he is entitled to make, for he was no party to the admission. The order admitting the appeal was not passed in his presence or by the Bench before which he is to answer the appeal. There is nothing in the law which connects him with the appeal until he is called upon to answer it, and the Court which is to try the appeal is bound to dispose of his objections to its being heard at all.

It has been said that the Court cannot reject the appeal at the hearing, because, according to s. 350 of Act VIII of 1859, the

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judgment must be for confirming or reversing or modifying the decree of the lower Court, and therefore there is no authority for rejection. This was the view taken by Sir Barnes Peacock in the case referred to above, which led to the enactment of s. 4, Act IX of 1871. Section 4, subject to the provisions of s. 5, provides that an appeal presented after time shall be dismissed, although limitation has not been set up as a defence. The illustrations of this section are as follows :—"(*a*)—A suit is instituted after the prescribed [42] period of limitation. Limitation is not set up as a defence and judgment is given for the plaintiff. The defendant appeals. The appellate Court must dismiss the suit. (*b*)—An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless be dismissed."

In the first illustration, though the defendant does not plead limitation and a decree is passed against him, yet if he appeals, the moment the Court hearing and determining the appeal finds that the suit was barred by limitation, it must dismiss the suit. It must, as a Court, obey the provisions of s. 4, which are imperative. The appeal, though it has been admitted and registered, though on the hearing no objection as to limitation has been taken by respondent, yet if the Court finds that it was admitted too late, must be *dismissed.* The Court does not reject the appeal but dismisses it, thus practically affirming the decree of the Court below. The appellate Court then must dismiss the appeal. That is, the two Judges who sit to hear and determine the appeal must dismiss it, even though a single Judge has admitted and registered it. It is not therefore the appellate Court hearing and determining the appeal that necessarily admits it, nor is it bound by the admission and registration permitted by another Judge.

It is contended that s. 4, being subject to the provisions of s. 5, if the Court admits the appeal and has satisfied itself that the appellant had sufficient cause for not presenting the appeal within time, the admission under such circumstances cannot be questioned. But to this I would reply that the Court receiving the memorandum of appeal has only to satisfy itself on the showing of the person who presents it that the case is one that may be admitted for registry. The Judge admitting the appeal is not required to go beyond this. Clause (*b*) does not say that when the Court has satisfied itself, it *shall* admit the appeal. Admitted it *may* be, but it when it comes on for hearing, the Court sitting to hear and determine the appeal finds, either of its own motion or on the representation of the respondent, that it was admitted after time without sufficient excuse, it is bound under the provisions of s. 4 of the Act to dismiss the appeal. If, on the other hand, the excuse is found to be sufficient, the provisions of s. 5 are fully complied with.

The appeal proceeds and is heard and determined.

[43] Holding this view of the case, I would reply that the Judges at the hearing of the appeal are at liberty to question its admission by a single Judge.

OLDFIELD, J.—Section 5, Act IX of 1871, gives the Court a discretion to admit an appeal after expiration of the period of limitation prescribed for it, when the appellant satisfies the Court that he had sufficient cause for not presenting the appeal within such period. The Judge of this Court sitting for receiving applications and admitting appeals exercises a discretion under this section, but subject to the provisions of s. 4.

Illustration (*b*) of s. 4, which applies generally to appeals after they have been admitted and registered, is to this effect :—" An appeal presented

after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed." This is a general direction for the dismissal of appeals under certain circumstances, notwithstanding their previous admission and without reference to the authority admitting them, and will, in my opinion, apply to appeals admitted by a Judge of the Court under the discretion given him by s. 5, and this power of subsequent dismissal, I apprehend, is intended to be exercised by the Court sitting for the hearing of the appeal, and that Court having both parties before it (which the Judge admitting the appeal had not), is bound to determine whether the appeal should not be dismissed, sufficient cause not being shown why it should be entertained after the period prescribed by limitation.

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1 A. 43 (F.B.).

BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

QUEEN v. NAIADA.* [23rd August, 1875.]

Act XLV of 1860, *ss.* 59, 377—*Punishment—Transportation in lieu of Imprisonment.*

When an offence is punishable either with transportation for life or imprisonment for a term of years, if a sentence of transportation for a term less than life is awarded, such term cannot exceed the term of imprisonment.

[44] The Sessions Judge of Moradabad convicted Naiada of the offence described in s. 377 of the Indian Penal Code, and in consideration of the offender's youth passed a sentence on him of 14 years' imprisonment in transportation, instead of transportation for life. The Sessions Judge followed a case in which the High Court passed a like sentence for a like reason. The legality of the sentence appearing doubtful to Oldfield, J., before whom an appeal against the conviction and sentence came on for hearing, the learned Judge referred the question to the Full Bench, with the following remarks:—

OLDFIELD, J.—There is some doubt whether a sentence of ten years' transportation is not the maximum which can be passed for the offence. The punishment for the offence is transportation for life or imprisonment of either description for a term which may extend to ten years. The Code does not specifically provide transportation for any term shorter than life. Section 59, however, provides that "in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment." It may be said that this section refers to offences where imprisonment is the sole punishment, and that the words "transportation for life," where they occur as denoting a punishment, will include transportation for a term of years. But, on the other hand, the terms of s. 59 seem to refer to all cases, whether transportation for life be an alternative punishment or not, for the words of the

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* Appeal from a conviction by the Sessions Judge of Moradabad, dated the 26th April 1875.

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section are " in *every* case in which an offender is *punishable* with imprisonment, *etc.*," and the words "transportation for life," as used in s. 377, seem not to allow the option of transporting for a shorter term, for had that been the intention, the words would have run " shall be punished with transportation for a term which may extend for life," just as in the latter part of the section the words are " or with imprisonment of either description for a term which may extend to ten years "

I would draw attention to the note to s. 59 in Mayne's Commentary on the Penal Code, and the remarks at page 34 in Morgan and Macpherson's Penal Code.

[45] The question is of some importance, now that the Government of India, by its resolution dated the 17th of November 1874, has rescinded the orders by which only life convicts were to be transported to the Andamans, and the Courts are likely to exercise more frequently their powers of sentencing to transportation for a term of years.

OPINION.

The opinion of the Full Bench was as follows:—

When the Indian Penal Code was originally drawn, it was in the contemplation of the framers of the measure that no sentence of transportation should be passed for a less period than life, and the Bill was so prepared. When the Bill was before the Council, s. 59 was introduced, which enacts that in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, the Court may, in lieu of awarding a sentence of imprisonment, sentence the offender to transportation, for a term not less than seven years, and not exceeding the term for which by the Code such offender is liable to imprisonment. No alteration appears to have been made in the language of the several sections which prescribed transportation as a punishment. Thus, in the majority of instances, the words used are as follows:—" shall be punished with " transportation for life or with imprisonment which *may* extend, &c." While the Court has an option in determining the duration of the term of imprisonment, it has no option in determining the duration of the term of transportation. By s. 302 an offender convicted of murder shall be punished with death or transportation for life. By s. 307 an offender convicted of an attempt to murder shall, if hurt be caused, be *liable* to transportation for life, or to imprisonment for a term which may extend to ten years. By s. 389 an offender convicted of extortion under certain circumstances *may* be punished with transportation for life. By s. 75, on a second conviction of certain offences, an offender " shall be subject to transportation for life or to double the amount of punishment for which he would otherwise be liable." In no section of the Code which prescribes transportation as a punishment, with the exception of s. 59, is the language used such as to leave the Court any option regarding the duration of the term. If follows that a sentence of transportation for a period less [46] than life can only be passed under the provisions of s. 59, and consequently that when an offence is punishable, either with transportation for life or imprisonment which may extend to ten years, if a sentence of transportation for a term not less than life is awarded, the term cannot exceed ten years.

1 A. 46 (F.B.).

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BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

MUSAMMAT GANGA JATI (*Defendant*) v. GHASITA (*Plaintiff*).*
[23rd August, 1875.]

Hindu Law—Stridhan—*Inheritance—Unchastity.*

Per TURNER, OFFG. C.J., and OLDFIELD, J.—Unchastity in a woman does not incapacitate her from inheriting of *stridhan.*

Per PEARSON and SPANKIE, JJ.—Unchastity in a woman does not preclude her from keeping possession by right of inheritance of *stridhan.*

[F., 30 C. 521 ; 31 M. 100=18 M.L.J. 70=2 M.L.T. 533 ; 4 N.L.R. 31 ; **Appr.**, 40 C. 650 (675)=17 C.L.J. 438=17 C.W.N. 679=19 Ind. Cas. 129 ; R., 29 A. 4=3 A. L.J. 537 ; A.W.N. (1906) 243;33 A. 702 (703)=8 A.L.J. 811=11 Ind. Cas. 43 ; 4 B. 104 ; 4 C.W.N. 743 ; **D.**, 4 C. 550 ; 22 C. 347.]

GHASITA, plaintiff, on behalf of his minor son, Mithai Lal, sued Musammat Ganga Jati, his wife, to obtain possession from her of two houses left by Musammat Radha, her maternal grandmother. It appeared that the defendant's mother died in the lifetime of her grandmother, and that the plaintiff and his wife lived with her grandmother until his wife left her home with a paramour, when the plaintiff went to his own home, taking his son with him. The defendant once sued her husband for maintenance, but the suit was dismissed on the ground that she was leading a life of profligacy. Subsequently to this her grandmother died, and the defendant took possession of the houses in suit. The plaintiff obtained a certificate of guardianship to Mithai Lal, although the defendant claimed the right to be his guardian, and it was again recorded that the defendant was a woman of bad character.

The defendant pleaded that the suit to dipossess her was not maintainable, as Mithai Lal was not an heir according to Hindu **[47]** law, of Musammat Radha, being a daughter's daughter's son. The Court of first instance allowed the plea and dismissed the suit. The lower appellate Court held that the defendant was excluded from inheritance by the fact of her unchastity and decreed the claim. The defendant appealed to the High Court.

The grounds of appeal raised the question whether a woman was incapacitated by reason of unchastity from inheriting *stridhana*, and this question the Court (Spankie and Oldfield, JJ.) referred to a Full Bench.

Pandit *Nand Lal* and Pandit *Ajudhia Nath*, for appellant.

Lala *Lalta Parshad*, for respondent.

Pandit Nand Lal.—Under Hindu law, the right of succession to property in general depends on the capacity to confer spiritual benefits on the ancestors. The difference in the order of succession to a woman's peculiar property shows that the right of succession to it does not depend on such a capacity, and an incapacity therefore will not exclude from inheritance. There is no expression anywhere of a disability to succeed to *stridhana*, and it cannot be implied. A daughter being entitled to inherit, is entitled to inherit chaste or unchaste.

* Special Appeal No. 225 of 1875, from a decree of the Judge of Mirzapur, dated the 29th January 1875, reversing a decree of the Munsif, dated the 22nd August, 1874.

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Lala *Lalta Parshad.*—It is provided that unchastity in a widow creates a forfeiture, but there is no provision as to the chastity of a daughter or other famale relation. But the rules which exclude from inheritance apply generally to all property. A man who is an outcast cannot inherit. A woman who is unchaste becomes an outcast.

JUDGMENT.

TURNER, OFFG. C. J.—It appears to me immaterial whether the property in suit was or was not the *stridhan* of the grandmother. In either case, I am of opinion that the daughter is not deprived, by her unchastity, of her right of succession under the law administered by our Courts.

The objection to her succession is only based on the general rule embodied in the text of Narada cited in the Mitakshara (Chap. ii, s. 10), and again in the Dayakrama Sangraha (Chap. iii), and in Dayabhaga (Chap. v., s. 13), that a person addicted to vice does not [48] inherit. No doubt this rule is cited and treated as well established by the author of the Mitakshara, but for many years it has not been enforced in our Courts.

I was myself a party to a decision in which it was held that want of chastity in a mother does not defeat her right of inheritance, and the same rule which, it is contended, deprives a daughter of a right of succession, would also operate to deprive the mother of succession.

PEARSON, J.—The question which arises in this case is whether Musammat Ganga Jati is precluded, on account of her unchastity, from keeping possession, by right of inheritance, of the estate left by her maternal grandmother. If we are to understand that she is leading a vicious life, she might appear to be so precluded by a strict and literal application of the Hindu law. Among those described as excluded from inheritance is "one who is addicted to vice." Mr. Colebroke, however, says, in regard to the causes of disinheritance mentioned in the tenth section, Chap. ii, of the Mitakshara, that, while he is not aware that any have been abrogated or become obsolete, he does not think that any of our Courts would go into proof of one of the brethren being addicted to vice, or profusion, or being guilty of neglect of obsequies and duty towards ancestors. Since this remark was recorded by Mr. Colebrooke more than half a century has elapsed, and it may perhaps be doubted whether such causes of disinheritance as those indicated by him have not become obsolete in practice. It is less probable now than it was then that our Courts would recognize any one of those causes as a sufficient ground for declaring any man incapable of inheriting property ; and if this be so, one would hardly be justified in depriving the (defendant) respondent in this case of her maternal grandmother's estate.

As to the text which says that "a woman, who acts maliciously and is shameless, and a destroyer of property, and addicted to immorality, is unworthly of wealth," I have had occasion in another case to observe that it cannot, without violence, be construed to mean that she is to be deprived of property which has come into her possession ; and there is reason to believe that the text refers only to property recieved by her from her husband.

[49] I am therefore disposed to answer in the negative the question which has been put to us as it arises in the case in appeal.

SPANKIE, J.—I agree entirely with this opinion.

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OLDFIELD, J.— There is no passage to be found in the Mitakshara or other authority followed in the Benares school, debarring a woman living in unchastity from inheriting *stridhana*.

It is not expressed among the causes of exclusion from inheritance in chap. II, s. 10, Mitakshara, and whether it would become so when accompanied by deprivation of caste is not the question before us.

There is a text of Naroda cited in Mitakshara, chap. II, s. 10, v. 3, to the effect that one who is addicted to vice takes no share of the inheritance but the Courts would not give effect to a text of this nature, vague in itself and obsolete in practice.

The only other passages to be found in authorities recognised in the Benares school, from which such exclusion from inheritance can in any way be inferred, are certain passages in the Viramitrodaya of Mitra-Misra in the chapter treating of *stridhana* in West and Bühler's Digest of Hindu Law Cases, Bk. II, Appendix, s. 1, para. 17. The author, after stating that, on a wife's supersession by her husband taking a second wife, he must restore to her the property she may have given him, and that she may exact maintenance, confines the operation of this rule to the case in which she is blameless, and remarks :—"A wicked wife receives no separate property whatever," and goes on to cite the text of Catyayana :—"A wife who acts unkindly towards her husband, who is shameless, who destroys his effects, and who takes delight in being faithless to his bed, is unworthy of separate property." But this passage refers to a particular kind of property, that which the wife has given to her husband for his use, or which she is entitled to receive from him on his taking another wife. The same passage from Catyayana is cited in the Smriti Chandrika, ch. IX, s. 11, para. 24, referring to the same description of *stridhana*. It cannot be inferred from such passages that a woman is excluded from inheriting *stridhana* from her female relations.

It was argued before us that the right of succession to *stridhana*, equally with the succession to other property, is inseparable from [50] the capacity to confer benefits on the ancestors, and that this capacity is lost by reason of unchastity. It may be that the right of succession to *stridhana* is intimately connected with such a principle by the law current in Bengal, as would appear from the Dayabhaga, Dayakrama Sangraha, Vyavastha Darpana, but it is also certain that, even by that law, the right of succession to this kind of property does not rest exclusively on such principle. This appears from the permitted succession of barren and widowed daughters, notwithstanding they confer no direct benefits through the medium of sons ; and the note to ccccxcviii, Colebrooke's Digest, vol. 2, page 612, gives the general opinion that the advantages afforded are not principally considered in treating of separate property held by women. Under the law of the Mitakshara this is still more the case, and throughout that work, and the commentators, no allusion is made to the principle of succession to *stridhana* resting on a capacity to benefit the ancestors by offering funeral oblations. In Macnaghten's Hindu Law it is stated that "this description of property is not governed by the ordinary rules of inheritance : it is peculiar and distinct, and the succession to it varies according to circumstances." In fact, a woman succeeds to *stridhana* rather by reason of consanguinity and in order to afford her some provision. This is shown to be so from the fact that those persons who are worst provided for, or least capable of providing for themselves, are the first in the order of heirs. The argument must, therefore, I think, be dismissed which rests the exclusion from inheritance on the incapacity to

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confer benefits on the deceased. Nor does the fact that the unchaste widow is excluded from inheriting her husband's separate estate afford any argument in the case before us, as the widow's exclusion rests on express texts and with reference to grounds inapplicable to the case of a woman's succession to the *stridhana* of her female relations; and the same may be said of the rule which imposes chastity as a condition on the claim of dependent female members of a family to be supported from the estate in the hands of the male members.

No decided cases on the point have been brought to our notice. There is only the case in vol. 2, Macnaghten's Hindu Law, p. 132, where, in answer to the question,—Can a daughter who lives in a [51] state of prostitution take her parent's property by right of inheritance, the reply is given,—"a daughter who has given herself up to prostitution, or one who is unchaste, is wholly incompetent to inherit the property left by her parents." But it is not clear if this refers to *stridhana*, or if the exclusion is by reason of unchastity entailing loss of caste.

In the absence of any express law, or of any custom handed down or supported by a course of decisions of the Courts, the answer to the reference should, I apprehend, be that unchastity will not disqualify a woman from inheriting the *stridhana* of her female relations.

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1 A. 51.

APPELLATE CIVIL.

Mr. Justice Spankie and Mr. Justice Oldfield.

FATIMA BEGAM (*Plaintiff*) *v.* SAKINA BEGAM AND ANOTHER (*Defendants*).* [20th July, 1875.]

Dwelling-place—Act VIII of 1859, *s.* 5—*Act XXIII of* 1861, *s.* 4—*Jurisdiction.*

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of s. 5 of Act VIII of 1859, and s. 4 of Act XXIII of 1861.

[N.F., A.W.N. (1892) 115; R., 13 Cr.L.J. 522=15 Ind. Cas. 794=5 S.L.R. 220.]

THE plaintiff, who was the daughter of Yasin Khan, deceased, sued in the Court of the Subordinate Judge of Farukhabad to recover her share of the estate left by her father, consisting of immoveable and moveable property in the district of Farukhabad, and the sale proceeds of a house at Calcutta. The defendants were the widow of Yasin Khan, Musammat Sakina Begam, and his nephew Azim Khan, who had married the widow. At the time the suit was brought, Azim Khan, who was a sawar in the Scinde Horse, was with his regiment. The defendant Musammat Sakina Begam was residing in his family residence in the district of Farukhabad. The Court of first instance decreed the claim in part. The lower appellate Court reversed the decree and dismissed the suit on an objection taken by the defendant's pleader in appeal, that the suit was not maintainable with reference to s. 4 of Act XXIII of 1861, which requires that the sanction of the High Court should be obtained for the trial of a suit, when all the [52] defendants are not residing within the jurisdiction of the Court in

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* Special Appeal, No. 573 of 1875, from a decree of the Judge of Farukhabad, dated the 11th May, 1875, reversing a decree of the Subordinate Judge, dated the 27th January 1875.

which the suit was brought, the lower appellate Court holding that the defendant Azim Khan was not residing within the Court's jurisdiction. **1875 JULY 20.**

On special appeal by the plaintiff, it was urged that the suit being one for the possession of both immoveable and moveable property, the lower appellate Court erred in holding that the absence of one of the defendants from the territorial jurisdiction of the Court of first instance was fatal to the case and took it out of its jurisdiction; and that the lower appellate Court had placed a wrong construction on s. 4 of Act XXIII of 1861. APPELLATE CIVIL. **1 A. 51.**

Mr. *Mahmood* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellant.

Pandit *Ajudhia Nath* and Pandit *Bishambhar Nath*, for the respondents.

JUDGMENT.

The judgment of the Court (after setting out the facts as above stated) was as follows:—

In our view the lower appellate Court is in error, and Azim Khan's residence or dwelling within the meaning of those terms in s. 5, Act VIII of 1859, and s. 4, Act XXIII of 1861, is in the jurisdiction of the Farukhabad Civil Court.

The words dwelling or residence are synonymous with domicile or home, and mean that place where a person has his fixed permanent home, to which whenever he is absent he has the intention of returning. In *Lord* v. *Colvin* (1) it was held "that place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." And in a case cited in Broughton's Civil Procedure Code, *R.* v. *Murray* (2), it was held that a man may have two dwelling-places, living sometimes at one and sometimes at another, and during his temporary absence each house though empty, if there be an *animus revertendi*, will still be his dwelling-house.

[53] In the present case, Azim Khan, being a sawar in the Scinde Horse, his duties no doubt oblige his presence with his regiment for the greater part of his service, but the quarters of a regiment, always liable to be changed, are the temporary and not the permanent residence of the soldier; Azim Khan's family residence, admittedly within the jurisdiction of the Court, and the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of the law.

We reverse the decree of the lower appellate Court and remand the case under s. 351, Act VIII of 1859, for trial of the appeal. Costs to follow the result.

(1) 4 Drew 366; 28 L. J. Chanc. 361.

(2) 2 East P. C. 496.

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AUG. 22.

FULL BENCH.

1 A. 53 (F.B.).

1 A. 53 (F.B.).

BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

PARMESHAR RAI AND OTHERS (*Defendants*) *v.* BISHESHAR SINGH AND OTHERS (*Plaintiffs*)*. [22nd August, 1875.]

Hindu Law—Inheritance—Act I of 1872, s. 108—*Act XVIII of* 1872, s. 9—*Missing person—Presumption of death—Burden of proof—Act VI of* 1871, s. 24.

The reversioners next after J. to the estate of S., deceased, sued to avoid an alienation of S.'s estate affecting their reversionary right made by his widow. J. had not been heard of for eight or nine years, and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of s. 108, Act I of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead.

[F., 11 B. 433; R., 8 A. 614; D., 2 A. 625.]

THE plaintiffs sued, as being reversioners to Salig Rai, deceased, the next heir, Janki Rai, being missing, for the cancelment of a mortgage of the real estate of Salig Rai made in favour of Fakir Rai, Lachmin Rai, and Parmeshar Rai, defendants, by his widow, Musammat Ablaki, defendant, in so far as the mortgage affected their reversionary right, and for a declaration of that right. The mortgagees, defendants, equally with the plaintiffs, were reversioners to Salig Rai. The defendants denied that Janki Rai was [54] missing, alleging that he was in the Mauritius, where he had been for the last eight or nine years; and contended therefore that the plaintiffs were not competent to bring the suit, the Hindu law requiring that a person should be missing for 12 years before he could be held to be civilly dead. They admitted that Janki Rai had not been heard of for eight or nine years and that there was no proof of his being alive.

The Court of first instance held, and the lower appellate Court concurred with it, that Janki Rai must be regarded as civilly dead, the defendants having failed to rebut the presumption against them by s. 108, Act I of 1872.

On special appeal by the defendants it was contended by them that Act I of 1872 did not affect the Hindu law, and that the plaintiffs could not bring their suit before the expiration of 12 years from the date that Janki Rai was last heard of.

The Court (Stuart, C. J. and Spankie, J.) referred the following question to the Full Bench:—

"Is the question whether a man be alive or dead one simply of evidence, not necessarily forming a portion of the Hindu and Muhammadan law of succession and inheritance, inasmuch as the order of succession, devolution of property, are not really affected by its determination, and therefore its determination should follow the rules of evidence in Act I of 1872; or is it a question which can only be answered in accordance with the presumption allowed to be drawn by the Hindu and Muhammadan law of succession and inheritance, and therefore so much a portion of these laws, that the Courts are bound to follow the provisions of s. 24, Act VI of 1871, in dealing with it?"

* Special Appeal, No. 187 of 1875, from a decree of the Judge of Benares, dated the 8th December 1874, modifying a decree of the Munsif, dated the 14th August 1874.

The reference was accompanied with the following remarks:—

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Section 107 of the Evidence Act provides that, when the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Section 108, as amended by s. 9, Act XVIII of 1872, is as follows:—"Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have [55] heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

The mortgagor defendant, especially, and the other defendants, equally with plaintiffs, are those who would have naturally heard of Janki Rai had he been alive, and the defendants are the persons who affirm that he is alive. The *onus* therefore has been laid on the right party. One thing is quite certain, that the question whether Janki Rai is alive or dead is the question which must be answered prior to the determination of the suit on its merits. When the question is whether a man is alive or dead, what is the effect of these two sections? Do they establish one uniform rule in all cases, or are the Courts bound to follow what has been held to be the Hindu and Muhammadan law on the point?

In the first report on the draft Bill the Committee remarks:—"We have, however, admitted one or two such presumptions to a place in the Code, as in the absence of an express rule the Judges might feel embarrassed. These are the presumption of death from seven years' disappearance and the presumption of partnership."

The Senior Government Pleader (Lala *Juala Parshad*) and Munshi *Hanuman Parshad*, for the appellants.

Lala *Lalta Parshad*, for the respondents.

OPINIONS.

The following opinions were delivered:—

TURNER, OFFG. C. J. and PEARSON, J.—The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance. Were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him. He is the next heir or reversioner to one Salig Rai, deceased, whose estate is retained during her lifetime by his widow Musammat Ablaki; and this suit is brought by the plaintiffs, as next reversioners after the aforesaid Janki Rai, in consequence of his absence, for the avoidance of a deed of mortgage executed by Musammat Ablaki to the detriment of their reversionary rights. Under the circumstances, there seems to be no reason why the provisions of s. 108 of the Evidence Act should not be applicable. The death of Janki Rai may be [56] presumed for the purposes of this suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the law of succession prescribed when a person is missing and not dead.

SPANKIE, J.—It appears to me that the question whether a man be alive or dead is one simply of evidence, and has no immediate connection with the devolution of property under the Hindu or Muhammadan law, and its determination should follow the rules of evidence in Act I of 1872. When a person is claiming the estate of a missing person, he could not do so, if a Hindu, until after the expiration of 12 years from the date of that person's forsaking his family, and being lost sight of, or if a

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Muhammadan, until 90 years had passed from the date of the missing person's birth. The period at which the estate of a missing person may be claimed under the Hindu or Muhammadan law seems to be unaffected by the sections of the new Act referred to.

OLDFIELD, J.—Under Hindu law the property of a missing person will not vest in the next heir until the expiry of at least 12 years from the date that the missing person forsook the family, supposing that during the interval no intelligence of him has been received: and if the present case were one in which the plaintiff sues to succeed to the property of a missing person, it may be that we should apply the Hindu law as to the presumption of death, with reference to s. 24, Act VI of 1871.

But the case before us is not of this character, and there is no question in respect of the devolution of property of a missing person. The plaintiff sues to protect property in the hands of a widow from alleged illegal alienations made by her, and ordinarily the next heir should sue, but in this case the missing person is the next heir, and plaintiff asks to be allowed to sue, and on the ground that the next heir is missing and presumably dead.

The decision will determine no right of inheritance or succession, so as to make Hindu law necessarily applicable, and in such a case, the general rules of evidence under the Evidence Act as to the presumption of death and consequent burden and proof may, in my opinion, properly apply to this case.

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1 A. 57 (F.B.).

[57] BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

HAMIR SINGH AND OTHERS (*Defendants*) v. MUSAMMAT ZAKIA (*Plaintiff*).* [27th August, 1875.]

Muhammadan Law—Inheritance—Minor.

Two of the widows of a deceased Muhammadan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians.

Held, if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected.

[**F.**, A.W.N. (1881) 16; 19 Ind. Cas. 911 (912)=6 S.L.R. 268; **Ap.**, 7 A. 822 (F.B.) =A.W N. (1885) 248; 11 C. 421; **R.**, 1 A. 533; 4 A. 361; 9 A. 340; 20 B. 199; 26 M. 734; **Observed**, 37 M. 514=15 Ind. Cas. 576 (579)=23 M.L.J. 244 (249) =12 M.L.T. 147=(1912) M.W.N. 889 (892); **D.**, 26 A. 22; 5 O.C. 201; 9 O.C. 97.]

THE plaintiff sued to obtain possession, by right of inheritance, of a share in certain property forming portion of the real estate of her deceased father. The property was sold during her minority to satisfy decrees

* Special Appeal No. 168 of 1875, from a decree of the Subordinate Judge of Moradabad, dated the 4th December 1874, affirming a decree of the Munsif of Amroha, dated the 30th March 1874.

obtained by creditors of her deceased father against two of his widows, Musammat Sadat-un-nissa and Musammat Maghlu, as his representatives. The sale-deed was executed by them on behalf of themselves, and as guardians of his minor children. The deceased left considerable personal property as well as real. The plaintiff was not the daughter of either Musammat Sadat-un-nissa or Musammat Maghlu, but of a third widow of the deceased. At the time of the sale she lived with her mother, but was supported by Musammat Maghlu. She had no legal guardians at the time. From the sale-deed it appeared that she was in possession of the property. It did not appear that the plaintiff was a party to the suits brought by the creditors, and properly represented in those suits, nor whether the decrees obtained in those suits passed on confession of the defendants in them, or after proof of the debts. The Court of first instance held that the sale was invalid, because, the defendants, Musammat Sadat-un-nissa and Musammat Maghlu, [58] were not competent to deal with the plaintiff's share in her deceased father's estate as her assumed guardians, and because there was no necessity for the sale of the share, as it appeared that the personal property of the deceased was sufficient to have met his debts. In this view the lower appellate Court concurred.

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The vendees appealed to the High Court, the grounds of appeal being as follows :—" (1) When it is admitted that the property in dispute was sold for the payment of the debts of the ancestor, and that such debts were paid, it is improper to set aside the sale. (2) When no legal guardian, according to the Muhammadan law, was present, and the property was sold by the stepmothers of the plaintiff, who were in possession, for the payment of the debts of the ancestor, such sale is valid according to law."

The Court (TURNER and OLDFIELD, JJ.), in reference to the doctrines of Muhammadan law expounded in Bk. XX., ch. 4, of the Hedaya, referred to the Full Bench the following question :—

" Whether, under the circumstances found by the Courts below, the sale by the widows in possession, against whom decrees had passed as representatives of the deceased, is or is not binding on all the heirs, the sale being made for the purpose of satisfying such decrees."

Babu *Oprokash Chandar*, for the appellants, contended that the sale was valid under Muhammadan law, the property having been sold by the heirs in adverse possession of it in satisfaction of a debt adjudged to be due from it.

Munshi *Hanuman Parsad*, for the respondent.—This is not a case of a sale by one or more heirs in possession of an estate to satisfy a debt against the estate. It is the case of the sale of a minor's property by a so-called guardian, and is illegal under Muhammadan law.

JUDGMENT.

TURNER, OFFG. C.J. and SPANKIE and OLDFIELD, JJ., concurred in the following opinion :—

Under the Muhammadan law, the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. The discharge of debts is a matter of necessity, the right of the heirs is connected with the [59] estate on the sole condition of its being free from incumbrance, whence it is that the discharge of the funeral expenses precedes the right of the heirs, as that is also a matter of necessity—Hedaya, Bk. XXV. Nevertheless, the circumstance of a small debt attaching to the estate of a deceased person does not prevent the heirs from inheriting, whereas if the estate were

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completely involved in debt they would be prevented—Hedaya, Bk. XXVI. While then the heirs might lawfully take possession of an estate not completely involved in debt, the creditors have the right to sue such of the heirs as have taken the estate; "but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir;" and the reason given is—"that although any one of them (the heirs) may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf unless *the whole of the effects are in his possession.*"

There is, however, still another provision of the Muhammadan law, that if a creditor desires to realize his debt out of the *akar*, or immoveable property, of the deceased, he cannot obtain a decree to the prejudice of heirs who are not parties to the suit on the mere confession of some of the heirs, but he must establish his claim by proof—Hedaya, Bk. XXXIX., ch. 1.

In the case now before the Court it appears from the sale-deed that the plaintiff was in possession, and that the deed was executed on her behalf by a person who had no legal right to represent her. It does not appear whether she was or was not a party to the suits brought by the creditors and properly represented in those suits: nor whether the decrees obtained in those suits passed on confession of the defendants or after proof was given of the debts.

If the minor was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, then it would seem she cannot be bound by the decrees nor by the sale subsequently effected, and she is entitled to recover her share but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected.

PEARSON, J.—The doctrine that a sale made by one or more of the heirs of a deceased Muhammadan, in lawful and exclusive **[60]** possession of his estate, in discharge of a debt which has been adjudged to be due from it, is valid, though it appears reasonable and equitable, may not be altogether free from doubt. But in the case in which this reference has been made, it is not clear that the two widows, who took upon themselves to sell the plaintiff's share, were lawfully in possession of it to her exclusion, and they were certainly not legally competent to act on her behalf as her guardians. Under the circumstances, it would seem, therefore, that she is entitled to recover her share, on payment of her share of her father's debt which was discharged by the sale (1).

(1) The case having been returned to the Division Bench (TURNER and OLDFIELD, JJ.), it was remanded to the lower appellate Court to try the following issues:—"Was the plaintiff a party to, and properly represented in, the suit in which the creditors of her ancestor obtained decrees which were subsequently satisfied by the sale proceeds? What is the sum she was bound to contribute in payment of the debts discharged out of the sale proceeds?"

1 A. 60 (F.B.).

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FULL BENCH.

1 A. 60 (F.B.).

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

LYELL (*Defendant*) v. GANGA DAI (*Plaintiff*).* [1st June, 1875.]

Carrier—Duty of persons sending goods of a dangerous nature—Notice—Act XVIII of 1854, *s.* 15*—Act XIII of* 1855*—Negligence—Action for compensation for destruction of life.*

Held (PEARSON, J., dissenting), that a person who sends an article of a dangerous and explosive nature to a railway company to be carried by such company, without notifying to the servants of the company the dangerous nature of the article, is liable for the consequence of an explosion, whether it occurs in a manner which he could not have foreseen as probable, or not.

Held, also (PEARSON, J., dissenting), that such a person is liable for the consequences o an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precautions to preclude the risk of explosion.

Mode of estimating damages under Act XIII of 1855 *discussed.*

THE plaintiff sued, under Act XIII of 1855, to recover Rs. 9,360, damages for the loss of her husband, Babu Ganpat Rai, deceased.

[61] The plaint stated that the plaintiff's husband was in the service of the East Indian Railway Company at Allahabad, and entrusted with the duty of despatching goods. On the 29th November 1872, the defendant, through his servant William Henry Pollard, sent to the Allahabad railway station a box containing combustible and dangerous substances for despatch to Gwalior, without notifying the contents, as he was bound to do by law, and the said box was placed as usual in the railway station near the very place where the plaintiff's husband was performing his duty. Suddenly the said box, owing to its having been filled with explosive materials, exploded, and thereby the plaintiff's husband was wounded in so serious a manner, that he died from the effects of the injury he had received; and thus, independently of the comfort, happiness, prospects, and security which a wife enjoys during the lifetime of her husband, the plaintiff has been deprived of the advantages derivable from his salary. At the time of the fatal occurrence the plaintiff's husband was 31 years old, and assuming the natural term of human life to be 70 years, the plaintiff has, independently of his prospects of promotion, sustained a loss to the extent claimed, calculated on the salary of the place he held on the date of his death. Hence the suit.

The defendant alleged in his written statement—(1) that the box in question did not contain any combustible or dangerous substance as alleged by the plaintiff, and that the occurrence of the explosion was still a mystery to all experts in chemistry: (2) that there was no reason to suppose that the plaintiff's husband lost his life through the omission to declare the contents of the box in question; for even if it had been marked "dangerous," there would be evidence to show that the railway authorities would have placed the box precisely where it was located before despatch, and the deceased would have presumably dealt with it in no different manner than he did when the explosion unaccountably took place: (3) that the amount of damages laid was grossly excessive.

* Appeal under cl. 10 of the Letters Patent, No. 2 of 1875.

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It appeared at the trial that on the 19th of November 1872, the defendant, who carried on the business of a chemist in Allahabad, received from a customer at Gwalior an order for certain chemicals, and among others for a detonating powder. He delivered this order [62] to an assistant, Mr. Pollard, a qualified chemist, directing him to execute it, and to despatch the articles. The defendant had previously supplied his customers with detonating powder composed of equal parts of black sulphuret of antimony and chlorate of potash. These ingredients were not compounded in the shop, but sent to customers in separate bottles. On this occasion, however, Mr. Pollard, without having received any express orders, prepared a detonating powder composed of one part sulphur and three parts of chlorate of potash, and these ingredients he compounded and placed in one bottle. Having delivered the articles ordered to the packer, Mr. Pollard went to the defendant and consulted him about it. The defendant enquired of Mr. Pollard how he had prepared the detonating powder, and Mr. Pollard informed him. The defendant observed that he supposed the ingredients had been placed in separate bottles. Mr. Pollard replied that they had been placed in one bottle. The defendant enquired if that was quite safe. Mr. Pollard said that he had frequently made it in England and kept so. He added that the bottles were being packed, and he would mark the box "*dangerous*," as a precautionary measure, to be taken care of by the railway company. The bottle containing in all 1lb of detonating powder was wrapped in paper and tow, and placed with seven other bottles (similarly prepared) in a box, which was sent by a coolie to the railway station to be despatched by passenger train. The forwarding note which was sent with the box contained no description of the character of the contents. The box was not marked dangerous, nor was any notice given, nor did any thing exist which could suggest to the servants of the company that the box contained any explosive substance or required care in manipuiation. The box was weighed and placed in the parcel room. Outside the door of the parcel room was a semi-circular counter, boarded to the floor, with an opening in the centre affording passage to the parcel room. The space enclosed by it was of limited extent. After attending to his duties in connection with a train which was leaving the station, the deceased whose duty it was to receive parcels directed the coolie to bring the box from the parcel room. He did so, and placed it inside the counter and near the passage. The deceased, standing at the counter, commenced to write the usual receipt; and while he was engaged in so doing, the contents of the box exploded. The front [63] of the counter was blown out, the deceased was severely wounded, and died from the effects of the injuries sustained.

There was no direct evidence as to the cause of the explosion. A clerk in the station-master's office, Ganpat Rai by name, was standing outside the counter speaking to the deceased when the explosion occurred. He stated that the box was not visible to him, the counter being so constructed that it was impossible to see from the outside what was lying inside. The coolie who carried the box from the defendant's premises to the railway station deposed as follows:—" I had placed the box just at the passage of the counter. The Babu was writing the receipt when the box exploded. I ran off towards the west. I carried the box on my head to the railway. It did not tumble down on the way, nor did it tumble down when it was weighed, nor when I took it to the office, nor when I brought it from the office and placed it inside the counter. It received no shock. No one kicked at the box, for nobody went that way." The witness was

standing outside the counter at the time of the explosion, and about a yard from it.

The station-master at Allahabad, who was called by the plaintiff, stated in cross-examination as follows :—"I don't know what the clerk (deceased) would have done with the box if it had been marked "dangerous;" but if it had been so marked, it was his duty to report it to me. In the meanwhile, of course, he would have allowed the box to remain on the platform. There is no separate place in our Allahabad station for keeping such parcels. There is nothing in the rules of the railway company to compel Mr. Lyell to declare the contents of such a parcel, unless he knew that it was dangerous." In re-examination the witness deposed that, in the case of dangerous articles, except gunpowder and kerosine oil, he thought the consignor was bound to notify the dangerous character of the articles to the railway authorities, so that they might consider whether to receive the article or not, and to make special charges as to rate, and special arrangements to insure safe transit.

In the opinion of the experts examined, the explosion might have been due to the application to the detonating powder of some external agency, such as friction or percussion. Two of these **[64]** experts stated that the spontaneous explosion of a detonating powder so composed was a thing unknown. The third, assuming the box suffered no violence of any sort, was of opinion that the explosion might have taken place owing to chemical action having arisen between the ingredients constituting the detonating powder.

Section 15 of Act XVIII of 1854 (an Act relating to railways in India) enacts that " no person shall carry upon any such railway any dangerous goods, or be entitled to require any such railway company to carry upon such railway any baggage or goods which, in the judgment of the company or any of their servants, shall be of a dangerous nature ; and if any person shall carry upon such railway any dangerous goods, or shall deliver to such railway company any such goods for the purpose of being carried upon such railway, without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing of the nature thereof to the book-keeper or other servant of the company to whom the same shall be delivered for the purpose of being so carried, he shall be liable to a fine not exceeding two hundred rupees for every such offence; and it shall be lawful for any such company or any of their servants to refuse to carry any luggage or parcel that they may suspect to contain goods of a dangerous nature, and to require the same to be opened to ascertain the fact previously to carrying the same ; and in case any such luggage or parcel shall be received by the company for the purpose of being carried on the railway, it shall be lawful for the company, or any of their servants, to stop the transit thereof until they shall be satisfied as to the nature of the contents of the luggage or parcel."

The Cout of first instance, holding it proved that the box contained some dangerous chemical preparation, that its dangerous character was fully known to the defendant and his servant, that the omission of the defendant to mark the box "dangerous" amounted to a wrongful neglect or default which entitled the plaintiff to maintain the suit, and that the death of the deceased was caused by such wrongful neglect or default, gave the plaintiff a decree for Rs. 5,253.

[65] On appeal by the defendant to the High Court, the learned Judge of the Division Court (Stuart, C. J., and Pearson, J.) before which the appeal came on for hearing differed in opinion.

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The judgments of the learned Judges were as follows:—

STUART, C. J.—It has been with no little difficulty and hesitation that I have arrived at the conclusion that we ought to dismiss this appeal, at least substantially, for I must propose a modification of the Subordinate Judge's decision and order.

Mr. Lyell, the defendant, is no doubt, under the circumstances, entitled to much consideration, and even to a certain sympathy; and, if the nature of the case had admitted of it, I would have been glad to have determined his liability to be merely nominal. His manifest good faith in the whole transaction, the absence of any motive or idea on his part inconsistent with conduct entirely innocent, nay the fact that by the manipulation of the dangerous materials which caused the explosion, the filling and packing of the bottles, and the careful preparation of the box for transit by railway, Mr. Lyell and Mr. Pollard exposed themselves to the greatest possible risk, risk that might have cost them their lives, are all surely sufficient to absolve Mr. Lyell from liability in any grossly culpable sense But notwithstanding these just claims to consideration and sympathy, he cannot be relieved of liability, and a liability proportionate in some degree to the nature of the plaintiff's claim, and to the extent of the loss she has suffered. Of the serious nature of that loss there can be no doubt, and it is not disputed that her husband's death was occasioned by the explosion of the box at the railway station.

On the evidence it is not easy satisfactorily to determine what it was that occasioned the fatal explosion. The weight of it is, I think, against the suggestion that it was occasioned by friction. The more reasonable conclusion that the explosion was spontaneous while the box was lying on the railway platform, owing in all probability to some unexplained chemical action among the contents of the bottles, and such is the theory suggested by the plaint itself, for, in claiming dangerous, that pleading alleges that Mr. Lyell "sent to the Allahabad railway station a box containing combus-[66]tible and dangerous substances for despatch to Gwalior, without notifying the nature of its contents, as he was bound to do by law, and the said box was placed as usual in the railway station near the place where the plaintiff's husband was performing his duty. Suddenly the said box, owing to its having been filled with explosive materials, exploded, and thereby the plaintiff's husband was wounded in so serious a manner, that, despite of his being placed and treated in the Government hospital, he did not recover, but died from the effects of the injury he had received," and such, as well as we can see and understand, was the truth of the matter. But with reference to Mr. Lyell's liability, it is, in my view, immaterial how the explosion took place. It may be that Mr. Lyell's professional knowledge and experience were not such as to have led him to anticipate such an accident, especially by spontaneous explosion; and any want of such knowledge and experience on his part is, on the evidence, not to be wondered at. That circumstance of itself, however, does not relieve him of liability. As a skilled and professed chemist, he was bound to protect the public, whether railway clerks or others, to the utmost of his power, and with the use of every precaution against any possible consequences of his dealing with and sending by railway, or by other means of carriage, chemical substances which, it appears from the evidence, both he and Mr. Pollard knew to be explosive, and therefore dangerous; and even if they did not know as much, they must be assumed and taken to have known—at least Mr. Lyell, as a professed and skilled chemist, must be taken to

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have known—the real and dangerous character of the contents of the box, and he cannot be excused for not having notified that fact to the railway company and the public by a distinct inscription on the box of the word "dangerous," or some other equally suitable term, or in some other way, or by some other means. Indeed, it appears from the record that he was aware of the importance of such a precaution ; and as to s. 15, Act XVIII of 1854, no doubt that enactment is penal, and contemplates a criminal prosecution, but such a law does not interfere with, much less take away, the civil remedy. On the contrary, I consider it assists a civil suit for damages, by the warning it has placed on the Statute Book to all persons in the position of the defendant to be careful to use all proper precautions against accidents of this kind.

[67] However, therefore, Mr. Lyell's conduct may be explained and in a sense palliated, his legal liability to the plaintiff, is, in my opinion, undoubted, and he must pay damages. The only question, therefore, that remains is how, and to what amount, these damages ought to be assessed.

The impression made upon me at the hearing of this appeal was that, if there was a case for damages at all, these should be merely nominal, and that the lowest possible figures would, under all the circumstances, have satisfied the justice of the case. But the anxious consideration I have since given to it has convinced me that such a result would neither be consistent with the nature of the suit, nor with fairness to the plaintiff. Her loss is extreme, and, the defendant's liability to her being once reached, her claim for compensation must, in principle as well as in substance, be admitted. The law in force in India on this subject is regulated by Act XIII of 1855, which, on the preamble that " it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him," proceeds to enact that the party injured may maintain an action, and that " every such action shall be for the benefit of the wife, husband, &c.," and that " in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death." There are no children in the present case, so that the loss is that of the plaintiff herself exclusively. The Subordinate Judge, in considering the question of damages, very properly takes into account the deceased's age, which he estimates was from 30 to 35 years, adding that, " by all accounts, the deceased was a strong, healthy, robust man, and that it is not improbable that he might have lived to the age of 70 years," and he decides upon an allowance of Rs. 200 a year, or Rs. 17 per month, which required an investment of Rs. 5,253. It appears to me, however, that the Subordinate Judge has conceived an undue estimate of native life. The proportion of natives who attain the age of 70 is, I believe, very small ; and the atmosphere, work, and attendance at an office, connected with a railway station, such as that in Allahabad, is, in my opinion, not favourable to longevity, and all things considered, it appears to me that the offer suggested by Mr. Howard (on the assumption of his client's liability) is a fair one. That suggested offer was a monthly [68] allowance of Rs. 15 secured by the investment of Rs. 3,000. Whether the investment of such a sum would produce a monthly allowance of Rs. 15, or whether it is necessary that the plaintiff should have such a monthly allowance I do not determine, but I consider that I sufficiently meet the legal conditions of the suit and the just claims of the plaintiff by awarding to her as damages the sum of Rs. 3,000. To that extent, therefore, I would modify the decree of the Subordinate Judge, and *quoad ultra* dismiss the appeal, with costs in both Courts.

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I have not thought it necessary to say anything respecting the position of Mr. Pollard in the case. He, no doubt, was also a skilled chemist and was stated to have been, and I presume still is, member of the Pharmaceutical Society, and if he had acted on his own responsibility without reference to his connection with Mr. Lyell, his separate liability would have been undoubted. But he was at the time the servant of Mr. Lyell, was, so to speak, Mr. Lyeil's hand in the matter, and, as the Subordinate Judge puts it, his omission or neglect was the omission or neglect of his master. But I need not enlarge further on this subject, as Mr. Pollard's immunity from liability was, I believe, not disputed by the plaintiff's counsel.

PEARSON, J.—The real cause of the explosion by which the plaintiff's husband lost his life does not appear to me to have been ascertained beyond all doubt. There is no evidence whatever to show, and I think that there is no reason to suppose, that the box which exploded contained either potassium or fulminating powder; and I must, therefore, proceed upon the assumption that the explosion is attributable to the detonating powder. The learned witnesses are agreed that such an explosion might be occasioned by heat, percussion, or friction, and are inclined to surmise that, in this instance, the explosion must have been occasioned by friction, which might have resulted from the breaking of the bottle containing the detonating powder, or from the other bottles coming into contact with it, or from such an accident as a fall. But there is no evidence to show that anything occurred which could cause friction. On the contrary, the evidence goes to show that the explosion took place when the box was lying upon the ground, without any application of force to it, and, so to speak, spontaneously, and yet most of the learned [69] witnesses seem to be of opinion that such spontaneous explosion is impossible. Dr. Waldie, indeed, in answer to the question, "supposing it were approved that the box suffered no violence of any sort prior to explosion, what would you be disposed to attribute the explosion to," answered, "I should now suppose that, under the circumstances, the explosion might have taken place owing to chemical action having arisen between the ingredients constituting the detonating powder." He does not, herefore, reject the hypothesis of spontaneous explosion as wholly out of the question; and this hypothesis is, as I have already remarked, most in accordance with the evidence of what actually occurred. The detonating powder was composed of one part sulphur and three parts chorate of potash. Whether or not it is the case, as the learned advocate for the appellant informs us, that such a composition, when the potash has been pounded too finely or the sulphur is not quite pure, is liable to spontaneous explosion, I cannot determine. The learned witnesses were not examined on the point. They all seem to intimate that they would not have anticipated the explosion of the powder in transit in a well secured bottle properly packed. That Mr. Pollard who prepared the powder did not know it to be liable to spontaneous explosion may be assumed as certain, for, had he known it to be so, he would never have exposed himself to the risk involved in mixing it. But I must conclude that he did know, or ought to have known, that its explosion might be caused by friction, and that, in its transit by railway, it was not exempt from the risk of friction, and that he was, therefore, legally bound to mark distinctly its dangerous nature on the outside of the package, or to give notice thereof in writing to the book-keeper or other servant of the company to whom it was delivered for the purpose of being forwarded. This duty he neglected to perform, and for that neglect he may have been punishable; but it is contended that, although he would

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have been liable to an action like the present had the death of any person ensued upon an explosion of the detonating powder caused by friction in the transit of the box containing it, he cannot be held liable for the consequence of its spontaneous explosion, which he could not be expected to have foreseen as probable, at a time when the box was lying untouched on the railway platform, and which could not have been prevented by [70] any precautions which the railway company could have taken, even had they been made aware of what he knew, or should have known, that there was a danger arising from the possibility of friction, in the event of the bottle containing the powder being broken, or the other bottles being brought into contact with it by a violent shaking of the box. This contention, which is founded on the presumption that it cannot be the intention of the law to hold a man answerable for an event which he could not reasonably be expected to have foreseen, appears to me to be sound and cogent, on the assumption that the explosion was spontaneous, and I prefer to adopt the hyphothesis that it was spontaneous, supported as it is by the evidence of what really occurred, and Dr. Waldie's opinion that, under the circumstances evidenced, it might have been spontaneous, rather than the opinion of the other learned witnesses who believe that it could not have occurred spontaneously, and that it must have been due to friction, although there is no proof of friction having taken place. On this view of the case, I would decree the appeal and dismiss the suit, but order the parties to bear their own costs in both Courts.

The defendant appealed to the Full Court, under the provisions of cl. 10 of the Letters Patent, against the judgment of the learned Chief Justice.

Mr. *Howard*, for the appellant, contended that, inasmuch as the explosion was spontaneous and the appellant could not have anticipated it, he could not be held liable for it. The learned Chief Justice overlooked the evidence of the station-master respecting the rules of the railway company relating to the despatch of parcels by passenger train. The appellant could not have anticipated the explosion, and was consequently not bound to notify the character of the contents of the box. The respondent has failed to prove that the death of her husband was occasioned by the omission of the appellant to give notice of the character of the contents of the box; and the sum awarded to the respondent is excessive.

The Junior Government Pleader (Babu *Dwarka Nath Banerjee*), for the respondent, contended, that the case was governed by the principle of law down 'laid in *Farrant* v. *Barnes* (1)., *viz*., that a person who sends an article of a dangerous nature, to be carried by a carrier, [71] is bound to take reasonable care that its dangerous nature should be communicated to the carrier and his servants who have to carry it; and if he does not do so, he is responsible for the probable consequences of such omission. The learned pleader also contended that Act XVIII of 1854 imposed an obligation on the defendant to communicate the dangerous nature of the detonating powder to the railway company, the breach of which rendered him liable for the probable consequences of such breach. The evidence shows that it was the duty of the deceased to communicate the receipt of dangerous articles to the station-master, who, in the exercise of the discretion vested in him, might refuse to carry them. It is highly probable that, had the appellant communicated the contents of the box, the station-master would have refused to receive it. The accident could have therefore been prevented, and the life of the deceased saved.

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(1) 31 L.J.C.P. 137; 11 C.B.N.S. 553; 8 Jur. N.S. 868.

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STUART, C. J.—I listened with great attention to the able argument of Mr. Howard, the counsel for Mr. Lyell, in support of the reasons of appeal, but after carefully and anxiously considering all that he urged with reference to the facts, the evidence and the authorities which he cited, I see no ground for altering the opinion I originally formed on the question of Mr. Lyell's liability to the plaintiff, and the amount to be assessed as damages to her for the loss of her husband. I would, therefore, affirm the judgment of the Divisional Bench, and dismiss the appeal with additional costs.

PEARSON, J.—After hearing the case re-argued in appeal before the Full Court, I find no reason to alter the opinion expressed by me after hearing it argued in appeal before the Divisional Bench ; and will add only a few remarks which will proceed, as did my former judgment, on the hypothesis that the explosion of the detonating powder was spontaneous. On that hypothesis, I still consider it to be most material to determine whether the death of the plaintiff's husband was the result of the defendant appeliant's illegal omission to comply with the requirement of s. 15, Act XVIII of 1854. My opinion on that point is that the misfortune cannot be held to have been due to that illegal omission. Had the appellant informed the book-keeper or other servant of the railway company to whom the package containing the detonating powder was deli- [72] vered, that it contained detonating powder which was liable to explosion by friction or percussion, I cannot suppose that any other step would have been deemed necessary than to take care that the package should be secured from the risk of explosion by friction or percussion ; for detonating powder is shown by the evidence not to have been regarded as being of so dangerous a nature as to require other precautions than are needed to obviate that particular risk ; the risk of spontaneous explosion being one which has never heretofore been apprehended. No precautions that could have been used to avoid the risk of explosion by friction or percussion would have avoided the risk of spontaneous explosion. Under the circumstances, it seems to me now, as before, that, although the illegal omission of which the appellant was guilty may have been punishable under the Railway Act, the present suit for damages on the ground that Ganpat Rai's death was caused by that illegal omission cannot be sustained, the defendant not being justly liable on account of his illegal omission for what was not directly or presumably a consequence thereof. Putting out of sight the illegal omission on which the plaintiff's claim is based, there might have been a question whether the defendant could be justly held liable for what was certainly a consequence of his having prepared the detonating powder and having sent it to the railway premises for despatch by passenger train ; and, in deciding such a question, it would, in my opinion, be necessary to consider whether the result which occurred was a natural and probable consequence which should have been foreseen by him ; and upon the hypothesis, which I have adopted, that the explosion of the detonating powder was spontaneous, and upon the evidence which shows that such a spontaneous explosion is a thing altogether new to scientific experience, I should conclude that he ought to be exonerated from liability. Nor can I conceive that the illegal omission of which he was guilty can render him responsible for an event which was not a consequence of that omission, and which he could not reasonably have been expected to foresee and provide against. If A were to throw upon B some dirty water, of

which the natural and probable effect would be to soil and spoil his clothes, and the dirty water by an unexpected and extraordinary action were to ignite the clothes and cause him to be burnt to death, I should be loth to maintain that A was responsible [73] for the effect which, contrary to all expectation and previous experience, had been actually produced, notwithstanding that his conduct in doing what was likely to cause injury to B's cloths was wrong and unjustifiable.

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It was not contended in the pleading before the Full Court that the explosion was proved to have been caused by friction, or that it could not have been spontaneous. What was contended was that whether it was caused by friction or was spontaneous, was a matter of no importance, the appellant being equally liable for what happened in either case, by reason of his illegal omission. This contention, for the reasons above-mentioned, I am unable to admit.

TURNER, SPANKIE and OLDFIELD, JJ., concurred in the following judgment:—

There is, it must be admitted, no direct evidence to show the immediate cause of the explosion. Two out of three gentlemen examined as experts deposed that the powder could not have exploded spontaneously; the third, while admitting that in his experience he had never known the compound explode without friction or percussion, deposed that, assuming it proved that prior to the explosion the box had not suffered violence of any sort, he should attribute the explosion to "chemical action having arisen between the ingredients constituting the detonating powder." This answer is not elucidated by any further explanation. The coolie who had brought the box to the station deposed that it had not fallen or received a shock from the time he received it up to the time he placed it inside the counter, and that "no one kicked at the box, for nobody went that way," by which we understand him to mean that no one entered the passage in or near which he had placed the box. This answer does not exclude the possibility that the clerk while writing the receipt may have struck the box with his foot. The coolie was standing outside the counter at a distance of a yard from it. It does not appear that from the place in which he stood he could see the box. Another witness, Ganpat Rai, who spoke to the deceased just before the explosion, stated the counter was so constructed that a person outside could not see what was placed inside it. If the coolie could have seen the box from the place at which he stood, it is not likely that he would have kept his eyes [74] on it, and if a blow was given to the box the explosion which would have immediately followed it would have rendered the sound of the blow inaudible. Even then if the compound be capable of spontaneous explosion, the evidence would fail to satisfy us that in the present instance it had so occurred.

We regard this point, however, as immaterial. That the appellant had reason to believe the compound was explosive is shown by the conversation which took place between him and Mr. Pollard, and it was incumbent on him, both on the general principles of law, and by the special provisions of the Railway Companies Act, XVIII of 1854, to give notice of its contents to the company's servants. Had such notice been given, looking to the evidence of the station-master, it is possible the box would never have been received for despatch, and it is in the highest degree improbable that, had the deceased received notice of the dangerous nature of its contents, he would have permitted it to be placed in immediate contiguity to him. The case appears to fall within the principle of

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Farrant v. *Barnes* (1) cited in the Court of first instance. *Lynch* v. *Nurdin* (2) establishes the principle that a person may be liable for the consequences of an accident resulting from his own negligence in combination with other causes which he did not contemplate. In that case the defendant left his cart and horse unattended in the street; the plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt; it was held the defendant was liable to make compensation for the injury sustained by the plaintiff.

Furthermore, assuming that the explosion was spontaneous, it could not have occurred had the appellant followed the practice he had hitherto pursued of sending the ingredients of the powder in separate bottles. With a knowledge of the highly explosive character of the preparation, he omitted a precaution which his own practice proves he considered reasonable to preclude the risk of accident.

The sum awarded to the respondent appears to us by no means incommensurate with the pecuniary injury sustained by her. We would, therefore, affirm the decree and dismiss the appeal with costs.

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1 A. 75.

[75] APPELLATE CIVIL.

(*Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Spankie*).

BALDEO SAHAI (*Plaintiff*) *v.* BATESHAR SINGH AND OTHERS (*Defendants*).* [20th August, 1875.]

Act VIII of 1859, *s.* 2—*Res judicata.*

When a plaintiff claims an estate, and the defendant, being in possession and knowing that he has two grounds of defence, raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff. (*Woomatara Debia* v. *Unnopoorna Dassee* (3)).

Where, therefore, the defendants purchased an estate in the plaintiff's possession and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that he was the auction-purchaser of it, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property, a claim which he might have asserted in reply to the former suit; *held*, that he was debarred from suing to enforce such claim.

[Overruled, 26 A. 61=A.W.N. (1903) 105; F., 1 A. 316; 3 A. 189; 20 A. 516; R., 11 B. 708.]

THE defendants purchased on the 18th September 1873, a share in mauza Tajpur which was in the possession of the plaintiff. The plaintiff denied the title of their vendor, alleging that he was in possession of the property in virtue of its purchase at an auction sale. The defendants accordingly brought a suit against him to recover possession, by the establishment of the title of their vendor. The plaintiff pleaded his title as auction-purchaser. The defendants obtained a decree for the possession of the property, and applied for its execution, upon which the

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* Special Appeal No. 18 of 1875, from a decree of the Subordinate Judge of Ghazipur, dated 30th September 1874, reversing a decree of the Munsif of Ballia, dated the 15th August 1874.

(1) 31 L.J.C.P. 137=11 C.B N.S. 553=8 Jur. N.S. 865.

(2) 4 P. &. D. 672=1 Q.B. 29=5 Jur. 797.

(3) 11 B.L.R.P.C. 158.

plaintiff instituted the present suit, claiming a right of pre-emption in respect of the property, basing the claim on a condition in the village administration-paper to the effect that it was competent to each proprietor to sell his own share, but so long as an *haq shafawala* (pre-emptor) was willing to buy it, it must not be sold to a stranger. The defendants pleaded that the plaintiff was not in a position to advance a right of pre-emption, because he had neglected to do so in the former suit, and merely impugned the title of their vendor.

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[76] The first Court held that the plaintiff was entitled to maintain the suit, notwithstanding his omission to set up his pre-emptive title in the previous suit; and decreed the claim. The lower appellate Court dismissed the suit on independent grounds, which it is immaterial for the purposes of this report to state.

On special appeal by the plaintiff to the High Court the defendants again contended that the plaintiff was estopped from suing to enforce the right of pre-emption claimed, by his omission to plead the right as an answer to the former suit.

Munshi *Hanuman Parshad*, Munshi *Sukh Ram* and Lala *Lalta Parshad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Parshad*) and Pandit *Bishambar Nath*, for the respondents.

JUDGMENT.

The judgment of the Court was as follows :—

In 1873 the respondents purchased the share of which the appellant claims pre-emption. The appellant denied the title of the vendor, but the respondents instituted a suit against the appellant, and having succeeded in establishing their vendor's title, they obtained a decree for possession. The appellant then instituted the present suit to have the sale to the respondents set aside, and a sale concluded in his favour as pre-emptor. It is contended that the respondents having succeeded in obtaining a decree for possession in a suit to which the appellant was a party, he is now debarred from suing to enforce a claim which he might have asserted in reply to the claim formerly made by the respondents, and decreed in their favour. We admit the validity of the plea. It would have been a good answer to the claim then advanced that the sale on which it was founded was invalid, in that the defendant was entitled to a prior right of purchase and ready to exercise it. In *Srimut Rajah Mootoo Vijaya* v. *Katama Natchiar* (1), it was declared by the Privy Council that, "when a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible to him, according to his knowledge, then to bring forward," and that, if he fails to do so, he is estopped from [77] asserting any of them thereafter. This dictum was cited and re-affirmed in *Woomatara Debia* v. *Unnopoorna Dassee* (2), decided by the Privy Council on May 13th 1873. We must, then, allow the plea urged by the respondents and dismiss this appeal with costs (3).

(1) 11 M.I.A. 73.
(2) 11 B.L.R. P.C. 169.
(3) See *Maktum Valad Mohidin* v. *Imam Valad Mohidin*, 10 B.H.C.R. 293 and *Janaki Ammal* v. *Kamalathammal*, 7 M.H.C.R. 263.

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APPELLATE CIVIL.

1 A. 77= 11 Mad. Jur. 222.

1 A. 77=11 Mad. Jur. 222.

APPELLATE CIVIL.

Mr. Justice Turner, Officiating Chief Justice and Mr. Justice Oldfield.

BALDEO DAS (*Plaintiff*) *v.* SHAM LAL (*Defendant*).*
[26th August, 1875.]

Hindu Law—Undivided Hindu family—Ancestral immoveable property—Rights of father and son.

The snos, in an undivided Hindu family although they have a proprietary right in the paternal and ancestral estate, have not independent dominion.

Where, therefore, the plaintiff sued to eject the defendant, his son, from a portion of a house, partly self-acquired by the plaintiff and partly ancestral property in which the defendant was living against the plaintiff's will, the Court decreed the claim.

[R., 4 C. 723; 33 C. 1119=3 C.L.J. 616=10 C.W.N. 765; A.W.N. (1892) 35; 23 P.R. 1902=135 P.L.R. 1902.]

THE plaintiff and the defendant, Hindus, were father and son. The plaintiff sued to eject his son from a portion of a house of which he had taken possession on its being vacated by a tenant. The defendant replied that the plaintiff had no right to eject him, the house being ancestral property, in which father and son had equal rights.

The first Court found that a portion of the house was ancestral property, and a portion acquired by purchase by the plaintiff from his brother, and decreed the claim, holding that, under Hindu law, a son could not enforce a right to possession of any property, whether ancestral or self-acquired, in his father's lifetime. The lower appellate Court dismissed the suit on the ground that, under Hindu law, sons have equal rights with their fathers in immoveable ancestral property.

[78] The plaintiff appealed to the High Court. The pleas set out in the memorandum of appeal were that, under Hindu law, a son was not entitled to take possession of any portion of ancestral property without the father's consent; and that, as a moiety of the property in dispute was the plaintiff's self-acquired property, he was entitled to eject the defendant.

Munshi *Hanuman Parshad*, Babu *Oprokash Chandar*, and Mir *Zahur Hosain*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Bishambher Nath*, for the respondent.

JUDGMENT.

OLDFIELD, J. (who, after stating the facts as above, continued) :—

The decree of the Court of first instance should, in my opinion, be restored.

A son, no doubt, takes by birth a vested interest in immoveable ancestral property, and there is authority for considering that his interest in the father's lifetime, and before partition, is a present interest of a proprietary and coparcenary nature—(Mitakshara, ch. i, s. 1 and s. 5); and the power to enforce partition of the ancestral estate implies such an interest, looking to the definition of partition given in Mitakshara, ch. i, s. 1, para. 4, and ch. i, s. 1, para. 23. But even assuming such ownership on the part of the son, yet until partition takes place, or until the death of the father, natural or civil, the father, by reason of his paternal relation, and

* Special Appeal No. 185 of 1875, from a decree of the Subordinate Judge of Moradabad, dated the 8th December 1874, reversing a decree of the Munsif, dated the 14th May 1874.

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his position as head of the family, and its manager, is entitled to make lawful disposition of the property in the interest of the family. This is shown by ch. i, s. 5, paras. 9 and 10, Mitakshara, which, by marking the extent of the son's power of interference in the father's disposition of the property, shows that the power of disposition within certain limits is centred in the father. The son's enjoyment of the property is subject to the dispositions lawfully made by the father, and, if dissatisfied, the son's remedy will lie in any right he may possess to enforce partition of the estate.

In this case there has been no illegal disposition of the property on the part of the father. It appears that the defendant objects to live with his mother-in-law, and insists on occupying part of a house [79] which used to be rented, and which his father desires to dispose of in the way he considers most advisable.

I would decree the appeal and decree the claim, but, looking to the relationship subsisting between the parties, they should bear their own costs in all Courts.

TURNER, OFFG. C.J.—I concur in decreeing the appeal. Sons who are members of an undivided Hindu family acquire by birth an interest in the paternal as well as the ancestral estate, and are entitled in certain events to interfere to prevent waste or to enforce partition in the lifetime and without the consent of their father; but, while their interest is proprietary, it lacks the incident of dominion. "They have not independent dominion, although they have a proprietary right."—Colebrooke's Digest of Hindu Law, Bk. v, ch. vii, 433, vol. ii, p. 552, 3rd ed.

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1 A. 79.

APPELLATE CIVIL.

Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

SHUGAN CHAND (*Defendant*) v. THE GOVERNMENT, NORTH-WESTERN PROVINCES (*Plaintiff*).* [26th August, 1875.]

Contract—Act IX of 1872, *s.* 72—*Liability of person to whom money is paid by mistake.*

A treasury officer, under the imposition of a gross fraud, paid money to the defendant, who was the innocent agent of the person who contrived the fraud. In paying the money the treasury officer neglected no reasonable precaution, nor was he in any way guilty of carelessness.

Held that the defendant was bound to repay the money received by him, and that he could not defend himself by the plea that he had paid it to his principal: nor could the Court allow that the circumstance that the principal was himself a servant of the plaintiff, and in the course of his employment obtained facilities for committing the fraud, relieved the defendant from his liability.

THIS was a suit brought on behalf of the Government, North-Western Provinces, to recover Rs. 5,293-15-4, being an amount which the plaintiff by mistake paid to the defendant on his presenting to the officer in charge of the Civil Treasury in Dehra Dun, by [80] the hand of his agent Manohar Misr, a forged certificate of requisition for an advance to the 1st Division, Bhawalpur Revenue Survey, which certificate was duly authenticated by the signature of the defendant.

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* Regular Appeal No. 95 of 1874, from a decree of the Subordinate Judge of Dehra Dun, dated the 22nd June 1874.

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It appeared that when the officers of the survey were absent from the station at which the Treasury was located, they occasionally sent requisitions for the pay of establishment through bankers and their agents in order to obtain cash from the Treasury. One Kana Ram, a clerk in the office, being aware of the practice, on the 1st of October, 1872, called at the shop of the defendant, a banker residing at Landaur, and tendering a requisition and a letter to the defendant's gomashta, requested him to obtain the amount mentioned in the requisition from the Dehra Dun Treasury. The gomashta consented to do so, on payment of a small commission, to cover the cost of despatching a messenger and conveying back the money. The requisition was a most perfectly executed forgery. The letter was also a forgery and equally well executed. It purported to be addressed by Mr. Johnson, an officer of the survey, to the Treasury Officer, and requested him to pay the amount entered in the requisition to the bearer. These documents the defendant sent by a servant to the Treasury Officer and duly received the money, which he credited in his books to Kana Ram, and subsequently paid over the whole amount to him, in five separate payments. The forgery having been discovered, the Government, North-Western Provinces, sued to recover from the defendant the amount paid to him by the Treasury Officer.

The first Court found that the money was paid under a twofold mistake of fact; the mistake of supposing that the requisition was a genuine document, and the mistake of supposing that the defendant's servant was the bearer of a letter from Mr. Johnson, and that the money would be paid by the defendant to Mr. Johnson. It considered that, the under terms of the Indian Contract Act (Act IX of 1872), it was unnecessary to inquire whether the Treasury Officer had been guilty of laches in making the payment, and found that, if the point was material, there was no proof of laches, and, lastly, it held that the plea that the defendant had paid away the money was inapplicable. It, therefore, decreed the claim.

[81] On appeal the defendant urged that s. 72, Act IX of 1872, was not applicable to the circumstances of the case; that the finding of the first Court that the Treasury Officer supposed that the defendant's servant was the bearer of the letter from Mr. Johnson was unsupported by any evidence ; that the Treasury Officer and his subordinates did not exercise due care in the payment of the money to the defendant's servant, and it was inequitable to make the defendant liable for their carelessness ; that the defendant, having paid over the money, in the ordinary course of business, to the person for whom it was realized from the Treasury, was not liable in equity for its repayment to the plaintiffs ; and that, as the defendant paid the money to Kana Ram, a public servant, in good faith, it was not equitable to hold him responsible for the misappropriation of a public servant.

Mr. *Conlan*, Pandit *Bishambhar Nath*, and Munshi *Hanuman Parshad*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Parshad*), for the respondent.

JUDGMENT.

The judgment of the Court (after setting out the facts as stated) was as follows :—

It appears to us that the pleas taken in appeal fail. The money was paid under a mistake, and, therefore, the provisions of the 72nd section apply. The Treasury Officer would certainly not have paid the money

unless he had believed the requisition was duly signed and countersigned, and the signatures which he believed to be genuine are admitted to be false. He, therefore, paid the money under a mistake of fact. It is immaterial whether he believed the bearer of the requisition to be the messenger sent by Mr. Johnson or by the appellant; and, indeed, the circumstance that the messenger was the servant of a respectable native banker would have been calculated to disarm rather than excite suspicion. Looking to the course of business, we cannot find any ground for the contention that the Treasury Officer neglected any precaution he could reasonably have been expected to take, nor that he was in any way guilty of carelessness. The Officer was imposed on by a gross fraud, and paid the money to the appellant, who was the innocent agent of the [82] person who contrived the fraud. The appellant is, under the circumstances, bound to repay the moneys received by him, and he cannot defend himself by the plea that he has paid the money to his principal—*Togman* v. *Hopkins* (1); nor can we allow that the circumstance that the principal was himself a servant of the respondent, and in the course of his employment obtained facilities for committing the fraud, relieves the appellant from his liability. If the form of the requisition was purloined it was taken without the consent of the respondent, and it is not shown that the Officers of the department in any way facilitated the theft by the omission of any reasonable precautions. The appeal fails, and is dismissed with costs.

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APPELLATE CIVIL.

(*Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield*).

UDA BEGAM (*Plaintiff*) v. IMAM-UD-DIN AND OTHERS (*Defendants*).*
[26th August, 1875.]

Equitable—Estoppel—Laches—Acquiescence—Limitation.

The plea of acquiescence is applicable to suits for which a fixed term of limitation is prescribed by law, but mere delay in enforcing a right does not constitute acquiescence. (*Rama Rau* v. *Raja Rau* (2), impugned: *Peddamuthulaty* v. *N. Timma Reddy* (3) approved with certain qualifications).

The defendants took possession of, and erected buildings on, land which they knew belonged to the plaintiff and they had no claim to, without applying to the plaintiff for consent. The plaintiff abstained from suing to eject them for one or two years, knowing that the defendants were building on the land.

Held, under the circumstances, that the delay in the institution of the suit was not sufficient to deprive the plaintiff of her right to relief.

[F., 9 A. 661 (663); Appl., 18 Ind. Cas. 799 (801)=63 P.R. 1913=113 P.L.R. 1913=112 P.W.R. 1913; R., 9 A. 434 (438); 14 A. 362 (364); 27 B. 515 (532); 33 C. 1119=3 C.L.J. 616=10 C.W.N. 765; 6 A.L.J. 57; A.W.N. (1886) 123; A.W.N. (1908) 282; 4 C.L.J. 198 (206); D., 16 A. 328 (332).]

THE plaintiff in the suit was the zemindar of Sarai Babar Khan, a mohalla of the town of Budaun. She resided in another mohalla of the same town about two miles distant from Sarai Babar Khan, [83] and

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* Special Appeal No. 1677 of 1874, from a decree of the Subordinate Judge of Shahajhanpur, dated the 23rd September 1874, affirming a decree of the Munsif of Budaun, dated the 28th July 1894.

(1) 4 M. & G. 389=5 Scott, N. R. 464.
(2) 2 M.H.C.R. 114.
(3) 2 M.H.C.R. 270.

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being a *pardanashin*, her affairs were managed by her son Gholam Haidar. The suit related to a plot of land No. 31 in Sarai Babar Khan. The plaintiff, alleging that this plot of land had formerly been granted to a tenant named Vasil for the erection of certain kacha buildings thereon; that Vasil had deserted the premises; that she had retaken possession; that the defendants had dispossessed her, and having entered on the plot had erected on it certain kacha and packa buildings without her consent; and that the action of the defendants had only become known to her in June 1874: claimed that the defendants should be ejected and the materials they had brought upon the land removed. The suit was instituted on the 18th June 1874. The defendants pleaded that the plot had been occupied by three sheds, one tenanted by Vasil, who was still in possession, and the other two by Usman and Jani; that they had no concern with so much of the plot as was occupied by Vasil, and did not question the plaintiff's right to it, but that they had succeeded by inheritance to the portions of the plot occupied by Usman and Jani, and had built thereon a house at a cost Rs. 1,000; and that inasmuch as the plaintiff had known of the erection of the house and had not interfered to prevent it, she must be taken to have acquiesced in it, and had thereby lost her right to the relief sought.

The Court of first instance found that the plot had been occupied by Vasil as tenant, and that there was no proof of any occupation by Usman and Jani; that Vasil had abandoned the plot and a right of entry had accrued to the plaintiff; that the defendants had entered and erected the house of which the removal was prayed one or two years before suit; and that the appellant must have known of the erection while in progress, because her son, who was her manager, resided with her at a place only distant about two miles from the spot. On these findings it held that the plaintiff had, by acquiescence, lost her right to the relief she claimed, and must fall back on an action for damages, and consequently dismissed the claim.

The lower appellate Court agreed with the Court of first instance as to the plaintiff's title, and the absence of proof of the title set up by the defendants, but it also found that the plaintiff had through her son the means of knowing of the erection while in progress. Hence it inferred her knowledge, and from her knowledge and **[84]** inaction it inferred that she had tacitly consented to it. It affirmed the decree of the first Court, relying on the rulings of the late Sudder Court in *Powell* v. *Guffor Khan* (1), and *Ramjewun* v. *Sah Koondun Lall* (2).

The plaintiff appealed to the High Court. The pleas set forth in the memorandum of appeal were that the decision of the lower appellate Court was bad in law, as the plaintiff, being admitted to be the rightful owner of the land, and having brought the suit within the time allowed by law, was entitled to a decree for the possession of the land and for the removal of the buildings erected thereon by the defendants; and that it was also bad in law in that the onus lay on the defendants to prove that they obtained express permission from the plaintiff to build upon the land.

The *Senior Government Pleader* (Lala *Juala Parshad*) and Munshi *Hanuman Parshad*, for the appellant.

Pandit *Bishambar Nath* and Mir *Zahur Husain*, for the respondents.

(1) S.D.A.R. N.W.P. 2nd July 1864. (2) S.D.A.R. N.W.P. 29th January 1864.

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JUDGMENT.

The judgment of the Court (after setting out the facts of the case as stated) was as follows :—

In special appeal it has not been objected that the circumstances from which the appellant's knowledge is inferred were insufficient to warrant that inference, and, therefore, we need not consider this point; the case has been argued on the hypothesis that the erection of the building commenced with the appellant's knowledge a year or two before the institution of this suit. The pleas recorded in the memorandum of special appeal are inaccurately drawn, but the contention of the appellant at the hearing was that her consent ought not to be inferred merely from her inaction, and that, inasmuch as she has brought her claim into Court within the term allowed by law for the institution of such claims, she is entitled to a decree. The rulings of the Sudder Court as to the effect of delay in the assertion of a right have been considerably modified or explained by more recent decisions of this Court, which have, however, we believe, escaped the observation of the reporter. We propose, therefore, in disposing of this case, to examine at somewhat greater length than [85] we should have otherwise thought it necessary to do, the principle on which the rule of estoppel *in pais* appears to rest, and the circumstances to which it should be applied. This rule has been stated generally in the following terms :—"If a man by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induced others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given credit to his words, or to the fair inference to be drawn from his conduct." And again :—"if a party has an interest to prevent an act being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license."—*Cairncross* v. *Lorimer* (1).

Mr. Justice Story points out the principle on which the rule rests, and it is most important that the principle should be borne in mind in applying the rule :—

"This doctrine of estoppels *in pais*, or equitable estoppels, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. As if both parties were equally conusant of the facts, and the declaration, or silence, of the one party produced no change in the conduct of the other, he acting solely on his own judgment. There must be deception, and change of conduct in consequence, to estop the party from showing the truth."—(Story's Equity Jurisprudence, vol. ii, s. 1543). Of course by fraud the author must be understood to mean whatever amounts in law to fraud.

In *Ramsden* v. *Dyson* (2) Lord Chancellor Cranworth and Lord Wensleydale declared that if a stranger builds on the land of another supposing it to be his own, and the owner does not interfere, but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profit. But [86] if a stranger

(1) 3 Macq. H. L. Cas. 829; 7 Jur. N. S. 149.
(2) L. R. I. H. L. 129; 21 Jur. N. S. 506; 14 W. R. 926.

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builds on the land of another knowingly, there is no principle of equity which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

These dicta of the highest authority illustrate the application of the general rule. There must be something more than a mere delay in instituting proceedings to deprive a man of his legal remedies. We are not, indeed, prepared to adopt without qualification an opinion thrown out by the High Court of Madras, "that the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil for which a period of limitation is provided by the Limitation Act."—*Rama Rau* v. *Raja Rau* (1).

The rule as expounded by the authorities we have quoted is obviously founded on a highly equitable principle, and we see no reason why on fitting occasions it should not be applied in this country. No doubt a distinction must be made between those cases in which a suitor seeks some relief which, if he proves his case, the Court is bound to grant him, and the cases in which he seeks relief which the Court has discretion to grant or refuse. When a suitor has a right to demand relief, no doubt a stronger case must be made out against him than such mere tardiness in seeking a remedy which might justify a Court in refusing relief when it has a discretion to grant or refuse it. With this qualification we assent to the dictum of the Madras High Court in a case decided subsequently to *Rama Rau* v. *Raja Rau* (1) to the effect that "on the whole, it may be taken as the law both of Courts of law and equity that mere laches, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of suit."—*Peddamuthulaty* v. *N. Timma Reddy* (2); but where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence, and the plea if sufficiently proved ought to be held a good answer to **[87]** an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation. In the case before us it has been found that the appellant, knowing that the respondent was building on her land, abstained from commencing proceedings for one or two years. The respondents have set up a title to the land which has been held to be manifestly false. They must have known they had no claim to it, and they could hardly have doubted it belonged to the zemindar. Had they thought it probable the zemindar would consent to their usurpation, they might have assured themselves on the point by applying to her before they expended a rupee on the land. Under the circumstances, we cannot hold that the delay in the institution of the suit is sufficient to deprive the appellant of her right to relief.

The appeal is decreed with costs, and so much of the decrees of the Courts below as dismissed the claim to the plot in question in this appeal are reversed, and the claim is decreed.

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(1) 2 M.H.C.R. 114 (116). (2) 2 M.H.C.R. 273.

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Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

CROSTHWAITE (*Plaintiff*) *v.* HAMILTON (*Defendant*). [31st August, 1875.]

Principal and surety—Clerk of the Small Cause Court—Bond for performance of duties of office—Liability of surety—Act XI of 1865, *ss.* 45, 51*—Small Cause Court Judge —Principal Sudder Amin* (*Subordinate Judge*)*—Jurisdiction.*

Held, that, in permanently investing, under s. 51, Act XI of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares, with the powers of a Principal Sudder Amin (Subordinate Judge), the local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name from time to time, with the powers of a Principal Sudder Amin, may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted. (*Musammat Bijee Kooer* v. *Rai Damodur Dass* (1) impugned).

The defendant and J.W.C., Clerk of the Small Cause Court at Allahabad, entered into a bond to the Judge of the Small Cause Court, as well as to his successors in office, in a certain sum as security for the true and faithful performance by J.W.C. of his duties as Clerk of the said Court, [88] and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. *Held*, in a suit against the defendant as surety, that he was liable for misappropriation by J.W.C of moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, and that, had the Small Cause Court Judge not been invested, at the time of the execution of the bond, with the powers of a Subordinate Judge, the defendant's liability in respect of such moneys would not have been thereby affected.

THIS suit was instituted in the Court of the Subordinate Judge of Allahabad, but was transferred to the High Court for trial by an order of Turner, O. C. J., on the application of the defendant. It was a suit on a security-bond executed on the 20th March 1871, by the defendant and one J. W. Church, then Clerk of the Small Cause Court at Allahabad; and it was brought to recover from the defendant a sum of Rs. 2,000, being a portion of certain moneys alleged to have been received by the said Church in his official capacity, and to have been fraudulently misappropriated by him.

The plaint, as originally drawn, purported to be filed on behalf of the Secretary of State in Council. The material portion of the bond was as follows:—"Know all men by these presents that we, John Montgomery Hamilton of Allahabad, land and house-holder, and John William Church, Clerk of the Court of Small Causes at Allahabad aforesaid, are hereby jointly held, and each of us severally firmly bound unto William Tyrrell, Esquire, of the Bengal Civil Service, and Judge of the Court of Small Causes aforesaid, as well as to his successors in office, during the continuance of these presents, in the sum of two thousand rupees lawful current money as security for the true and faithful performance by the said John William Church of his duties as Clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. Now, the conditions of this bond are that if, owing to misappropriation or misapplication, but not owing to fire, robbery with force, or any cause beyond the control of the said John William

(1) N.W.P.H.C.R. (1873), 55.

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Church, any deficiency shall arise in the moneys so to the John William Church entrusted, then we the said John Montgomery Hamilton and John William Church, and each of us separately, our respective heirs, executors, administrators, and assigns, are bound to make good the same to the extent [89] of the misappropriation or misapplication, provided the same does not exceed the amount herein stipulated, in which case no claim shall lie as under this instrument further than for the sum of two thousand rupees against each of us separately."

On an objection taken by the defendant, it was held by the Court that the suit was not maintainable in the name of the Secretary of State, as he was not a party to the bond; and the plaint was thereupon amended, the name of Mr. Crosthwaite, the then Judge of the Court of Small Causes at Allahabad, being substituted as plaintiff. In his answer to the case on the merits the defendant admitted the execution of the bond and the misappropriation by Church, but contended that he was not liable for any money received by Church, except in his capacity as Clerk of the Small Cause Court; that after the execution of the bond (and not previously) the Judge of the Small Cause Court at Allahabad was invested with the powers of a Subordinate Judge, and that it was in the discharge of duties imposed upon him by the Judge acting in this new capacity that Church had received and misappropriated the moneys referred to, and that the plaintiff " misconceived the extent of his liability in suing him for sums received by Church acting as bailiff to the Subordinate Judge."

The issues to be tried were settled at the first hearing. The first of those issues referred to the institution of the suit by the Secretary of State in Council, and was disposed of in the manner above stated. The 2nd, 3rd, and 4th issues, the only others material for the purposes of this report, were as follows :—

(2) At the time the bond in suit was executed by the defendant, was the Judge of the Small Cause Court invested with the powers of a Subordinate Judge?

(3) Was it a part of the duties of J. W. Church, as Clerk of the Small Cause Court, to receive moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Court of Small Causes in the exercise of his powers of Subordinate Judge?

(4) If at the date the bond was executed the Small Cause Court Judge was not invested with the powers of a Subordinate Judge, does this circumstance affect the [90] liability of the defendant in respect of sums received by the said J. W. Church as the proceeds of sale made in execution of decrees passed by the Judge in the exercise of his powers as a Subordinate Judge?

Certain evidence was adduced by the plaintiff, but the facts of the case, in so far as they are material for the purposes of this report, may be taken to have been undisputed. They were as follows :—On the 6th June 1866, the Government of the North-Western Provinces issued the following notification :—" Under s. 51 of Act XI of 1865, His Honour the Lieutenant-Governor has been pleased to permanently invest the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares with the powers of a Principal Sudder Amin, to be exercised within the limits of their respective jurisdictions, subject to the orders of the Court of Sudder Dewany Adawlut, North-Western Provinces, in respect to the reception of original regular suits and regular appeals."

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In the year 1869 Mr. J. W. Church was appointed Clerk of the Court by Mr. E. T. Atkinson, who was then officiating as Judge of the Small Cause Court, with the powers of a Principal Sudder Amin, or Subordinate Judge, under s. 51, Act XI of 1865. On his original appointment he had executed a mortgage of a bungalow belonging to him as security for the faithful discharge of his duties. The bungalow having been removed by the order of the Collector, he and the defendant executed to Mr. Tyrrell, who had meantime succeeded Mr. Atkinson, the bond forming the basis of the suit. It did not appear that Mr. Tyrrell had been invested with the powers of a Principal Sudder Amin, or Subordinate Judge, otherwise than under the notification above set out; but Mr. Rawlins who was officiating as Judge of the Small Cause Court at the time of the misappropriation had been so invested by a special notification.

There had not been at any time any separate office or establishment for the purposes of cases tried by the Judge of the Small Cause Court as Subordinate Judge. The only office held by Mr. J. W. Church was that of the Clerk of the Small Cause Court, and as the Clerk of that Court, from the date of his appointment to that on which he absconded, he continued to perform the duties of the Clerk of the Court in respect of all cases, whether they were [91] tried by the Judge on the Small Cause Court, or on the Subordinate Judge side. No attempt had ever been made to distinguish his liability in respect of one class of cases from his liability in respect of the other. The deposits had in each been entered by him in the cash-book and deposit-register, that of the Small Cause Court, and had been remitted to the treasury to be there credited indiscriminately to Small Cause Court deposits. On the 2nd May 1865, the Sudder Court sanctioned the employment of the Clerk of the Small Cause Court in effecting sales of moveable property within the local jurisdiction of the Court. Under this sanction the Clerk continued to hold such sales in execution of decrees, whether they had been given on the Small Cause Court, or on the Subordinate Judge side of the Court, until a new bailiff was appointed in 1869, when Mr. Atkinson, the then Judge of the Court, in consideration of the smallness of his pay, allowed the bailiff to sell moveable property in execution on the Small Cause Court side and to enjoy the fees. The Clerk of the Court continued to sell all property and enjoy the sale-fees on the Subordinate Judge only, until, on a representation made by Mr. J. W. Church, Mr. Tyrrell recorded on the 6th April 1871, seventeen days after the execution of the bond in suit, that "the fees in *all* sales properly go to the Clerk of the Court, and unless Mr. Church chooses of his own accord to part with any portion, they must be his." This rule continued in operation until the following August, when Mr. Atkinson, who was then again officiating, drew up new rules which laid down that "in all Small Cause Court attachments the bailiff will attach and sell, and retain the fees as before, and in all Subordinate Judge cases the bailiff will attach, but the Clerk will sell and retain the fees."

The money misappropriated by Church was part of the proceeds of a sale in execution of decrees on the Sudordinate Judge side of the Court conducted under these new rules.

Mr. *Conlan*, (with him Mr. *Leach*), for the defendant.—The language of the bond must have the ordinary meaning given to it. The contract was made with Mr. Tyrrell as Judge of the Small Cause Court. Supposing Mr. Tyrrell to have been invested with the powers of a Magistrate—s. 51, Act XI of 1865—when the bond was executed, and the Clerk of the Small Cause Court [92] embezzled moneys realized by fines. Could such moneys have

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been recovored under the bond? If I give an undertaking for the Clerk of the Small Cause Court for the performance of his duties as such, I do not see why I should be liable for his defalcations on the Magistrate's or Subordinate Judge's side of that Court. What other language could have been used than that in the bond to limit the liability of the surety? The liability might have been extended by the use of the words "and Subordinate Judge." The language, being limited, should not be extended so as to include every office with which the Clerk of the Small Cause Court might be invested. The amount of the security demanded shows that the bond referred to an office in which the responsibility was small. If it had been intended to secure loss on both sides of the Court, a larger security would have been demanded. (OLDFIELD, J.—Was the Clerk in charge of the moneys belonging to the Subordinate Judge side of the Court when the bond was executed?) There is no evidence. (TURNER, Offg. C.J.—There is only one office. Mr. Tyrrell was not a Subordinate Judge, but the Judge of the Small Cause Court, with the powers of a Subordinate Judge). He was not legally invested under the Government Notification, dated the 6th June 1866, with the powers of a Subordinate Judge. In each case there must be an investment —*Musammat Bijee Kooer* v. *Rai Damodar Dass* (1). Assuming that Mr. Tyrrell was Judge of the Small Cause Court only when the bond was executed, and was invested with the powers of a Subordinate Judge subsequently to such execution, the defendant could have come forward and said that he was not to be considered responsible for Mr. Church as Clerk of the Subordinate Judge. There is nothing to show that Mr. Church was exercising the duties of the Clerk of the Subordinate Judge when the bond was executed. If his duties were subsequently enlarged by Mr. Rawlins, the defendant is not liable for the faithful performance of such duties. The learned counsel referred to *North-Western Railway Company* v. *Whinray* (2); *Pybus* v. *Gibb* (3); *Franks* v. *Edwards* (4); *Anderson* v. *Thornton* (5)).

[93] The Government Advocate (Mr. *Warner*) for the plaintiff, in reply.—It is the duty of the Clerk of the Small Cause Court to receive all moneys payable into the Court—s. 45, Act XI of 1865. Although a Judge of a Small Cause Court may be invested with the powers of a Subordinate Judge, there is only one tribunal, *viz.*, the Small Cause Court. The learned counsel cited *The Guardians of the Portsea Island Union* v. *Whillier* (6).

JUDGMENT.

The judgment of the Court in so far as it related to the issues above set out was as follows:—

The first issue had reference to the institution of the suit on behalf of the Secretary of State for India in Council. That personage, it was argued, was not a party to the bond or interested therein. The Government Advocate admitted the force of the argument, and was allowed to amend the plaint by substituting the present Judge of the Small Cause Court, Mr. Crosthwaite, as plaintiff. By this amendment of the plaint, the objection taken to the competency of the plaintiff to maintain the suit has been removed.

(1) N.W.P. H.C.R. (1873), p. 55.
(2) 23 L.J. Exch. 261; 10 Exch. 77; C.L.R. 1207.
(3) 6 El. and Bl. 290; 3 Jur. N.S. 315; 26 L.J.Q B. 41.
(4) 8 Exch. 214; 22 L.J. Exch. 42.
(5) 2 G. & D. 502; 3 Q.B. 271; 6 Jur. 1199.
(6) 29 L.J.Q.B., 150; 2 El. and El. 755: 6 Jur., N.S. 887; 8 W. R., 498; 2 L. T.N.S. 211.

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The Government Notification of the 6th June 1866, *prima facie* determines the second issue in the affirmative. It is argued that the *permanent* investiture of the Judges of the Small Cause Courts of Agra, Benares, and Allahabad, *ex officio*, with the powers of a Principal Sudder Amin by a single order was not within the scope or in accordance with the spirit and intention of s. 51, Act XI of 1865, which provides that "*whenever* the state of business in any Court of Small Causes, the Judge of which shall be the Judge of such Court only, is not sufficient to occupy his time fully, the Local Government may invest him within such limits as it shall from time to time appoint, in addition to his powers as such Judge, with the powers of a Principal Sudder Amin." But we cannot hold that, because the order is open to some criticism on the ground urged, the Judges thereby invested with the powers of a Principal Sudder Amin had no legal jurisdiction to exercise the powers so conferred upon them, and that all acts done by them in that capacity are null for want of such jurisdiction. Without [94] meaning any disrespect to the learned Judges who passed the decision dated the 27th February 1873, in the regular appeal case No. 135 of 1872, *Musammat Bijee Kooer*, appellant v. *Rai Damodar Dass*, respondent (1), to which our attention has been drawn, we are unable to concur in the conclusion at which they arrived on this point. The Government, it may be presumed, had reason to believe that the Judges of the three Small Cause Courts mentioned in the order had generally leisure to dispose of more business than was supplied by the small causes instituted in their Courts; and on the strength of this belief, in the exercise of the discretion which the law has given to it, passed the order of the 6th June 1866. If this belief was well founded, or if it was entertained *bona fide*, we should not be justified in declaring the Government to have exceeded its power, or to have contravened the law although the occasional investiture of Small Cause Court Judges by name from time to time with the powers of a Principal Sudder Amin may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted. We are, therefore, of opinion that, by the Government order of the 6th June 1866, the powers of a Principal Sudder Amin were legally conferred on Mr. Tyrrell, who was officiating as Small Cause Court Judge on the 20th March, 1871, the date of the execution of the bond in suit.

We proceed to the third issue. The evidence of Mr. Tyrrell proves that, as a matter of fact, "if it was a part of Mr. Church's duties, as Clerk of the Small Cause Court, to receive moneys realized under decrees or processes issued by the Judge in the exercise of his powers as Subordinate Judge." It could not well be otherwise; for "there was no separate establishment to carry out the orders of the Judge exercising those powers." Under this head we may notice the fallacy of the second plea set out in the defendant's written statement, to the effect that, "by the terms of the bond on which the suit is based, he is not liable for any money received by the Clerk of the Court of Small Causes, J. W. Church, except in his capacity as such Clerk and within the scope of such office; and the plaintiff has misconceived the extent of defendant's liability in suing him for sums received by the said Clerk acting as nazir, or bailiff, of [95] the Subordinate Judge." That fallacy consists in supposing that the grant of the powers of a Principal Sudder Amin, or Subordinate Judge, to the Judge of the Small Cause Court, constituted him a Subordinate

(1) N.W.P. H.C.R. (1873), p. 55.

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Judge, and created a Court distinct from that of the Small Cause Court. This supposition is altogether erroneous. The Judge of the Small Cause Court when exercising the powers of a Subordinate Judge is still the Judge of the Small Cause Court; decrees passed by him in the exercise of those powers are decrees of the Small Cause Court; moneys paid into Court under such decrees are paid into the Small Cause Court, and under s. 45, Act XI of 1865, it is the duty of th Clerk of the Court to take charge and keep an account of them. If it was Mr. Church's duty, as Clerk of the Small Cause Court, to receive moneys paid or realized under decrees by the Judge of that Court in the exercise of the powers of a Subordinate Judge, it follows that the defendant, as Mr. Church's security, is liable for the misappropriation by his client of any of those moneys. A Munsiff is sometimes invested with the powers of Small Cause Court within certain territorial and pecuniary limits. The decrees passed by him in the exercise of such powers are decrees of the Munsiff's Court not less than decrees passed by him in the exercise of his ordinary jurisdiction. It is equally the duty of the Nazir of his Court to receive moneys paid or realized under all decrees whether passed by the Munsiff in the exercise of the one or the other jurisdiction; and the surety of the Nazir is just as much responsible for his client's misappropriation of moneys paid or realized under decrees passed in the exercise of the Small Cause Court jurisdiction as of moneys paid or realized in the exercise of the ordinary jurisdiction. This was not disputed by the defendant's advocate, but he contended that the case of a Munsiff invested with Small Cause Court powers was essentially different from the case of a Small Cause Court Judge invested with the powers of a Subordinate Judge. The only difference is that the grant of the powers of a Subordinate Judge to a Small Cause Court Judge gives him a larger jurisdiction than he possessed as Small Cause Court Judge; whereas the investiture of a Munsiff with Small Cause Court powers only gives him a peculiar kind of jurisdiction in some classes of causes which he had before jurisdiction to try. The difference does not in the least degree [96] affect what is the matter in question, *viz.*, the extent of the duty of the Clerk of the Court, and of the Nazir, and of the liability of their sureties.

The third issue is, therefore, decided in the plaintiff's favour.

Our decision on the second issue relieves us from the obligation of deciding the fourth; but we have no hesitation in expressing our opinion that, had the Small Cause Court Judge, at the date of the execution of the bond in suit, not been invested with the powers of a Subordinate Judge, the Clerk of his Court would, nevertheless, have been bound to receive, take charge and keep account of any moneys paid or realized under decrees passed by any of his successors in office invested with such powers, and that the Clerk's surety would have been liable for his client's misappropriation of any of those moneys. This, indeed, follows from what we have already said in disposing of the third issue. The Clerk's duty is to take charge of all moneys paid into the Small Cause Court and this duty remains the same whether the Judge of the Small Cause Court only exercises his ordinary jurisdiction, or be invested with additional powers. The grant and exercise of such powers is an accident attached by the law to the office of a Small Cause Court Judge; and the Clerk of his Court is as much bound to perform the accidental as the ordinary duties of his appointment, and the surety's pecuniary liability is co-ordinate with that of the Clerk. The defendant would not, therefore, have been able to repudiate his liability in respect of moneys paid to, or realized by,

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the Clerk in respect of decrees passed by the recent Judges of the Small Cause Court at Allahabad in the exercise of the powers vested in them of a Subordinate Judge, even had it appeared that, at the time when he executed the bond, Mr. Tyrrell had not been invested, or not legally invested, with those powers. The circumstance that, at that time, and for some years before, the Judge of the Small Cause Court has exercised those powers, and the Clerk of his Court had, as a part of his duty, received all moneys paid or realized under decrees passed in the exercise thereof, precludes the defendant from pleading with plausibility, and us from believing, that he executed the bond in ignorance of the Clerk's duty and liability, and under the impression that he was only undertaking a risk in respect of moneys paid or realized under decrees [97] passed by the Small Cause Court Judge in the exercise of his ordinary jurisdiction. The description of Mr. Church in the bond as the Clerk of the Small Cause Court and of Mr. Tyrrell as the Judge of that Court is strictly accurate, and not at all incomplete by reason of the absence of any mention of the powers of a Subordinate Judge vested in the Judge of the Small Cause Court. The plea that, in reference to that description, the defendant's liability was limited to moneys paid to, or realized by Mr. Church under decrees passed by the Judge in the exercise of his ordinary jurisdiction is not sustainable.

Decree for plaintiff with costs.

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1 A. 97 (F.B.) 11=Mad. Jur. 258.

BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.*)

JIWAN SINGH (*Judgment-debtor*) *v.* SARNAM SINGH (*Decree-holder*).*
[5th August, 1875.]

Execution of decree—Limitation—Act IX of 1871, *s.* 15.

Held (STUART, C.J. dissenting), that applications for execution of decrees are not "suits" within the meaning of s. 15, Act IX of 1871 (1).

[F., 2 M. 1.]

ON appeal by the judgment-debtor against the order of the first Court disallowing his objection that the execution of the decree was barred by limitation, the question arose whether, in computing the period of limitation, the time during which the decree-holder was endeavouring to obtain execution in a Court without jurisdiction should be excluded or not, under s. 15, Act IX of 1871. The lower appellate Court held that the provisions of the section applied to applications for the execution of decrees, relying on a ruling of the High Court, dated the 1st May 1884, in which Stuart, C. J., and Oldfield, J., ruled that the provisions of s. 14, Act XIV of 1859, were so applicable, expressing their [98] concurrence in what the

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* Miscellaneous Special Appeal No. 79 of 1874, from an order of the Judge of Ghazipur, dated the 3rd July 1874, affirming an order of the Subordinate Judge, dated the 17th January, 1874.

(1) So held by Jackson, (McDonell, J., dissenting), in *Banee Kant Ghose* v. *Haran Kisto Ghose*, 24 W.R. 405—*Contra* by Birch and McDonell, JJ., in *Rajah Promotho Nath Roy* v. *Watson & Co.*, 24 W.R. 333.

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learned Judges considered a ruling to that effect in *Huroo Chunder Roy Chowdhry* v. *Shoorodhonee Debia* (1).

On special appeal to the High Court, the judgment-debtor impugned the decision of the lower appellate Court, citing a ruling of the High Court, dated the 17th June, 1872. In that ruling Pearson and Turner, JJ., were of opinion that *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia* only went to show that deductions might be made in calculating the limitation prescribed by Act XIV of 1859 for suits, and did not determine that the provisions of s. 14 of that Act applied so as to enlarge the time within which applications might be made for execution. The learned Judges held that the section applied only to original suits and not to applications for the execution of decrees, referring to *Khetturnath Dey* v. *Gossain Dass Dey* (2), in which case a similar view was taken by the Calcutta High Court, and to *Darsaiah Chinniah Chenchu* v. *Godain Chetty Veeriah* (3), in which case the Madras High Court held that the provisions of s. 13 could not be applied to the execution of decrees.

The Court (Pearson and Oldfield, JJ.) referred to the Full Bench the question which of the two rulings of the High Court was the right one.

Mr. *Leach* and Babu *Dwarka Nath Mukarji*, for the appellant.

Mr. *Conlan*, Pandit *Ajudhia Nath*, and Munshi *Hunuman Parshad*, for the respondent.

OPINIONS.

The following opinions were delivered by the Full Bench :—

STUART, C. J.—I was a party to the decision of 1st May 1874, and to the opinion I then expressed I advisedly adhere. With regard to the present reference, I cannot say that an application for the execution of a decree is not a suit within the meaning of s. 15, Act IX of 1871. I think it is. It has been repeatedly held in England that the word "suit" does include any proceeding instituted for the purpose of obtaining any beneficial order or relief, and that a petition presented for this purpose was a suit; and I observe it has been used in that sense in the practice of the American Courts. In Kent's Commentaries on the American Law, vol. i, [99] p. 314, note (*d*), 11th ed. published in 1867, two cases are referred to in which it was decided that a *mandamus* is a "suit, for it is a litigation in a Court of Justice seeking a decision," and in the Calcutta case referred to by the Officiating Judge of Ghazipur (1), the following passage occurs in the judgment of Sir Barnes Peacock, Chief Justice :—" The word 'suit' does not necessarily mean an action, nor do the words 'cause of action' and 'defendant' necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim if recoverable, is a cause of action." The meaning of this, I think is that the word "suit," as used in s. 15 of the Limitation Act, does not mean a suit or action in an exclusively technical sense, but simply and generally any proceeding intended and adapted to the recovery or vindication of any right or demand or material advantage. Such was undoubtedly the meaning put upon the

(1) 9 W. R. 402. (2) 4 W. R. Misc. 18. (3) 4 Mad. Jur. 101.

word "suit" by lawyers before Act IX of 1871 was passed; and the question therefore is whether there is anything in that Act to change the construction which up to that time had been put upon the term. I do not see that there is, nor do I understand that the mere mention of applications in the Act distinct from suits can have the effect of limiting the general relief of benefit that by s. 15 is intended. I would, therefore, answer this reference by saying that the above ruling is right, and that an application for the execution of a decree is a suit within the meaning of s. 15, Act IX of 1871.

PEARSON, J.— I was myself a party to the decision of the 17th June, 1872, and on re-consideration adhere without hesitation or doubt to the opinion therein expressed. Throughout the Act IX of 1871 the distinction between suits and applications is never forgotten; they are never confounded together. The particular s. (15) which we have to consider enacts that, "in computing the period of limitation prescribed for any *suit*, the time during **[100]** which the plaintiff has been prosecuting with due diligence another *suit*, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded on the same right to sue, and is instituted in good faith in a Court which from defect of jurisdiction or other cause of like nature, is unable to try it." The cases in which a plaintiff may honestly make a mistake as to the Court in which his suit should be brought are not unfrequent; and therefore the provision contained in s. 15 is quite suitable to a suit. But the case in which a decree-holder could *bona fide* attempt to execute his decree in a wrong Court must be very peculiar and exceptional; and a general provision of law is therefore not required to meet a case which can hardly ever occur. It is remarkable that ss. 16, 17, 18, 19 and 20 are only applicable to original suits; and it may reasonably be assumed that, if s. 15 had been intended to apply to applications for execution of decree as well as to suits, the intention would have been expressed and made known in an explanation like *explanation* 2, which intimates that "a plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section." In the absence of any such explanation, regard being also had to the distinction which is observed throughout the Act between suits and applications, I conceive that s. 15 must be held to apply to suits as distinguished from applications, and that the word suit as distinguished from applications, and that the word suit therein used does not include an application for the execution of a decree.

TURNER, J.—I concur in the opinion delivered by Mr. Justice Pearson, and place the same construction on the 15th section of Act IX of 1871 as I have heretofore placed on the similar section (Act XIV of 1859).

SPANKIE, J.—I accept Mr. Justice Pearson's opinion as conclusive on the point referred to us.

OLDFIELD, J.—Looking to the terms of s. 15, Act IX of 1871, I do not think the provisions of that section were intended to apply to applications for execution of decrees, but only to suits in their strict sense.

[101] It will be observed that throughout Act IX of 1871, a distinction is made between suits, appeals and applications. It is to be found in the preamble of the Act, and again notably in s. 4, and in the second schedule, which prescribes the period of limitation applicable to three

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divisions of subjects, suits, appeals and applications, amongst the last of which are found enumerated applications for executions of decrees.

I think Act IX of 1871 clears up what was obscure in Act XIV of 1859, under which the word suit may have been used in a wide sense, so as to include an application to enforce execution of a decree.

The title of Act XIV of 1859 is an "Act to provide for the limitation of suits," and the preamble is "whereas it is expedient to amend and consolidate the laws relating to limitation of suits, it is enacted as follows:" but the title and preamble of Act IX of 1871 differ materially Act IX of 1871 being "an Act for the limitation of suits and for other purposes," and it recites, "whereas it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts, &c." Whereas in Act IX of 1871, suits and applications are separately treated, the word suit cannot, I apprehend, be held to mean and include an application.

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1 A. 101 (F.B.).

BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

TEJ RAM AND OTHERS (*Auction-purchasers*) *v.* HARSUKH (*Judgment-debtor*). [10th August, 1875.]

Stat. 24 and 25 Vic. c. 104, s. 15—Powers of Superintendence of High Court—Revision of Judicial Proceedings—Jurisdiction.

The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s. 15 of 24 and 25 Vic., c. 104, to interfere with the order of a Court subordinate to it on the ground that such order has proceeded on an error of law or an error of fact.

Where, therefore, on appeal by the judgment-debtor against an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale, on a ground not provided by law, and the [102] auction-purchasers applied under the above-mentioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere (1).

[R., 9 A. 104 (F.B.) = A. W. N. (1886) 309; 31 A. 59; 9 B. 432; 12 B. 617; 26 C. 74; 33 C. 68; 36 C. 994 = 11 C.L.J. 50 = 10 Cr.L.J. 385 = 13 C. W.N. 1221 = 3 Ind. Cas. 861 = 41 C. 323, 876; 22 M. 68; 28 M. 28 = 14 M.L.J. 329; 6 A.L.J. 22; 2 C.L.J. 241 = 9 C.W.N. 1046 (F.B.); 1 C.W.N. 617 (620); 13 C.W.N. 1221; 8 M.L.J. 231.]

THIS was an application to the High Court by the purchasers at a sale of immoveable property in the execution of a decree for the cancelment, as being contrary to law, of the order of the lower Court setting aside the sale. The application purported to be made under s. 15 of 24 and 25 Vic., c. 104, the auction-purchasers contending that the High Court was empowered to interfere under that section. The question of jurisdiction raised by this contention was referred by the Division Bench (Stuart, C. J., and Oldfield, J.) before which the application came for hearing to the Full Bench.

It appeared that, on appeal by the judgment-debtor from the order of the first Court confirming the sale, the lower Court of appeal had set

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(1) Compare *In the matter of Durga Charan Sircar*, 2 B.L.R.A.C. 165, and see also *In the matter of Khowaz Ram Bux Singh*, 23 W.R.402, in which the Calcutta High Court similarly refused to interfere with an order of the lower appellate Court upholding a sale.

aside the sale on the ground that no notice of the application for the execution of the decree had been served on the representative of the original party to the suit against whom execution was sought in accordance with the provisions of s. 216, Act VIII of 1859.

Mr. *Ross*, the Junior Government Pleader (Babu *Dwarka Nath Banarji*), Pandit *Ajudhia Nath*, and Babu *Oprokash Chandar*, for the auction-purchasers.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the judgment-debtor.

The *Junior Government Pleader*.—This application is made with reference to *R. V. Koshti* v. *Narayan Dhulappa* (1). If your Lordships refuse to interfere in cases like the present much mischief will ensue. The lower Court might as well have set aside the sale on the ground that it was opposed to Scotch Law as on the ground it has set it aside. Your Lordships can interfere under s. 15 of the High Court's Act. The first part of the section gives the High Court the power of "superintendence" as distinct from the power it gives it to "call for returns."

Mr. *Conlan*.—The High Court cannot interfere ; *Da Costa* v. *Hall* (2) is an authority exactly in point.

OPINION.

[103] The opinion of the Full Bench was as follows :—

It is not contended that an appeal lies to this Court from the order of the Judge, or that under the Code of Civil Procedure this Court has any power of interference. It is argued that the Court is authorized to exercise jurisdiction in the matter in virtue of the provisions of 24 and 25 Vic., c. 104, s. 15. These provisions have frequently been urged as justifying the interference of this Court with orders of a Subordinate Court, on the grounds that the orders of the Subordinate Court has proceeded on an error of fact or law, and that no further appeal is given by the Code, and so far as we are aware the Court has uniformly declined jurisdiction.

The provisions of s. 9 of the Statute above-mentioned declare that High Courts established under the Act shall have and exercise all such civil, &c., jurisdiction, &c., and all such powers and authority for, and in relation to, the administration of justice, etc., as Her Majesty may by letters patent grant and direct, and that save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the Act at the time of the abolition of such last-mentioned Court.

By the Letters Patent of this Court Her Majesty was pleased to confer on it extraordinary original civil jurisdiction and appellate civil jurisdiction, but she conferred on it no powers of revision in civil suits or matters arising thereout. In these matters the Court has no other power or authority than that enjoyed by the Sudder Dewany Adawlut of these Provinces at the time of its abolition unless such power is derived from the 15th section of the Statute. The Sudder Dewany Adawlut certainly had no power to exercise judicial functions in any case in which its rights of interference was not declared by the law of India, and no provision of any

(1) 3 B. H. C. R. A. C. J. 110.
(2) 1 R. C. and C.R. Civil Rulings, 165=5 W.R. Misc. 25.

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Indian Act is cited as conferring on the Sudder Dewany Adawlut authority to interfere on an application of the nature of that which is now preferred to the Court.

The petitioners then can rely only on the provisions of 24 and 25 Vic., c. 105, s. 15, which declare that the High Courts established under the Act shall have "superintendence" over all Courts [104] which may be subject to its appellate jurisdiction, and consequently it is contended that the term superintendence confers jurisdiction to revise proceedings of the Subordinate Civil Courts.

We cannot allow this contention. Whether we consider the ordinary significance of the term or construe it in connection with the context, it appears to us to confer on the High Court no revisional power, no power to interfere with or set aside the judicial proceedings of a Subordinate Court, but that it confers on the High Court administrative authority and not judicial powers; as we construe the term (1), it would be competent to the High Court in the exercise of its power of superintendence to direct a Subordinate Court to do its duty or to abstain from taking action in [105] matters of which it has not cognizance, but the High Court is not competent in the exercise of this authority to interfere and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court had proceeded on an error of law or an error of fact. It is true that some cases may be found in the reported decisions of other High

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(1) The statement of the law here given seems on the whole to be in conformity with the view taken in a long series of cases by the Calcutta High Court. That Court has held

(*a*) that it may interfere, under s. 15 of the High Courts Act, to direct the exercise of a power or jurisdiction disclaimed by the lower Court—see *Gobind Coomar Chowdhry* v. *Kisto Coomar Chowdhry*, 7 W R. 520 = 2 Ind. Jur. N. S. 199; *Greesh Chunder Lahooree* v. *Kasheessuree Debia*, 8 W.R. 26: *Omar Chand Mahata* v. *Nawab Nazim of Bengal*, 11 W.R. 229; *Collector of Bogra* v. *Krishna Indra Roy*, 2 B.L.R. A.C. 301; *Petition of Sankar Dobay*, 4 B.L.R. A.C. 65; *Hardayal Mandlal* v. *Tirthanand Thakur*, 4 B L.R. App. 28; *Khenumkuree Debi* v. *Ranee Shurut Soonduree Dabi*, 14 W.R. 9; *Munohur Paul* v. *J. P. Wise*, 15 W.R. 246; *Petition of Rani Umasundari Dabi*, 5 B.L.R. App. 29; *Petition of Srimati Nassir Jan*, 7 B.L.R. 144; *Haris Chandra Gupto* v. *Srimati Shashi Mala Gupti*, 6 B.L.R. 721; *but see Petition of Hureehur Mookerjee*, 20 W.R. 202.

(*b*) that it may interfere to set aside an order made by the lower Court without jurisdiction—see *Joy Ram* v. *Bulwant Singh*, 5 W.R. Misc. 3; *Bhyrub Chunder Chunder* v. *Shama Soonderee Debi*, 6 W.R. Act X, Rulings 68; *Judooputtee Chatterjee* v. *Chunder Kant Bhattacharjee*, 9 W.R. 309; *Petition of Bunkobeharry Ghose*, 11 W.R. 26: *Petition of Maharaja Dhiraj Mahtub Chand Bahadur*, 2 B.L.R. A.C. 217: *Deep Chand* v. *Gouree and Beharee*, 13 W.R. 98: *Rooknee Roy* v. *Amrith Lall*, 14 W. R. 254: *Tarini Charan Mookerjee* v. *Raja Purna Chunder Roy*, 6 B L.R. 717: *Mir Habib Sobban* v. *Mahendra Nath Roy* 2 B.L.R. App. 32: *Amra Nashya* v. *Gagan Shuta*, 2 B.L.R. App. 35: *Harris Chandra Gupto* v. *Srimati Shashi Mala Gupti*, 6 B.L.R. 721.

(*c*) that it should not interfere merely on the ground that an order made by a Court having jurisdiction is erroneous—see *Petition of Pearee Lal Sahoo*, 7 W.R. 130: *Janokee Bullub Sein* v. *Dukhina Mohun Chowdhry*, 7 W.R. 519: *Showdaminee Dosse* v. *Manick Ram Chowdhry*, 9 W.R. 386; *Mahomed Busheerullah Chowdhry* v. *Ramkant Chowdhry*, 9 W.R. 394: *Jumal Ali* v. *Shaik Wahed Ali*, 11 W.R. 97: *Petition of Jodoo Moonee Dossee*, 11 W.R. 494: *Petition of Durga Charan Sirkar*, B.L.R. A. C. 165: *Sreemutty Dossee* v. *Sreenibash Dey*, 12 W.R. 74: *Asrafannissa Begum* v. *Syad Inayet Hossein*, 5 B.L.R. 316 = 13 W.R. 439; *Doorga Soonduree Debi* v. *Kashee Kant Chuckerbutty*, 14 W.R. 212: *Kallee Hur Doss* v. *Roodressur Chuckerbutty*, 15 W.R. 90: *Khorshed Ali* v. *Chowdhry Wahid Ali*, 15 W.R. 170: *Petition of Kasinath Roy Chowdhry*, 7 B. L.R. 146: *Hur Kishore Audhicary* v. *Sudoy Chunder Nundee*, 17 W.R. 80: *Petition of Munno. Singh*, 19 W.R. 306: *Petition of Bagram*, 20 W.R. 10: *Khowaz Ram Bux Singh* v. *Bishendharee Geer*, 23 W.R. 402: *Ajonnissa Bibi* v. *Surja Kant Acharji*, 2 B.L.R. 181: see, however, *Maharaja Dhiraj Mahtab Chund Bahadur* v. *Shagor Kundu*, 5 B.L.R. App. 91: *Petition of Mathuranath Chuckerbutty*, 9 B.L.R. 351.

Courts, in which it appears that Judges have claimed in virtue of the right of superintendence given them by the Statute to exercise larger powers than we believe are conferred by the provisions of that law, but the practice of this Court has accorded with the views expressed by us, and on the construction we put on the Statute we are not at liberty to disturb it.

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The record will be returned to the Bench with this expression of our opinion.

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1 A. 105 (F.B.)=11 Mad. Jur. 260.

BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson and Mr. Justice Spankie.

DEBI PARSHAD AND OTHERS (*Defendants*) *v.* THAKUR DIAL AND OTHERS (*Plaintiffs*).* [27th August, 1875.]

Hindu Law—Undivided Hindu Family—Inheritance.

When, in an undivided Hindu family living under the Mitakshara law, a brother dies without leaving issue, but leaving brothers and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but on partition the whole estate, including the interest of the brother so dying, is divisible; and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grand-father would have taken had he survived the period of distribution.

Madho Singh v. *Bindessery Roy* (1) overruled.

[F., 2 C. 379; 4 C. 425; R., 17 C. 33; 9 C.L J. 485; 23 Ind. Cas. 912=16 Bom. L.R. 263.]

DURGA, Bisheshar, Bhairo, and Ram Pargas, were four brothers united in estate. Ram Pargas died leaving sons who were the plaintiffs in this suit. Then Durga and Bhairo died without issue. Finally, Bisheshar died leaving sons, who were the defendants in this suit. [106] The principal issue raised by the suit was whether the plaintiffs were entitled on partition to a moiety of the undivided immoveable estate of the family, or to one-fourth. The first Court held, having regard to the answers to the questions 3 and 4 given in p. 33, Bk. ii., West and Bühler's Digest of Hindu Law Cases, to *Bywastha* No. 2, dated 5th July 1860, *Bywasthas*, S. D. A. N. W. P., vol., i, part i, and to the opinion of three of the Benares pandits whom it examined on the point, that the plaintiffs were entitled to a moiety of the estate.

The first plea taken by the defendants on appeal by them to the High Court impugned this ruling. With reference to that plea, the Court (Pearson and Spankie, JJ.) referred to the Full Bench the following question, *viz.* :—

" Whether, in a joint family property, two or four brothers dying without issue, their interest passed on their death to their surviving brother exclusively, or whether the sons of a brother who predeceased them are entitled to participate in it ? "

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* Regular Appeal No. 33 of 1875, from a decree of the Subordinate Judge of Benares, dated the 18th December, 1874.

(1) H.C.R.N.W.P. (1868) p. 101.

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The order of reference was accompanied with these remarks :—

Had Bhairo and Durga left separate estates, there can be no doubt that their surviving brother would have succeeded to them in preference to, and to the exclusion of, their nephews ; and it is contended that the succession would not be different in a joint undivided family. The contention is supported by the decision of a Bench of this Court, dated the 25th February 1868, in special appeal No. 1779 of 1867, at p. 101 of the High Court Reports for 1868. The ruling of the lower Court in this case is opposed to that decision, but is supported by the answers to the questions 3 and 4 given in page 33, Bk. ii, West and Bühler's Digest, and by the opinions of the Benares pandits examined by the Subordinate Judge. Under the circumstances we think it expedient to refer the point in question for the consideration of a Full Bench.

Pandit *Ajudhia Nath* (with him Munshi *Shuk Ram*), for the appellants, contended that, on the death of a member of an undivided Hindu family, his estate devolved on his heirs. There is nothing in Hindu law to the contrary, and the pandits examined by the first Court are agreed in so stating. Although perhaps it cannot be said that any one member of an undivided Hindu family is the owner of any particular portion of the undivided estate, **[107]** still his share in it is capable of being defined and expressed. He may be the owner of one-half, or one-third, and so on. If, on his death, his estate devolves on his heirs, then the estate of a brother dying without issue devolves on his surviving brothers and their heirs, according to the rule of succession laid down in Mitakshara. If the rule does not apply, there is no other. If the lower Court is right, the death of a member of an undivided Hindu family alters the shares of the surviving members. Thus there would be no inheritance liable to obstruction, according to the definition of the term in Mitakshara, but a third kind of inheritance, *viz.*, one liable to alteration. It is true that the Privy Council has ruled in *Katama Natchiar* v. *The Rajah of Shivagunga* (1) that the members of an undivided Hindu family are entitled to the benefit of survivorship, but that is as against females. All the members are not entitled to participate in the estate of a deceased member—*Madho Singh* v. *Bindessery Roy* (2). There is no authority to show that the share to which a member of an undivided Hindu family has succeeded lapses on his death into the estate of the common ancestor. It would be impossible to say, where a family consisted of several branches, whether the estate of a deceased member lapsed into the estate of the ancestor of the branch to which he belonged, or into the estate of the common ancestor. A brother in an undivided Hindu family is preferred to a nephew—*Madho Singh* v. *Bindessery Roy* ; *Brojo Kishoree Dossee* v. *Sreenath Bose* (3). The *status* of a re-united Hindu family and an undivided are the same. The rules of succession in a re-united Hindu family support the contention of the appellants.

Mr. *Mahmood* (with him Munshi *Hanuman Parshad*), for the respondents.—As to the *status* of an undivided Hindu family, see Norton's Leading Cases on Inheritance, part i, 173. In *Katama Natchiar* v. *The Rajah of Shivagunga* the Privy Council held that the property of an undivided Hindu family is subject to the benefit of survivorship. Again, in delivering the judgment of the Privy Council in *Appovier* v. *Rama Subba Aiyan*(4) Lord Westbury said no member of an undivided Hindu family could ascertain

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(1) 9 M.I.A. 539.
(2) H.C.R.N.W.P. (1868) p. 101.
(3) 9 W.R. 463.
(4) 11 M.I.A. 75.

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his share without partition, and that partition produced an effect upon the undivided estate of the family similar to the effect produced by the conversion of joint tenancy into a tenancy in common. The respondents as co-parceners with the appellants in an undivided estate are entitled to share *per capita*. It appears from the judgment in *Sadabart Prasad Shau* v. *Foolbas Koer* (1) that the mere fact of birth entitles the sons of brothers united in estate to a right of co-parcenership with their fathers and uncles. There are numerous rulings to the effect that, under Mitakshara, the sons have rights of the same degree and quality as the father. In *Bhyro Pershad* v. *Basisto Narain Pandey*(2) it was held that, so long as an estate remains undivided, the share of a member of the co-parcenary is so uncertain and undefined that he may be said to have only "a life-interest in a common property." The deaths of Bhairo and Durga neither reduced the shares of the respondents, nor increased those of the appellants. The nature of the possession of the parties remained the same, and their shares in the estate are equal shares. But taking another view, even if "the allotment of the shares is according to the fathers"—Mitakshara, ch. I, s. 5, v. 1,—the respondents are entitled to share *per stirpes*, that is, they are entitled to a moiety of the estate in dispute.—Norton's Leading Cases, part i, 299; part ii, 461 ; *Duljeet Singh* v. *Sheomunook Singh*(3). They stand in the same relation to the common ancestor as the appellants, and are entitled to the share which their father would have acquired on partition—Norton's Leading Cases, part ii, 463. So long as the estate remained undivided the share of Bisheshar could not assume a definite shape and descend to the appellants, or on the death of Durga and Bhairo their shares become definite and descend to Bisheshar.

OPINION.

The opinion of the Full Bench was as follows :—

To answer the question proposed to us it is necessary to consider the condition of a Hindu family in these Provinces while it remains undivided, and to inquire whether the same rules of succession apply while the members continue joint in estate, when they have separated and effected partition, and when they have re-united. [109] Sir Thomas Strange in the ninth chapter(4) of his work on Hindu Law declares that "wherever a plurality of sons exists, the inheritance descends to them as co-parceners making together but one heir" * * * "the deceased may have left, not only more sons than one, but brothers, as well as a widow or widows, and daughters, together with other dependants ; and such sons and brothers may have their wives and children respectively ; the whole having constituted in his lifetime, not so many co-parceners indeed in the proper sense of the term, but an undivided family. Or supposing him to have been a single man, with collateral relations only, their descendants and connections, all living together in co-parcenary, his death makes no difference in this respect among the survivors." If undivided at his death, they still continue so in point of law, however appearances may indicate a different state. So long as they remain joint, they offer one common sacrifice. "The religious duty of unseparated brethren is single,"—Narada quoted in Mitaksbara, ch. II, s. 12 v. 3,—until partition takes place.

In respect of property, whatever is acquired by the several members, with certain exceptions, falls into and becomes part of the common

(1) 3 B.L.R. F.B. 31=12 W.R. F.B. 1.
(2) 16 W.R. 31.
(3) 1 S.D. Rep. 59=Morley's Digest, vol. i, 307.
(4) On Partition, 4th Cd., p. 198.

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fund, and the expenses of all members are met from this common fund; no account being taken of excess in the expenditure of some over the expenditure of other members. This community of worship and property being the ordinary condition of a Hindu family, it is to be presumed that a Hindu family is undivided until the contrary is shown, and that the acquisitions of the several members form part of the common stock unless the acquirer, or those claiming under him, prove that it was acquired in such a manner as would, by the special provisions of the law, constitute it the sole property of the acquirer.

Moreover, " according to the true constitution of an undivided Hindu family, no individual member of the family whilst it remains undivided, can predicate of the joint and undivided property that he has a certain share."—*Appovier* v. *Rama Subba Aiyan* (1); while a Full Bench of the High Court of Calcutta has gone so far as to hold, in *Sadabart Prashad Sahu* v. *Foolbash Koer* (2), that under the [110] Mitakshara law one of the several members of a joint Hindu family cannot, without legal necessity, alienate any portion of the undivided ancestral property without the consent of the whole of the co-sharers, and that such an alienation is not valid, even for the share to which the alienor would have been entitled on partition.

The condition of an undivided family being such as has been described it is not unintelligible that rules may govern the distribution of the joint inheritance different from those which would regulate the devolution of separate property : and it has been ruled that in one and the same family different rules may govern the succession to the estate of a deceased member according to the nature of the different properties comprising it, whether it be joint or separate.—*Katama Natchiar* v. *The Rajah of Shivagunga* (3).

The peculiar incidents of the joint property of an undivided family are survivorship and the right of representation. In the Shivagunga case above cited, the Lords of the Privy Council declared that, " according to the principles of Hindu law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession " (4). It has been argued that this is a mere statement of the general rule, and that it does not necessarily follow from it that the benefit of survivorship extends to all, and not only to some of the surviving members of the family. When once the principle of survivorship is admitted it is difficult in the absence of express law to limit its operation. The principle of survivorship taking effect on the common fund, in which no one of the members of the family has any distinct share, operates not to augment the rights of any particular class of the co-parceners, but to enlarge the shares which upon partition would fall to the lot of every one of the members. In effect, by the operation of this rule, the share to which a co-parcener dying without issue would have been entitled does not pass by descent but lapses. The right of representation operates at the time of partition to secure an equal partition [111] of the inheritance between the several sons of the common ancestor and the issue to the third generation of sons who have died leaving issue

(1) 11 M.I.A. 75.
(2) 12 W.R. F.B. 1 = 3 B.L.R. F.B. 31.
(3) 9 M.I.A. 613.
(4) 9 M.I.A. 611.

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surviving the period of distribution, such issue taking *per stirpes* the share of their father or forefather—"Should a younger brother die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son, and the same proportionate share shall be allotted to all the brothers according to law. Or if that grandson be also dead his son takes the share; beyond him the succession stops."—Katyayana —cited in Vyavahara Mayukha, ch. IV, s. 4, v. 21. "Although grandsons have by birth a right in the grandfather's estate equally with sons, still the distribution of the grandfather's property must be adjusted through their father, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text"—Mitakshara, ch. I, s. 5, v. 2. "A grandson (D) whose father (B) is dead, and a great-grandson (F) whose father (E) and grandfather (C) are dead, participate equally in the inheritance with the son (A), for they without distinction confer equal benefits on the deceased owner of the property by the presentation to him of funeral offerings at solemn obsequies.—Daya-Krama Sangraha, ch. I, s. 1, v. 3. Unless authority be shown to the contrary, these incidents of the joint estate of an unseparated Hindu family survivorship and the right of representation govern the case before us and determine the answer to be given to the question put to us. The fathers and uncles of the parties lived as an unseparated Hindu family in possession of an undivided estate. Assuming partition to be made now, there are living representatives of two sons only of the common ancestor, and equal partition being made [112] between the stocks, each stock is entitled to one moiety, but it is argued that, inasmuch as the father of the one line died before any of his three brothers, and the father of the other line died after two other brothers, who died without male issue, the shares of the brethren dying without male issue descended to the sole surviving brother and passed from him to his issue—to the exclusion of the line of the brother who died first—in other words, it is contended that the case is not to be governed by the law of survivorship, except so far as to exclude females, but that the shares of the deceased brothers passed to the surviving brother in virtue of the rule that, "in case of competition between brothers and nephews, the nephews have no title to succession, for their right of inheritance is declared to be on failure of brothers."—Mitakshara, chap. II, s. 4, v. 8. No doubt, if this rule was intended not only to apply to the descent of the separate property of a brother but to operate on the share which he would have taken in the common property of the family had he survived the period of partition, the contention is correct; but if we carefully examine the system on which the Mitakshara is compiled and bear in mind the principles of Hindu law, as to which there can be no dispute, it will appear that the rule on which the contention is based cannot apply to the undivided ancestral estate, nor to anything which has accrued to and become part of that estate. The author of the treatise commences with a definition of heritage,

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"daya," and distinguishes between the wealth of a father or grandfather which *becomes the property* of his sons or grandsons *by right of their being his sons and grandsons*, and which the author consequently terms unobstructed, and property which *devolves* on parents, brothers and the rest, *on the demise* of the owner without male issue, and which he terms liable to obstruction, because existence of issue or the survival of the owner impede its devolution. After investigating the nature of property and reviewing the methods by which it may be acquired, he declares the fundamental principle of the Hindu law obtaining in these Provinces that property in the paternal or ancestral estate is by birth. He next describes the limitation to which the power of the father over ancestral and acquired wealth is subject, and having previously defined partition to be "the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate," **[113]** he proceeds to declare in what manner and subject to what rules the common property of the family is to be distributed by partition in the father's lifetime or after his decease. The consequence of the doctrine that a right in the paternal ancestral estate is acquired by birth is that there is in fact no devolution of the property from one owner to another, but that as each son comes into being he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which, should he not survive partition and have issue, his son or grandson would take by substitution, and which if he dies before that period, will simply lapse. There being no devolution of the property, the laws of descent are inapplicable. An ascertainment of the rights of the several members of the family is effected by partition, and consequently the rules regulating partition in every Hindu work on inheritance take the place of rules regulating the descent of property from an owner leaving issue. Unless there is a plain direction to the contrary, rules of partition from their very nature operate at the time when the partition is made. Unless it is expressly declared that the ascertainment of shares is to be made at an earlier period, it must be assumed they are to be ascertained at the time partition is made. Seeing that a son in the undivided family is a co-owner, having acquired his right by birth there is no more reason for fixing the date of the death of the father as the period at which shares should be ascertained than in fixing the date of a son's death as that period: and if shares are not ascertained until the period of distribution; if, until that time, no one can declare he has any share in the common property, it accounts for the circumstance that in none of the treatises on Hindu law which have been brought to our notice is there any rule declaring what is to be done with the interest (it can hardly be called a share) in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition, subject to the qualification that those who take by representation take only the share which he whom they respectively represent would have taken had he survived partition.

Having in chap. I dealt with the distribution of the estate of a Hindu who dies leaving issue, and having declared the rules which provide for the distribution of the paternal and ancestral property **[114]** of the undivided family, the author next proceeds in chap. II to treat of the descent of the estate of a man who dies without issue. The first section clearly relates only to separate property. It presumes the case of a man who, leaving no male issue, could not be the founder of an undivided family.—"The sons, principal and secondary, take the heritage, has been shown.

The order of succession among all tribes and classes, on failure of them, is next declared. Here then we pass from a law of partition to a law of devolution of inheritance, the persons entitled no longer acquire an interest by birth. It accrues on the death of the owner, and to be entitled to claim they must survive the owner, and first in the line of descent the author places the widow, and after explaining that, if the proprietor died in union with his brethren, the widow has merely a right of maintenance, he concludes the discussion of her claims with the declaration that a wedded wife being chaste, takes the whole estate of a man who, being *separated from his co-heirs*, and not subsequently re-united with them, dies leaving no male issue.

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In the second section the right of succession of daughters and daughter's sons are declared. Now in this section there is no distinct allusion to separate property, yet it has never been doubted that it deals only with separate property, and the intention is evident from the commencement of the section:—" On failure of her (the widow), the daughters inherit." The widow could only take separate property and the daughters succeed to what, if she had survived the *propositus*, the widow would have taken. Similarly, the following section, which treats of the rights of parents, commences with the declaration :—"On failure of those heirs, the two parents meaning the mother and father, are successors," preference being given to the mother. In this section again there is no mention of separate property, but it manifestly deals only with that property for it is declared that the parents take, in default of widow, daughters and daughter's sons.

We now arrive at the fourth section, which treats of the rights of brothers, and which it is argued governs the case before us. The section commences like the preceding by premising the failure of the heir whose right had been last declared ; and from this circumstance it must again be inferred that the property to which it regulates the [115] succession is such property as would have been taken by the heirs entitled to priority of succession, had they survived the *propositus*. If it be held that the interest which a co-parcener acquires by birth does not lapse on his death without male issue, but passes under the law of succession to heirs other than direct issue, who presumably do not exist, and other than his widow, whose title is expressly denied, it follows that the right would devolve not on brothers only, but on those heirs also who are entitled to succeed in priority to brothers. Thus a daughter, a daughter's son, a mother, or a father, might, on partition, claim the share of a deceased co-parcener. No instance is cited in which such a claim has been allowed. The conclusion seems clear that s. 4, like the preceding sections of the chapter, provides only for the devolution of the separate estate of the *propositus*.

But in support of the contention that the interest of a member of an undivided family in the common fund is a share, and that the rules respecting the succession of brothers operate, notwithstanding the *propositus* may have died in union with his brethren, and regulate the inheritance of that share, reference has been made to the provisions of s. 9, which treat of the succession to re-united kinsmen.

It is argued that brethren who have re-united are in the same position as those who have never separated ; that the whole of the property is again brought into a common fund, each brother saying to the other "what is mine is thine and thine is mine," yet nevertheless the interest of each is described as his *share* :—"A re-united brother shall keep his *share* of his re-united co-heir who is deceased"—Yajnavalkya, cited in Mitakshara, chap.II,

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s. 9, v. 1—and inasmuch as on the death of a re-united brother without male issue his share devolves on re-united brethren of the whole blood to the exclusion of re-united brethren of the half-blood, or if there be no brethren of the whole blood in re-union, the re-united brethren of the half-blood and the unassociated uterine brothers divide the share equally, it is contended that the principle of survivorship does not operate to overrule the rules regulating the succession of brothers, but that so far as is possible effect is given to both.

[116] To these arguments it may be replied that a distinction is recognized by Hindu writers between undivided and re-united brethren (Colebrook's Digest, ccccxxx). Moreover, a re-union implies a previous partition, in virtue of which each of the re-united brethren has acquired separate ownership of a share. He brings to the re-united fund something which is specially his, while in an undivided family he acquired his right by birth in the estate of his father or grandfather. Again, when a partition is made of the property of an undivided family, no distinction is made between the half blood and the whole blood :—" If any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided, being held in co-parcenary, the half-brothers shall have equal shares with the rest, but uterine brother has the sole right to the divided property, moveable or immoveable"—(Colebrook's Digest, ccccxxxi); and on partition of the common property of re-united brethren the eldest never enjoyed the privilege, now in all cases obsolete, of receiving a larger or better portion than his brethren, to which Hindu writers declared him entitled, on a partition of the property of the undivided family. It is dangerous then to draw an analogy from the special rules which apply to the devolution of the shares of re-united brethren. Indeed, the circumstance that rules have been specially prescribed to regulate the devolution of the common property of re-united brethren affords ground for arguing that they were exceptions to the ordinary rules regulating the partition of the common property of an undivided family.

If then the provisions of ch. II, s. 4, are not applicable to the interest of an undivided co-parcener in the common property, but that interest lapses on his death without issue, it follows that, in the case before the Court, the interests of the brothers who died without issue do not devolve on the last surviving brother, and that the sons of the last surviving brother are only entitled to one moiety of the estate. This conclusion is supported by the opinions of the three pandits examined by the Subordinate Judge of Benares, although the reasons given by one of those gentlemen for the conclusion at which he has arrived are not satisfactory. It is also supported by the decision of the Sudder Court of Calcutta in *Duljeet Singh* v. *Sheomunook Singh* (1), to which Mr. Colebrooke was a [117] party, and by the decision of the Bombay Court in *Bhugwan Golab Chund* v. *Kriparam Anandram* (2). The decision of this Court in *Madho Singh* v. *Bindessery Roy* (3), it is true, is opposed to these authorities, but in our judgment that ruling cannot be supported.

(1) 1 S.D. Rep. 59. (2) 2 Borr. 29. (3) N.W.P. H.C.R. (1868) 101.

1 A. 117 (F.B.).

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BEFORE A FULL BENCH.

Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

DAIA CHAND AND OTHERS (*Defendants*) v. SARFRAZ AND OTHERS (*Plaintiffs*).* [27th August, 1875.]

Redemption of mortgage—Limitation—Acknowledgment of title of mortgagor or of his right to redeem—Act IX of 1871, *sch. II*, 148.

Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, *held* (SPANKIE J., dissenting) that there was an acknowledgment of the mortgagor's right to redeem within the meaning of art. 148, sch. II, Act IX of 1871.

Per PEARSON, J.—That there was also an acknowledgment of the mortgagor's title.

Per SPANKIE, J., *contra.*

[Cited, 8 A.L.J. 605 (608) = 10 Ind. Cas. 239 (240); R.,1 A.425; 17 B. 173; 9 C. 616; 12 C. 267; 16 M. 220; 8 A. L. J. 605 = 10 Ind. Cas 238; A.W.N. (1908) 226; 10 Bom. L.R. 385; 5 Ind. Cas. 77; U.B.R. (Civil) (1892—1896) 462.]

THE plaintiffs sued to redeem a mortgage of the entire 20 biswas of mauza Pal, pargana Jauli Jansath, zilla Shaharanpur, alleged to have been made in 1811 for Rs. 241 by their ancestors to the ancestors of the defendants. The latter denied the mortgage, alleging that they were the proprietors of the estate. From the evidence adduced it appeared that in 1863 the plaintiffs applied to the revenue authorities to record their names as the mortgagors of the estate, but the application was refused. In May, 1872, at the instance of the defendants, the entry of the word "mortgagee" opposite the names of the defendants in the *khewat* annually prepared by the patwari was directed to be discontinued. The first Court, looking at these circumstances, treated the suit as one for the possession of land and dismissed it, holding that it should have been valued at five times the revenue payable to Government in respect of the property in suit, instead of according to the principal amount [118] of the mortgage-money. The lower appellate Court held that the suit was correctly valued. It disallowed a plea taken by the defendants to the effect that the suit was barred by the law of limitation as it appeared that the defendants' ancestors had signed the *khewat* and the *khatauni shara asamiwar* prepared at the settlement of the estate with them under Regulation IX of 1833 in 1841, in which they were described as mortgagees, which it held amounted to an acknowledgment of the plaintiffs' title as mortgagors, and remanded the suit to the first Court for disposal on the merits.

The *khewat* of 1841 made no mention of the nature of the mortgage and none of the mortgagors. The parties who signed it were described as holding certain shares and as mortgagees. There was no record of the names of the owners of the shares. The *khatauni shara asamiwar* showed the rates of rent payable by tenants. The parties who signed that paper were also described as mortgagees There was a note by the officer making a settlement that "the parties in possession

* Appeal under cl. 10 of the Letters Patent, No. 4 of 1875.
[N.B.—For a further stage of this case, see 1 A. 425 = 2 Ind. Jur. 115.—ED.]

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mortgagees, but the amount of the mortgage and its duration are unknown: it occurred before British occupation." The parties did not, in affixing their signatures to either document, add the word "mortgagees." The *khewat* was not confined to a record of the distribution of the shares and the interest of the parties as mortgagees. It contained the *ikrar-nama*, or *wajib-ul-arz*, being a record of agreement between the co-parceners amongst themselves, on various matters and a detail of customs, &c., prevailing in the estate. The signatures were affixed at the foot of the document. The Tahsildar recorded that after all the particulars of the *ikrar-nama*,and the amount of rupees had been read out to the parties, they affixed their signatures and marks with their own hands. Similarly, with the *khatauni shara asamiwar*, the tahsildar recorded that the parties after hearing the rates of rent had affixed their signatures and marks, and verified all the particulars entered in the document.

On special appeal to the High Court from the order remanding the case the defendants contended that the signatures of their ancestors to the documents did not amount to an acknowledgment of the plaintiffs' title as mortgagors or of their right to redeem within the meaning of Act IX of 1871, sch. II, 148. They also contended, with reference to an order passed in the settlement department in [119] January 1864, which refused an application by the plaintiffs for the entry of their names in respect of certain unculturable lands and trees in the village and referred them to a Civil Court, that the suit was barred by limitation, not having been instituted within three years from the date of that order.

The learned Judges of the Division Court (Pearson and Spankie, JJ.) before which the appeal came on for hearing, differed in opinion.

The following judgments were delivered:—

PEARSON, J.—This is a suit for the redemption of a mortgage said to have been made in favour of the defendants' ancestors by the ancestors of the plaintiffs in 1811, and was dismissed by the Court of first instance improperly on the ground of insufficient valuation. The lower appellate Court has rightly held the valuation to be correct, and, disallowing a plea set up by the defendants to the effect that the suit was barred by the law of limitation, has remanded the case to the first Court under s. 351, Act VIII of 1859, for trial and disposal on the merits. The plea of limitation has been disallowed with reference to an acknowledgment of their mortgage tenure recorded in the settlement record of 1841, which is signed by the defendants or their forefathers. In that record they described themselves, or allowed themselves to be described, as mortgagees of the estate in question; and by so doing admitted by implication the title of the mortgagors, whoever they may be, and their right to redeem the property. Whether the plaintiffs' ancestors were the mortgagors and whether the mortgage was made by them in 1811, for a consideration of Rs. 241, are questions which must be determined before it can be decided whether the suit can be maintained. Even if it be established that the plaintiffs' ancestors were the mortgagors, unless it be shown that the mortgage was not made before 1811, it may be found that the suit is barred by limitation. But although the Subordinate Judge's decision is open to this objection, that he has somewhat precipitately declared the suit not to be barred by limitation, while not quite consistently remarking that, if the plaintiffs can prove the mortgage to have been effected by their ancestors in favour of those of the defendants in 1811, they will obtain a decree if not; their claim must be rejected," there is nothing objectionable in his remand order on the

[120] assumption that the materials on the record were not sufficient to enable him to decide satisfactorily himself. There is no force in the grounds of appeal. Nothing is shown to be a bar of the suit in the proceedings of 1864, which referred to a claim of certain manorial rights only. The admission of the mortgage tenure in the settlement record of 1841, if it can be referred to the plaintiffs' ancestors, and the mortgage be found to have been made by them in 1811, is sufficient to give a new period of limitation from the date of the admission. With these remarks, the appeal is dismissed with costs.

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SPANKIE, J.—Article 148, sch. II, Act IX of 1871, provides that time shall run from the date of the mortgage, unless when an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee or some person claiming under him and, in such case, the date of the acknowledgment.

It is argued in this case that some of the ancestors of the defendants, appellants, attested as correct the *khewat* and *khatauni shara asamiwar* prepared at the settlement under Regulation IX of 1833 in 1841, in which they are described as mortgagees. Their signatures, it was contended, are an acknowledgment of the mortgage tenure, and take the case out of the operation of the limitation law. (The learned Judge, after stating the facts relating to the *khewat* and the *khatauni shara asamiwar*, continued) :—It will be seen from what I have stated that the parties who signed have not acknowledged any particular fact, but their signatures must be taken as an admission of the general accuracy of the *khewat* and *khatauni*, the one containing a variety of matter, the other having the special object of showing the rent payable to the landlords by their tenants.

I may also mention that there did not appear to be any recognised owners in 1841, the entire 20 biswas being in the possession of persons described as mortgagees. I attribute this description to be due to some report regarding an earlier settlement and the state of the village then, obtained from the office when the settlement under Regulation IX of 1833 was made.

[121] I do not regard the signatures of the ancestors of the defendants under the circumstances described as amounting to an acknowledgment of the title of the mortgagor or of his right of redemption within the meaning of art. 148, sch. II, Act IX of 1871. The records show that the appellants did not acknowledge any right of redemption anywhere. They contested in 1863 an attempt of the heirs of the mortgagors to establish their right of redemption, and ultimately in 1872 they succeeded in obtaining an order from the revenue authorities for the erasure of the word mortgagees.

If we look at the effect of an acknowledgment in writing in respect of a debt or legacy (s. 20, Act IX of 1871), we find that no promise or undertaking would take the case out of the operation of the Act, unless the promise or acknowledgment amounts to an express undertaking to pay or deliver the debt or legacy, or to an unqualified admission of the liability as subsisting. So I think that any one who desires to take his claim out of the operation of art. 148, sch. II, must show a clear and express acknowledgment in writing of the title of the mortgagor or of his right to redeem, that this acknowledgment must be unqualified and made touching the mortgage. It cannot be implied from a general admission of

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the accuracy of certain settlement records dealing with a great variety of matters.

I, therefore, would decree the appeal, reverse the judgment of the lower appellate Court, and restore that of the first Court, with costs.

The defendants appealed to the Full Court, under the provisions of cl. 10 of the Letters Patent, against the judgment of Pearson, J.

Munshi *Hanuman Parshad* (with him Babu *Jogindro Nath Chaudhari*), for the appellants, contended that the mere signatures of the mortgagees to a document, in which they were described as mortgagees, and which did not show who the mortgagor was, or the nature of the mortgage, or the amount of the mortgage-money, did not amount to an acknowledgment of the title of the mortgagor or of his right to redeem. There is no written acknowledgment touching the mortgage, signed by the mortgagees, which expressly, or by implication, acknowledges the title of the mortgagor or of [122] his right to redeem. The entry in the documents was made by the settlement officer.

Pandit *Bishambar Nath*, for the respondents.—The mortgagees were in possession of the property. They assigned to themselves at the settlement of the estate the position of mortgagees. The entries were made on their representation, and are signed by them. The statements recorded are accepted by them. This amounts to an acknowledgment to the title of the mortgagor, whoever he may be.

OPINION.

TURNER, OFFG. C. J., and OLDFIELD, J., concurred in the following opinion :—

The question which arises in this appeal is whether or not there has been a sufficient acknowledgment of the mortgagor's title or his right to redeem to prevent the operation of the law of limitation, or rather to give the representatives of the mortgagors a new period from which limitation should be computed.

The terms of the law, an acknowledgment of the mortgagor's title or an acknowledgment of his right to redeem, were not, it may be presumed, intended to be mere tautology. An acknowledgment that a certain person, or his representative, is the proprietor of the estate is an acknowledgment of his title. An acknowledgment that the mortgage is a subsisting mortgage would be an acknowledgment of his right to redeen, if he established his title.

The provisions of the English Statute 3 & 4 Will. 4, c. 27, s. 28, require in order to enlarge the statutory period of limitation, that an acknowledgment of the title of the mortgagor or of his right to redemption shall be given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming. It appears to be the law that any acknowledgment, which before the passing of the English Statute would have been sufficient, will satisfy the requirements of the Statute if it be given in writing to the mortgagor or to a person claiming his estate, or to the agent of such mortgagor or person—Fisher on Mortgages, 2nd ed., vol. i, 502, p. 288. Before the Statute was enacted it was held that an acknowledgment of the mortgage as a subsisting mortgage was an acknowledgment of the mortgagor's right to redeem ; and in a case [123] quoted by Lord Hardwicke it was held by Sir J. Jekyll that, where a testator described an estate in his will as my "mortgaged estate," it was a sufficient acknowledgment of

the mortgagor's right to redeem (1). This ruling appears never to have been overruled; it is quoted in Tudor's Leading Cases, vol. ii, 4th ed., 1065. We are not, indeed, bound by English cases, but we may usefully consult them.

With the exception that it requires the acknowledgment to be in writing, the law of limitation in this country, so far as it applies to the question before us, appears to be analogous to the English law as it was established by the practice of the Courts of Equity before the Statute above referred to was enacted. The law of British India does not require that the acknowledgment should be given to the mortgagor, but, in other respects, it follows the language of the English Statute and the practice of the Courts of Equity before that Statute was enacted. The acknowledgment must be in writing, signed by the mortgagee or a person claiming under him, and it must acknowledge the title of the mortgagor or his right to redeem. In the case before us the settlement officer had prepared the record-of-rights, a record which by law he was bound to prepare, showing the interests in the village of which he found persons in possession. From the records of preceding settlements he ascertained that the appellants, or rather their predecessors in title, had obtained possession in virtue of a mortgage, and he entered them accordingly in his record as mortgagees. To this record, for the purpose of certifying to its correctness, he obtained the signature of those whom he found in possession, and, amongst others, of the appellants. This appears to be a stronger case than that decided by Sir J. Jekyll. Here there is not a mere description of the estate as a mortgaged estate, but a subscription to a record purporting to show the extent of the rights which the persons in possession enjoyed. For this reason we hold the acknowledgment sufficient, and would dismiss the appeal with costs.

PEARSON, J.—There can be no doubt that the settlement record of 1841 does not contain an express acknowledgment of the title of any particular persons as owners of the estate in question in this [124] suit of their right of redemption, for the mortgagors or their representatives are not named. If, therefore, such an express acknowledgment be required by the terms of art. 148, sch. II. Act IX of 1871, the present suit, instituted in 1874 for the redemption of a mortgage alleged to have been made in 1811, is liable to be dismissed as barred by the law of limitation. I still adhere to the opinion intimated in my judgment of the 8th April last, that such an express acknowledgment is not required, and the acknowledgment of a subsisting mortgage tenure is by implication as acknowledgment of the title of an owner and of his right to redeem and sufficiently for all practical purposes complies with the terms of the law. It is not reasonable to suppose that any one would allow himself to be described as the mortgagee of a property of which the mortgage had ceased to be redeemable at law, and the names of the owners thereof had been lost to knowledge by lapse of time, without any mention of those circumstances. In the present case there are no grounds of supposing that in 1841 there was any doubt or dispute as to who were the owners, or whether they were entitled to redeem the property in suit. The addition of their names, though it would have completed the statement of the facts, was hardly necessary, and the omission of their names was presumably accidental. An acknowledgment of a mortgage tenure, not including the title of a mortgagor and of a right to redeem, appears to be meaningless, useless, and absurd. The main point is whether the tenure is that of a mortgagee;

(1) 3 Atkyn's Rep. 114.

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it can make no difference to the mortgagee whether the owner is A or B. If it be held that an entry describing C as mortgagee of a share acknowledged by C. would be an acknowledgment that would satisfy the requirements of the law, it cannot plausibly be contended that an entry describing C as mortgagee does not describe a subsisting mortgage tenure. But if there were any real doubt as to whether the acknowledgment implied in a man's description of himself as a mortgagee referred to a subsisting mortgage, or one which had ceased to be redeemable, the doubt might easily be removed by an enquiry as to whether the mortgage had or had not ceased to be redeemable at law at the date of the acknowledgment.

The view which I have taken as to what constitutes a sufficient acknowledgment is apparently not at variance with English law. [125] In p. 288, vol. i., Fisher's Law of Mortgage, it is stated that "any expression referring to the estate as mortgaged will be a sufficient acknowledgment." The description by a man of himself as the mortgagee of an estate is surely a reference to estate as mortgaged to him. In the case of *Stansfield* v. *Hobson* (1), cited in support of the doctrine, the reference to the estate, as one of which the mortgage was redeemable, did not express the name of the party entitled to redeem, which was ascertained by external evidence. This case establishes both the points for which I contend; first, that an acknowledgment of a mortgage tenure is by implication an acknowledgment of the title of an owner; and secondly, that other evidence may be admitted to show who is the person possessing that title to whom the acknowledgment referred. In that case the evidence indicating the owner may have been nearer at hand than in the present case; but that difference does not affect the principle that an acknowledgment of a redeemable mortgage may be connected by evidence with the person entitled to redeem it. On the other hand, it is observable that the acknowledgment in that case not only did not specify any particular person as the owner, but that it did not specify any particular property as the subject of the mortgage; and further, that it was apparently made after the lapse of the period of the limitation, when the right of redemption, if it had not been extinguished, could not be enforced at law. The acknowledgment, indeed, which was deemed sufficient to take the case out of the ordinary operation of the law of limitation was no more than an answer by the mortgagee to a proposal on behalf of the mortgagor for a meeting for the purpose of considering the matter of the debt, to the effect that, unless some one was prepared to pay the debt, a meeting would be useless. It was held that, by that answer, a right of redemption had been admitted; and the admission was supplemented by evidence which pointed out the mortgagor and the mortgaged property. In the present case the acknowledgment takes the form of a description by the defendants' ancestors of themselves as mortgagees of the property in question on the public and solemn occasion of a settlement, the mortgage not being known to have been irredeemable at law at the time, and a [126] clue to the names of the owners being found in the settlement records.

At p. 314 of Atkyn's Reports mention is made of a case in which Sir J. Jekyll decreed a redemption upon the circumstance of the person who was in possession of an estate originally in mortgage calling it by the name of the mortgaged estate in his will. This case supports my judgment not less than that of *Stansfield* v. *Hobson* above quoted.

(1) 3 De G. Mac. & G. 620=16 Beav. 256; 22 L.J. Ch. 657.

SPANKIE, J.—I am under the impression that my honorable colleagues take a different view of this case than I do. I, therefore, would simply say that I adhere to my former judgment. Nothing was stated at the hearing which shows me that my opinion was wrong, and I can add nothing to what I have already put on record.

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1 A. 126.

APPELLATE CIVIL.

Mr. Justice Pearson and Mr. Justice Turner.

CHUNNI (*Defendant*) v. THAKUR DAS AND OTHERS (*Plaintiffs*).*
[15th December, 1875.]

Mortgage—Condition against Alienation—Auction-purchaser.

A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defeasance of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance.

[**F.**, 1 A. 610; **R.**, 5 M. 184; A.W.N. (1890), 59; 17 C.L.J. 384 (387) = 17 Ind. Cas. 1 (3); **Expl.**, 4 A. 518.]

DALGANJAN mortgaged to the plaintiffs, by a deed dated the 24th November, 1870, a share in a certain village as security for the repayment of a loan made to him by the plaintiffs. The mortgage **[127]** deed contained a condition against alienation to the following effect :—"I will not transfer the mortgaged property to any one else until the principal sum together with interest is repaid. Should I transfer it the transfer shall be illegal." The mortgagor, under the terms of the deed, continued in possession of the property. On the 9th October, 1874, Dalganjan granted the defendant a "lease" (*katkina*) of his rights as zemindar and malguzar in the share for a term of 11 years from 1282 fasli (1874-75) to the end of the rabbi harvest of 1292 fasli at a fixed annual rent of Rs. 291 on these, amongst other, conditions—that the lessee should duly pay the Government revenue, instalment by instalment, together with the cesses, as also the annual rent, instalment by instalment—that no increase of reduction, during the term of the lease or at any settlement, in the Government revenue should affect the lessor—that the lessee should be liable for the carrying out of Government orders, and the expenses connected therewith—that while he held under the lease the lessee should keep the ryots satisfied—that during the term of the lease the lessee should not be at liberty to surrender the estate. The plaintiffs obtained a decree on the 5th December, 1874, for the sale of the mortgaged property in satisfaction of the mortgage-debt.

They instituted the present suit for the invalidation of the lease, alleging that it was granted at low rate of rent, in bad faith, with the object of frustrating the execution and satisfaction of their decree. The

* Special Appeal No. 1000 of 1875, from a decree of the Judge of Bareilly, dated the 3rd August, 1875, reversing a decree of the Subordinate Judge, dated the 23rd February, 1875.

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defendant Chunni pleaded that the plaintiffs had no cause of action against him, as he took the lease in good faith prior to the passing of the decree, and the lease in no way hindered them from enforcing their lien on the property.

The first Court dismissed the suit on the ground that there was nothing to show that the lease was granted in bad faith, and that the stipulation in the deed of mortgage against the transfer of the property did not prevent the mortgagor from granting a lease of it. It remarked that the plaintiffs might bring the property to sale notwithstanding the lease, and that their statement that the property would fetch a small price at an auction-sale in consequence of the lease was merely conjectural. On appeal by the plaintiffs they contended that the stipulation in the mortgage-deed rendered the [128] lease invalid, and that the lease would interfere with the auction-sale of the property, as no one would be willing to purchase it subject to the lease. The lower appellate Court held, with reference to a ruling (1) of the late Sudder Court that the lease was invalid, being a violation of the stipulation against alienation contained in the mortgage-deed.

On special appeal to the High Court by the defendant Chunni, it was contended on his behalf that the stipulation in the mortgage-deed was a mere personal covenant binding on the mortgagor, but which did not bind him, and which could not defeat his right to hold under the lease for the term it was granted, the lease being a *bona fide* lease; that it was not shown that the lease obstructed the rights of the mortgagee; and that the plaintiff's had no cause of action against him, the lease having been granted and taken in good faith.

The *Junior Government Pleader* Babu *Dwarka Nath Banerji*, for the appellant.

Mr. *Colvin* and Babu *Jogendro Nath*, for the respondents.

JUDGMENT

The judgment of the Court was as follows :—

The lease is not a lease merely for agricultural purposes, but a transfer (2) of the interest of the proprietor for a term of years. Is it a violation of the condition against alienation? It has been held [129] that such conditions are introduced to protect the lien created by the mortgage, and that a transfer made in contravention of the condition is not absolutely void, but voidable so far as it is in defeasance of the mortgagee's rights. In the present case the mortgagees have obtained a decree for the sale of the estate in satisfaction of the loan. The existence of the lease may induce purchasers to offer a less price of the property

(1) 8 S. D. A., N. W. P., 341. See another case of a lease—*Gossain Mungul Dass* v. *Rughoonath Sahoy*, 17 W. R. 560, and as to such conditions generally—See on the one hand *Heera Lal* v. *Rutchpal*, 6 S. D. A. N. W. P. 39; *Mithoo Beebee* v. *Madho Pershad*, 7 S. D. A. N. W. P. 614—and on the other, *Gungapershad Singh* v. *Beharee Lal*, S.D.A.L.P., 1857, p. 825, and the cases there cited. Where the transfer is made *bona fide* for the purpose of paying off the mortgage-debt, a condition not to alienate cannot operate to annul it, see *Dookhchore Rai* v. *Hajee Hidayut-ool lah*, H.C.R. N. W.P.F.B., 1866-1867. p. 7; but the debt must be at once discharged by the transfer, see *Mahomed Zahooll ah* v. *Banee Pershad*, H.C.R.N.W.P., 1869, p. 40. See also *Koondun Lal* v. *Wazeer Ali*, H.C.R.N.W.P., 1871, p. 205.

(2) As to the meaning of "transfer," when used in a *wajibularz*, see *Chuttur Mull* v. *Chettur Kishore Lall*, H.C.R.N.W.P., 1868, p. 396. In that case it was ruled that the mere transfer of property to the possession of a tenant for a term of years, who pays rent to the owner, would not fall within a prohibition not to "transfer." This refers presumably to a transfer for agricultural purposes.

than they would offer if they could obtain immediate possession. On the other hand, the lease may be an arrangement highly beneficial to the owner of the estate and thus a substantial increment to its value. The mortgagees will have obtained all that in equity they are entitled to, if the Court gives them a declaration that the lease will not be binding on a purchaser in execution of the decree, unless he desires its continuance. The decrees of the Courts below will be modified accordingly, but as the appeal substantially fails, we must order the appellant to bear the respondents' costs.

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1 A. 129.

CRIMINAL JURISDICTION.

(*Mr. Justice Oldfield.*)

QUEEN *v.* KULTARANSINGH. [14 January, 1876.]

Act X of 1872, *ss.* 468, 471, 472, 473—*Offence against Public—Justice—Offence in Contempt of Court—Prosecution—Procedure.*

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1871.

But notwithstanding this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged.

The case of *Sufatoollah*, petitioner (1), followed.

[Overr. 1 A. 625 (F.B.) ; Diss., 1 B. 311 (312) ; 1 B. 339.]

A SUIT was brought against Kultaran Singh for the recovery of arrears of rent, in which he produced a witness, Bhikam Singh, who gave evidence as to the payment of the rent by Kultaran Singh. This evidence, in the opinion of the Assistant Collector trying the suit, afforded ground for inquiry into a charge against Kultaran **[130]** Singh of an offence under s. 196 (using evidence known to be false of the Indian Penal Code, and against Bhikam Singh of one under s. 193 (giving false evidence). That officer, therefore, acting in the capacity of Assistant Magistrate, proceeded to try the accused persons on the charges abovementioned, and finding each guilty of the offence he was charged with, sentenced him to one year's rigorous imprisonment.

The High Court called for the record of the case on the petition of Kultaran Singh.

Mr. *Raikes*, for the petitioner, in support of the first ground of revision taken in the petition, *viz.*, that s. 473, Act X of 1872, barred the jurisdiction of the Assistant Collector, referred to *Reg.* v. *Navranbeg Dulabeg* (2). When express provision is made for the prosecution of offences mentioned in ss. 467, 468, 469, Act X of 1872, when they are committed before a Civil or Criminal Court, such provision should be followed in those cases, notwithstanding the Court may have power otherwise to deal with such offences. It appears from the language of s. 471 that the Court before which the offence is committed cannot itself try the accused person. It also appears from s. 472, which gives the Court power,

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(1) 22 W. R. Cr. 49 see however *Reg* v. *Navranbeg Dulabeg*, 10 B. H. C. R. 73 ; and 7 M. H. C. R. Rulings, xvii and xviii.

(2) 10 B.H.C.R. 73.

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when it is a Court of Session, to commit, or hold to bail and try, a person for any such offence committed before it, upon its own charge, only if the offence is exclusively triable by it. He referred to the case of *Sufatoollah*, petitioner (1).

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.—Section 471 does not bar the jurisdiction of a Court if otherwise competent. It cannot be said that a Court before which perjury is committed has any such interest in the prosecution as would render it undesirable that it should itself try the offence. The principle recognized by s. 473 does not therefore apply (1).

JUDGMENT.

OLDFIELD, J (who, after stating the facts, continued) :—It has been objected on the part of Kultaran Singh that the Assistant Magistrate was not competent to try and convict the petitioner, being the Court before which the said offence was committed. This objection was urged under ss. 471 and 473, Code of Criminal Procedure.

[131] The objection is not tenable under s. 473. That section is to the effect that, except as provided in ss. 435, 436, 472, no Court shall try any person for an offence committed in contempt of its own authority of a Court. It was not intended apparently to include such offences as those which are the subject of this trial, which, under the Indian Penal Code, are classed as offences against public justice, in contradistinction to offences in contempt of the Court's authority. The Indian Penal Code has separately classified those two classes of offences and it may be presumed that s. 473, Code of Criminal Procedure, has followed this classification, and that when it refers to offences in contempt of authority of a Court, it refers only to such as are so classed under the Indian Penal Code. As a matter of fact also, the classification of the Indian Penal Code has been followed in the Code of Criminal Procedure, and notably in s. 468 in regard to offences under s. 193, and which are classed as offences against public justice. This is the view of s. 473 taken by this Court in their answer dated the 14th September, 1874, to a reference in *Munni* and others made by the Judge of Agra, and was also held by the Calcutta Court in *Safatoollah* (1).

But it appears to me that, with reference to s. 471, the Assistant Magistrate was not competent to try the petitioner for an offence under s. 196, committed before him as Assistant Collector. Section 471 is as follows :—"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in ss. 467, 468, 469, such Court, after making such preliminary inquiry as may be necessary, may either commit the case itself or may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged."

This section seems to require that the Court shall either commit the case or send it to some other Magistrate, but not charge or try the person on its own charge. It appears to have been intended that the rule in s. 471 should have general application, with the one exception provided for in s. 472. That section gives an exceptional power to a Court of Sessions to charge and try on its own charge a person for an offence committed before it when the offence is triable by the Court of Session exclusively; and s. 472, [132] by thus exceptionally exempting a Court of

(1) 22 W. R. Cr. 49.

Session from the operation of the provisions of s. 471, shows what the general effect and aim of those provisions was intended to be. 1876 JAN. 14.

To permit the Court in the present case to charge and try for the offence committed before it would be interpreting s. 471 as giving the Court a higher power than is allowed to a Sessions Court. A similar view of the effect of s. 471 was taken by the Calcutta High Court in *Safatoollah* (1). CRIMINAL JURISDICTION.

The convictions and sentences passed on Bhikam Singh and Kultaran Singh are annulled, and the Court is directed either to commit them for trial or to send the case to another competent Magistrate for disposal. 1 A. 129.

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1 A. 132=10 Mad. Jur. 346=11 Mad. Jur. 346.

APPELLATE CIVIL.

Mr. Justice Spankie and Mr. Justice Oldfield.

SHAIKH EWAZ AND ANOTHER (*Decree-holders*) v. MOKUNA BIBI AND OTHERS (*Judgment-debtors*).* [11th February, 1876.]

Pre-emption—Conditional decree—" Final " judgment and decree.

The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period (2), and if the decree-holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree. *Sheo Pershad Lall* v. *Thakoor Rai* (3) approved.

When a direction contained in a decree referred to the time at which such decree should become *final, held* (the case being one in which a special appeal lay) that such decree does not become final on being affirmed by the lower appellate Court, but on the expiry of the period of special appeal, or, where such an appeal was instituted, when the decision of the lower appellate Court was affirmed by the High Court.

[F., 7 A. 107; 4 A.W.N. (1884) 224; R., 24 M. 449; D., 1 A. 293: 11 A. 346; 4 A.L J. 360; 5 A.L.J. 136=28 A.W.N. (1908) 13; 8 A.W.N. (1888) 4.]

THE plaintiffs in a suit to establish a right of pre-emption in respect of a share in a certain village, under and by virtue of a clause in the village administration-paper to the effect that no [133] share in the village should be sold or transferred in any way to a stranger unless it had been previously offered to and been refused by all the co-sharers, obtained a decree in the first Court on the 5th January, 1875, which declared their right to the possession of the share on the payment of Rs. 300 within 31 days from the date of the decree becoming final. An appeal to the lower appellate Court by the vendees, defendant, was dismissed on the 18th March, 1875, the decision of the first Court being affirmed, and a special appeal by them to the High Court was dismissed on the 27th August following, the lower appellate Court's decision being affirmed.

The decree-holder paid the amount of the purchase-money into Court on the 1st May, 1875, and prayed that possession of the property might be given them in execution of the decree.

Both the lower Courts refused execution of the decree on the ground that the decree-holders had failed to deposit the purchase money within

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* Miscellaneous Special Appeal No. 66 of 1875, from an order of the Judge of Azamgarh, dated the 24th July, 1875, affirming an order of the Munsif, dated the 1st May, 1875.

(1) 22 W.R. Cr. 49.

(2) *Contra* see *SyudAhsan Ali* v. *Sabookee Beebee*, 10 W.R. 53.

(3) N.W.P. H.C.R. (1868), 254.

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the time specified in the first Court's decree, holding that that decree became final on the 18th March, 1875, the date of the judgment and decree passed in appeal.

On special appeal to the High Court the decree-holders contended that the right of pre-emption decreed in their favour was not lost to them by reason of their failing to deposit the purchase-money within the time specified in the decree, and that the decree did not become final till the date of the decision of the special appeal.

Mr. *Mahmood*, for the appellants.

Lala *Lalta Parshad*, for the respondents.

JUDGMENT.

The judgment of the Court was as follows :—

The first plea hardly arises in the shape in which it has been thrown. But it has always been the practice of our Court in these Provinces to insist upon the payment of purchase-money in cases of the nature within the period prescribed by the Court. We are understood to follow the ruling of this Court marginally noted. There a pre-emptor obtained a decree from the first Court which provided a certain time within which the sum ascertained to be the purchase-money was to be deposited. The pre-emptor appealed against the amount fixed by [134] the Court but failed. He did not deposit the money within the fixed time, and the Judge declined to enlarge the time. It was held by this Court that the plaintiff, in appealing from the original decree, could not escape from the obligation which it imposed, and the lower appellate Court was not bound by law to insert in its decree any special direction concerning such deposit unless occasion called for it, although it was important to have done so. This ruling is not one exactly in point. But the principle laid down is the same. The Court was competent to make the direction it did as to the payment of the money, and if the decree-holder failed to comply with the obligation imposed on him by the decree, he would lose the benefit of it.

Sheo Pershad Lall v. Thakoor Rai (1).

As to the second plea, the decision referred to by the lower appellate Court (2) is not one in point, for the ruling there related to the question whether a plea of limitation could be heard for the first time after a remand-order on the merits had been carried out, when it had not been made the subject-matter of appeal at a previous stage. The words in the decision—"it appears to us that the judgment and decree, from which the ninety days are intended to be reckoned, are the final judgment and decree in the suit between the parties" (3)—might perhaps be misleading as to what is to be considered the final decision of the case in the suit before us. The words of the decree of the first Court are that the plaintiffs "shall make a deposit of Rs. 300 within 31 days from the date this (the Munsiff's) decision becomes final." In our opinion a decision cannot be said to become final until the time for the last appeal allowed has expired, or, if appealed, it has become final by the decree of the High Court, as the ultimate Court in the country. In the suit before us there was a special appeal allowable under certain circumstances, and the Rs. 300 were deposited before the time fixed for the presentation of a special appeal had expired. Indeed, the special appeal was subsequently admitted and ultimately dismissed on trial on the 27th August, 1875.

(1) N. W. P. H. C. R. (1868), 254.
(2) *Mirza Himmut Bahadoor v. Gobindo Panday*, 5 W. R. 91. (3) 5 W. R. 93.

Under this view of the case the order of both the Courts below is wrong. The appeal is decreed and the decision of the lower appellate Court reversed, and the case remanded to it under s. 351, Act VIII of 1859, for trial on the merits. Costs will abide the result.

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APPELLATE CIVIL.

1 A. 132 = 10 Mad. Jur. 346 = 11 Mad. Jur. 346.

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1 A. 135 (F.B.).

[135] BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

UDAI SINGH (*Plaintiff*) v. JAGAN NATH (*Defendant*).*
[25th February, 1876.]

Lambardar—Co-sharer—Profits—Revenue—Set-off.

Held SPANKIE, J., dissenting), that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharers, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment.

THIS was an appeal to the Full Bench, under cl. 10 of the Letters Patent, against a judgment of Pearson, J., from which Spankie, J., dissented.

The facts of the case which are material appear in the judgment of the learned Judges.

PEARSON, J.—The first plea in appeal appears to be valid. The defendant is the lambardar of the mahal of which the plaintiff is a co-sharer. The jama of the mahal was fixed by Mr. Lowe at Rs. 1,488-12-0. Mr. Currie reduced it to Rs. 1,275 from 1272 fasli. In 1278 fasli the Government disallowed the reduction, and directed the difference to be recovered for the previous six years. The amount was made good by the defendant in 1281 fasli, and it cannot be denied that he would be entitled, if he had paid it out of his own pocket, to recover from the plaintiff a sum proportionate to his share in the mahal. In the present suit the plaintiff claims Rs. 384-14-0 as arrears of profits due to him for 1278, 1279, and 1280 fasli. The defendant answers that he has paid the amount claimed to the Government in payment of the demand above mentioned, and that it is less than what is due from the plaintiff on that account. The lower Courts have held this defence to be insufficient. They think that he was not justified in applying in 1281 fasli profits which were due to plaintiff before that time, and without first calling on the plaintiff to pay his share of the Government demand; and that the proper course to be taken was to have brought a suit against the [136] plaintiff for his share of the Government demand, in the event of his refusing to pay it on demand.

The opinion of the lower Courts is not well-founded in reason or equity. When the defendant was required to pay to the Government an amount for which the plaintiff was jointly responsible, the former had in his hands a balance remaining out of the collections of 1278, 1279, and 1280—a balance which, after payment of the Government revenue and village expenses, would have been divisible as profits among the co-sharers of the mahal. But it was no breach of trust or breach of duty on his part

* Appeal under cl. 10 of the Letters Patent, No. 7 of 1875.

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to use that balance in paying the demand of Government for the arrears of revenue on account of the six years previous to 1278. There was nothing illegitimate in the course adopted by him; and it seems unreasonable to insist that he should have paid to his co-sharers the profits which would doubtless otherwise have been due to them, and that he should have paid the demand of the Government out of his own pocket, and sued them for contribution. For the moneys claimed he has accounted most satisfactorily, and it may well be presumed that they were reserved during the years to which the suit refers for the purpose to which they have been applied.

The answer made to the suit being good and sufficient, the suit should have been dismissed. The appeal is therefore decreed by reversal of the lower Courts' decrees with costs in all the Courts.

SPANKIE, J.—I am sorry that I cannot accept the proposed judgment of my honourable colleague.

The judgments of the lower Courts appear to me to be correct on the point regarding which I differ from Mr. Justice Pearson. In the present case the order for payment of the enhanced jama had been made in 1278 fasli (1), but it had not been complied with by the appellant, the lambardar, until February and March, 1874; and in case No. 368, which is a similar one to case No.369 now before me, the lambardar had not made his second payment until May, 1874— that is to say, not until after the institution of the suit. It is found in both cases that the defendant, appellant, had never called upon the plaintiffs to make good their quota of the enhanced jama from 1272 to 1278 fasli (2). Nor had he himself, as far as appears from **[137]** the record, ever paid their portion or any portion of the sum claimed by Government for those six years from his own pocket—the first payment made by him in this case being on the 27th October, 1873, *i. e.*, Katik, 1281 fasli.

Now the plaintiff, respondent, claims profits on account of the years 1278, 1279, and 1280 fasli from the defendant, the lambardar, *i. e.*, whatever is due to him after payment of the Government revenue and village expenses. There is no dispute that his quota of the Government revenue on Mr. Currie's jama has been paid for those years, and what he claims is the profits of the three years, after deducting the Government revenue and village expenses. The accounts for each year should be closed and audited annually, and any sum remaining after the satisfaction of the Government jama and village expenses should be made over to the shareholders, and until distributed may be regarded as being in the hands of the lambardar in trust for the shareholders. He is not at liberty to appropriate them for any other particular purpose without authority from the shareholders. In these years 1278, 1279, and 1280 fasli the defendant, as lambardar, had not himself made any extra payment to Government. If he desired to make his co-sharers responsible for their quota of arrears of Government revenue which he had to pay, or expected that he might have to pay, he might have sued them from the amount under the Rent Act, or he should have taken such other steps, as the Civil Court or Revenue laws permitted him to take, for the recovery of the money, after he had been compelled to pay in 1281 fasli the difference between the jama of 1272 and that of 1278 fasli as settled by the Government. But he was not, in my judgment, at liberty to claim, in answer to this suit, from the plaintiff his share of the profits of 1278, 1279, and 1280 fasli, as a set-off

(1) Sept. 1870—Sept. 1871.

(2) Sept. 1864—Sept. 1871.

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FULL BENCH.

1 A. 135 (F.B.).

(for it amounts to that), being his quota of the sum actually paid by the defendant on account of the revenue demanded by Government, and levied from him in 1281 fasli.

The Act under which the suit has been brought does not allow a set-off to be pleaded in any claim of this nature. The money which the plaintiff claims in this suit as due to him was withheld by the defendant, appellant, before he had been compelled to make any payment on account of the enhanced Government demand; **[138]** and I do not think that the share for which the plaintiff may be responsible can be deducted in this suit from the amount of profits due to him on account of the three years for which he has instituted his claim. (The learned Judge then proceeded to determine the remaining pleas in appeal, but so much of the judgment, for the purposes of this report, is immaterial.)

The Senior Government Pleader (Lala *Juala Parshad*), for the appellant—The lambardar can only deduct from the profits of a year the legitimate village expenses of that year. He is a trustee and agent for the co-sharers, and cannot dispose of the profits of a co-sharer accrued due to him without his consent. The respondent should bring a separate suit.

Pandit *Ajudhia Nath* (with him Babu *Oprokash Chandar*)—Multiplicity of suits is to be avoided. The respondent had the money in his hands, and paid it in satisfaction of the Government demand, which he was entitled to do. He should be allowed the payment.

OPINION.

STUART, C. J., and PEARSON, TURNER, and OLDFIELD, JJ., concurred in the following opinion :—

It appears that Mr. Currie as Collector allowed a reduction of the yearly revenue, subject, it may be presumed, to the sanction of Government. In 1278 fasli sanction was refused, and a demand was made on the respondent, the lambardar, who however did not pay the arrears due until 1281 fasli. Meanwhile he retained in his hands the profits of 1278 fasli, 1279 fasli, and 1280 fasli, and not improbably for the purpose of meeting the Government demand if pressed. In the suit out of which this appeal arises, the appellants, the pattidars, sue the lambardar for their profits of the years 1278, 1279, and 1280; and he pleads that, out of the sums collected in these years and remaining in his hands, he has paid the arrears of revenue above mentioned ; and the question which principally calls for decision in this appeal is whether he is or is not entitled to be allowed this payment. We are of opinion that he is The lambardar is, in this village, the agent of the co-sharers to make collections, and after payment of the revenue to divide the profits. An arrear of revenue was due to Government, and to discharge this arrear he was entitled to have recourse to the collections for the years 1278 **[139]** fasli, 1279 fasli, and 1280 fasli, remaining in his hands undivided. There is nothing in the revenue law which restricts a lambardar or other co-sharer, who may make collections, to discharge arrears of Government revenue out of the collections of the particular year in which the arrear may accrue. It would be at least inconvenient to hold that, having in his hands profits to meet the Government demand, the respondent, instead of applying these profits to the discharge of the demand, should be driven to have resort to a suit against each co-sharer.

SPANKIE, J.—I adhere on the opinion expressed in my judgment of the 8th June, 1875. Nothing that I have heard leads me to think that my view is incorrect.

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FEB. 19.

FULL BENCH.

1 A. 139 (F.B.) = 1 Mad. L R. 51.

1 A. 139 (F.B.) = 1 Mad. L.R. 51.

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

IN THE MATTER OF HARDEO. [19th February, 1876.]

Act X of 1872, *s.* 297—*High Court—Powers of revision—Judgment of acquittal.*

The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297, Act X of 1872. *Queen* v. *Bisheshar Pandey* (1) observed upon.

Per TURNER and SPANKIE, JJ.—Such powers can only be exercised where the judgment of acquittal has proceeded on an error of law and not where it has proceeded on an error of fact (2).

[Appl., 2 A. 336 (339) ; **R.**, 14 B. 331 (341) ; 2 M. 38 (39) = 2 Weir 567.**]**

HARDEO was tried by the Court of Session on a charge under s. 471 (using as genuine a forged document), Indian Penal Code, and was acquitted by that Court, in accordance with the opinion of the assessors, the Court remarking that, as there was "such a serious amount of doubt as to the offence charged and so little prospects of a substituted charge being established, the accused ought not to be convicted." An application was made to the High Court on behalf of the persons who had instituted proceedings against him praying that the record to the case might be called for, and a new trial ordered, on the ground that the facts **[140]** found by the Court of Sessions were sufficient to convict him of the offence charged against him.

The Court (Stuart, C.J.) made the following reference to the Full Bench :—

The question raised in this petition has already been determined in this Court in the case of *Queen* v. *Bisheshar Pandey* (1) before Mr. Justice Turner, who was of opinion that we had no power to disturb an acquittal save on the appeal of Government, and that therefore, I presume, a private prosecutor could not apply for *revision* of a judgment of acquittal : and there is also a ruling by Mr. Justice Markby of the Calcutta Court (3) to the same effect. I am inclined to think that these learned Judges are right, but the question is not without difficulty and doubt.

On the other hand, the powers of revision by this Court under s. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge ; and it might be argued to be impolitic and scarcely intended that, while the Government cannot only *appeal*, but, according to the judgments above referred to, can also apply for *revision*—and in all cases—a private prosecutor has no remedy by resort to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest

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(1) N.W.P.H.C.R., (1874), 357. (2) So held in a case of conviction—*Petition of Belilios*, 12 B.L.R. 249. As "to material error," see 12 B.L R. 253, foot-note.

(3) *Queen* v. *Hatu Khan*, 12 B.L.R. App. 22 = 21 W.R. Cr. 21. Also *Petition of Bagram*, 19 W.R. Cr. 52 ; *Okhoy Teli* v. *Modhoo Sheik*, 19 W.R. Cr. 55.

evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself.

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In the present case the private prosecutor pleads that "the facts found by the Sessions Judge were sufficient to convict the defendant under s. 471, if not of direct forgery." This is a question that appears to be covered by the terms of s. 297, and revision is not necessarily the same thing as an appeal. The object of s. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was [141] perhaps simply to allow the public prosecutor in such a case a re-hearing on the merits, without any desire to limit or curtail the powers of revision, whatever the extent of these may be. I refer the question to a Full Bench of the Court.

Mr. *Howard*, for petitioners, referred to *Queen* v. *Gora Chand Gopee*, (1).

Cur. adv. vult.

OPINIONS.

The following opinions were delivered by the Full Bench :—

PEARSON, J.—The question on which our opinion is asked I understand to be whether an acquittal precludes revision under s. 297, Act X of 1872 ; and my answer to the question is in the negative. The terms of that section empower the High Court in any case, either called for by itself or reported for orders, or coming to its knowledge, in which it appears that there has been a material error in any judicial proceeding of any Court subordinate to it, to pass such judgment, sentence or order thereon as it thinks fit.

There is nothing in these terms restricting the High Court's action in the exercise of the powers conferred upon it to cases in which persons have been convicted of an offence. On the contrary, it seems to me that the High Court is fully warranted by these terms in ordering a new trial of a person who has been acquitted by reason of some material error in a judicial proceeding of a subordinate Court. The provisions of s. 272 of the Code are quite distinct from those of s. 297 and do not militate with them. Whether in the particular case out of which this reference to the Full Bench has arisen, there has been any such material error in the proceedings of the lower Court as to call for revision is another question which we are not asked to decide.

TURNER, J.—In *Regina* v. *Bisheshar Pandey* (2) an application was made to me to admit for revision the proceedings in a Session trial, in which the Sessions Judge had acquitted a person accused of adultery on the ground that he was not satisfied with the evidence of his guilt and inclined to accept the evidence adduced by the accused in support of a plea of *alibi*, and the petitioner contended that the application ought to be admitted because the guilt of the [142] accused was proved by the admission of the woman who was at the same time on trial for abetment of the offence.

In refusing that application I inadvertently used language which warrants the conclusion that in no case of acquittal can this Court interfere as a Court of Revision. I am not prepared to maintain that view. Where there has been an acquittal on the merits, where an accused person has been acquitted because the Court by which he has been tried holds the evidence insufficient to prove his guilt beyond reasonable doubt, I am still of opinion that this Court cannot interfere as a Court of Revision. But

(1) 1 Ind. Jur. N.S. 177 = 5 W.R. Cr. 45. (2) N.W.P. H.C.R. (1874), 357.

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where the acquittal has been brought about by a material error in the proceeding, and by material error I understand such an error as makes the proceeding bad in law, then I hold it is competent for this Court to interfere. Now it is not only not an error on the part of the Court, but it is the duty of the Court to determine whether evidence offered is in its judgment reliable or not. Consequently, although this Court might be disposed to give credit to evidence distrusted by a subordinate Court, it could not interfere on this ground as constituting a material error in a judicial proceeding. On the other hand, if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and therefore acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision.

It had been suggested that the first clause of s. 297 is controlled by the succeeding clauses. Although some of the cases mentioned in these clauses might be held to constitute material error in a judicial proceeding and so to fall within the purview of the first clause, I have already in other cases expressed my opinion that the first clause is not controlled by the succeeding clauses.

There remains the question whether, in the case referred, a private complainant may set the Court in motion. In my judgment in this as in other cases in which the Court has a discretionary power to call for cases for revision it is competent to the Court to allow a private person to move it to exercise its powers.

[143] SPANKIE, J.—The prayer of the petition which gave rise to the reference is that the records of the case may be called for, and an order for a new trial be given—and the reason assigned for the prayer is that the facts found by the Sessions Judge were sufficient to convict the defendant under s. 471, if not of direct forgery.

I do not quite gather from the order of reference what we are asked to determine. If we are asked whether the Court could entertain the petition under s. 297 so far as to send for the record, I would say that it could be sent for if the petition discloses any material error in the proceedings of the Court below. But it seems to me that nothing of the kind is disclosed by the petition in the case brought to our notice. The petitioner expresses his opinion that the facts found on the evidence by the Sessions Judge were sufficient to convict the defendant—but no error or defect either in the charge or in the proceedings on or before trial, on account of the improper admission or rejection of any evidence, has been shown, whereby there has been a failure of justice affecting the due conduct of the prosecution. The proceedings of the Court have been regular, but the Judge on the evidence finds that the charge has not been established. He therefore acquits the prisoner. There is no appeal allowed by law to a private prosecutor from an order of acquittal—and in my opinion there is no power given to this Court to revise an order of acquittal on the facts found on the evidence. Any revision must proceed on the ground of a material error in some judicial proceeding. When no such errors such as those referred to above are pointed out, unless there is something that could be considered to be a material error in law, all interference under the first paragraph of s. 297 seems to be barred. It will further be observed that though where the material error is such that the Court is empowered to pass such judgment, sentence or order as it thinks fit, and though these words seem to be almost unlimited in their range, still there does appear

to be some limit put to these cases in which a new trial may be ordered. When an accused person has been improperly discharged there is power to order commitment, there is power to alter a finding and sentence, and power to annul conviction, power to annul improper and to pass a proper sentence, and power in certain cases, of which this [144] before us is not one, to annul the trial and order a new trial before a competent Court. But there is no express power given to order a new trial in the case of an acquittal on the ground that the facts found might warrant conviction. From these considerations I come to the conclusion that, as there is no appeal to a private prosecutor in the case of an acquittal, so there can be no revision by the Court merely by the finding on the evidence, and if there is a revision at all, it must be on some purely material error (in law) in the proceedings.

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OLDFIELD, J.—In my opinion it was not the intention of the legislature that the power of revision given to this Court by the first paragraph in s. 297, Criminal Procedure Code, to pass such judgment, or sentence or order as it thinks fit, when a material error in any judicial proceeding of a Court in any case has come to its knowledge, should only be exercised in the particular instances of error and in the particular manner given in the succeeding paragraph of s. 297. I apprehend that those paragraphs are merely illustrative of the operation of the law in particular instances, and that this Court can, and should, revise any material error in a judicial proceeding coming to its knowledge, by passing such judgment, sentence or order as it thinks fit.

In this view of the law the fact that an accused person has been acquitted on trial will not operate to take away the general power of revision, when there has been a material error in any judicial proceeding in the case. The law by s. 272, Criminal Procedure Code, allows the High Court to entertain an appeal from judgments of acquittal at the instance of the Local Government, and since it can interfere in cases of acquittal on appeal, I conclude it can *a fortiori* under its power of revision; and without such a power in this Court there would be danger of miscarriage of justice. Such too was the view of the law under the old Criminal Procedure Code taken in *Queen* v. *Gora Chand Gopee* (1) by the Calcutta Court, Peacock, C. J., Trevor and Norman, JJ.

I am not called upon to express an opinion whether there has been a material error in the case within the meaning of s. 297.

ORDER.

[145] STUART, C.J.—This case has come back from the Full Bench with the opinions of the Judges, and it is now to be disposed of by me as the referring Judge.

The majority of the Court, including myself, hold generally that we have and may exercise in such a case as the present the revisional power conferred by the first general substantive enactment of s. 297 of the Criminal Procedure Code. Mr. Justice Spankie is of a different opinion, holding that, as there is no appeal to a private prosecutor in the case of an acquittal, there can be no revision as here claimed.

Some of my colleagues, however, do not appear fully to have apprehended my reference as I intended to put it, and if I could have anticipated their difficulty I would have endeavoured to have put the question referred in clearer terms than I have used. But, looking at the

(1) 1 Ind. Jur. N. S. 177 = 5 W. R. Cr. 45.

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case in the light in which its mere statement would be at once understood by the legal profession at home, it did not occur to me to be more precise, but let me here explain myself more clearly by a brief reference to the opinions of my colleagues. Mr. Justice Turner comes nearer my own views of the case in the sense I have alluded to, when he expresses himself favourably as regards our revisional power in all cases where there is error in law, adding that, "if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and consequently acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision—his meaning, I presume, being that, if the subordinate Court acquitted from an ignorant conception of the legal insufficiency of the facts, this Court could interfere. On the other hand, Pearson, Spankie, and Oldfield, JJ., although differing in opinion as to our powers of revision in cases of acquittal, do not appear to have considered that legal error or material error was shown in the reference, and that it had yet to be ascertained. Mr. Justice Spankie in such a case as this is against any revision on our part at all, while I suppose the meaning of the opinion of Pearson **[146]** and Oldfield, JJ., is that we may send for the record and then see what the error, if any, was.

But there was a question preliminary to such an order which I intended should be first entertained and decided, *viz.*, whether the petition before us shows, *on the face of it*, a case which we can entertain at all, in other words, assuming the statement in the petition to be true, does it on its face show legal error? This is a question that lies on the threshold of the case, and must be first determined before we even admit the application, much more before we make any order for the record. The Sessions Judge acquitted the accused, and it is alleged by the petitioner that not merely the facts, but the facts found by the Sessions Judge himself, were sufficient to convict. Now does such a statement show, or does it not show, *on the face of it*, legal or material error? There is here evidently the same question that is raised, the same legal or material error that is intended by, for example, the demurrer to an indictment at home, and legally demonstrated when well taken as a plea—for I think any one acquainted with the principle of the English demurrer in criminal pleading must perceive at once that the principle here sought to be applied is analogous.

Such was the reference I intended, and the question involved appeared to me to be a very simple one, and sufficient to raise the question and enable us to come to a decision as to the powers of revision given to High Courts in all cases. It was occasioned not only by the consideration I had given to the powers of this Court under the Criminal Procedure Code, but also by the judgments alluded to in my order of reference. No prosecutor other than the Government can appeal against a judgment of acquittal. This power, however, is expressly given to the Government by s. 272 of the Criminal Procedure Code. Such an appeal, I take it, is an appeal *on the merits* of the case, that is, an appeal on the ground that the trial in the Court below has miscarried by the reason of the Judge or Magistrate not having sufficiently weighed or considered the evidence, and that there has been an acquittal, whereas there ought to have been a conviction. Such is the appeal which in the case of an acquittal the

Government can make. A private prosecutor, however, has no such power.

[147] But, although a private prosecutor has no such power of appeal against a judgment of acquittal on the merits, can he apply to this Court for *revision* under s. 297 of the Criminal Procedure Code; or, in other words, is insufficiency of facts to support a conviction such a legal error, on the face of the acquitting judgment, or otherwise such a revisional question, as can be entertained under s. 297?

In the Calcutta case above referred to, *Queen* v. *Hatu Khan* (1) it was stated that the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor (two of them at least were present at the trial), and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Indian Penal Code. The Magistrate, however, being of opinion that such a judgment was illegal, reported the case for orders to the High Court of Calcutta, and it came on for hearing before Markby and Birch, JJ., the judgment of the Court being delivered by Mr. Justice Markby, who said:—"We do not think that we have power to do what the officiating Magistrate asks, namely, to set aside the acquittal of the prisoner, and to direct a retrial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged, we may order him to be tried, or to be committed for trial, under the second clause of s. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that case." The case (2) which came before Mr. Justice Turner in this Court is scarcely in point. It was one in which the Sessions Judge had acquitted the prisoner, one Bisheshar Pandey, who was charged under s. 497, Indian Penal Code (adultery), and 498 (enticing, or taking away or detaining with a criminal intent, a married woman, and two other persons, Balak and Mussamut Bhagia, of abetment of the offences, and the private prosecutor presented a petition to this Court in which it was objected that "the acquittal was bad in law, the statement of **[148]** Mussamut Bhagia being sufficient to establish the offences charged against the accused." Such an objection scarcely shows an error in law. It would rather appear to have been an error or mistake on the part of the Judge in not giving due effect to the evidence, and that therefore the petition was really an appeal on the merits, which of course could not be entertained. But the petition was entitled in revision, and it suggested that the acquittal was "bad in law" for the reasons stated, and the case was argued before my learned colleague, as one in revision, the counsel who appeared against the petition referring to the judgment of Mr. Justice Markby in the Calcutta case (1). In the order passed by Mr. Justice Turner it was stated that the reasons for the acquittal were not obvious, and it then proceeded:—"However, there has been an acquittal, and, as the learned counsel who appears for the accused in this Court contends, this Court has no power to disturb an acquittal save on the appeal of Government. The provisions of s. 297 only permit the Court to interfere and order a new trial when an accused person has been

(1) 12 B. L. R. App. 22. (2) H. C. R. N. W. P. (1874) p. 357.

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discharged without being put on his trial." The judgment of my honourable and learned colleague is so reported, but from the opinion he has recorded in the present case I am glad not to be driven to the conclusion that he necessarily holds against our power to revise.

Respecting, however, the opinion I have quoted of Mr. Justice Turner, and the judgment of Mr. Justice Markby in the Calcutta case (1), I stated in my order of reference that I was inclined to think that these learned Judges were right, but that the question was not without difficulty and doubt, suggesting at the same time considerations in favour of the remedy sought in the case before us I pointed out that "the powers of revision by this Court under s. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government can not only *appeal*, but, according to the judgments above referred to, can also apply for revision —and in all cases—a private pro-[149] secutor has no remedy by report to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself," and that the right to present such a petition "appears to be covered by the terms of s. 297 and revision is not necessarily the same thing as an appeal. The object of s. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was perhaps simply to allow the public prosecutor in such a case a re-hearing on the merits, without any desire to limit or curtail the powers of revision whatever the extent of these may be." And having now fully considered the question, I have formed the opinion very clearly, first, that a private prosecutor who can show on the face of his petition a proper case for revision of a judgment of acquittal is entitled to have it entertained under s. 297 of the Criminal Procedure Code and to an order on it for a new trial or otherwise as to this Court in such a case might seem proper, and secondly, that, inasmuch as the petition in the present case states that the facts found by the Sessions Judge were sufficient to convict, the petition was a petition in revision which the private prosecutor was entitled to present, and that her prayer that the records of the case be called for in order to consider the suggestion for a new trial should be granted.

So far, therefore, I must qualify the concurrence I expressed in favour of the ruling at least of Mr. Justice Markby (1). According to the report of the procedure in the lower Court in the case before that learned Judge and Mr. Justice Birch, I think they ought to have entertained the application and to have ordered a new trial; and I am clearly of opinion that the High Court has the power which these Judges appear to repudiate. In the other case in this Court my learned colleague Mr. Justice Turner appears to have considered, and, as I have already observed, correctly, that the case before him was really one of appeal on the evidence; but when he goes on to state that "the provisions of s. 297 only permit the Court to interfere and order a [150] new trial when an accused person has been discharged without being put on his trial," I must remark that it does not necessarily follow that there is no course open to a private prosecutor, or for

(1) 12 B.L.R. App. 22.

that matter to any prosecutor, public or private, under s. 297, who complains of an illegal acquittal after trial.

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But there is a question of considerable importance which was referred to at the hearing of this case, and as I have formed an opinion of my own of the subject, I desire to express it. The question is this, whether the first substantive portion of s. 297 is complete in itself, giving the High Court the full general powers of revision thereby appearing to be conferred, and that the paragraphs which follow this general portion of the section are to be considered merely as examples or illustrations in the way of express enactment, or whether the first part of this section is to be considered as merely introductory to the particular provisions which follow in the succeeding enactments, and that these particular provisions contain all the powers given to the High Court? Now on this subject I am clearly of opinion that the first part of s. 297 is not merely introductory to the particular enactments which follow, but that it is, on the contrary, a substantive and complete enactment in itself, without any necessary reference to the clauses which follow ; and of course the powers thus given to the High Court are large and full, if not unlimited.

It occurs to me to add that, in my opinion, s. 272 giving the Government the power of appeal against a judgment of acquittal did not affect or interfere with, much less take away, any rights or remedies competent to prosecutors, public or private under s. 297—that s. 272 was simply an addition to the provisions of the Code of Criminal Procedure, and that before it was passed prosecutors could avail themselves of the revisional powers of this Court, whether in the case of acquittal or otherwise, and that they can do so still.

As regards, therefore, the question of our powers in the case before us and the sufficiency of that case in law, I am of opinion that the petition ought to be admitted and entertained, and I admit it accordingly as an application that may be entertained and disposed of under s. 297 of the Criminal Procedure Code, and I direct the records to be sent for and notice to issue to the other side.

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1 A. 151 (F.B.).

[151] BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield*).

QUEEN *v.* THAKUR PARSHAD. [16th February, 1876.]

Act X of 1872, *s.* 390—*Convicted person—Bail—Sessions Court.*

The Court of Session has no power, under s. 390, Act X of 1872, to admit a convicted person to bail (1), a *convicted person* not being an *accused person* within the meaning of that section.

[Appl., 17 B. 334 (341).]

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(1) So held by Glover and Romesh Chunder Mitter, JJ. in *Queen* v. *Ram Ruttoh Mookerjee*, 24 W. R. Cr. 8 and in *Queen* v. *Kanhai Shahu*, 23 W. R. Cr. at p. 42. See also *Queen* v. *Mahendranarayan Banghabhushan*, 1 B. L. R. A. Cr. 7 in which Loch and Golver, JJ., held that, under s. 436, Act XXV of 1861, the law then in force, in which the term *accused person* was also used, the Court of Session had no power to admit a *convicted person* to bail.

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THIS was a reference to the Full Bendh by Stuart, C. J., arising out of the following facts :—

The Magistrate trying an offence mentioned in s. 222, Act X of 1872, in a summary way, sentenced the offenders, on conviction, to one month's rigorous imprisonment each. There was no appeal in the case under the provisions of ss. 273, 274, Act X of 1872. On the application of the convicted persons the Court of Session called for the record of the case, under the provisions of s. 296 of that Act, and at the same time directed the Magistrate to admit them to bail pending its decision as to the legality of their conviction. This order purported to be made under s. 390, Act X of 1872. The receipt of the order by the Magistrate gave rise to certain correspondence, which it is immaterial for the purposes of this report to notice, between that officer and the Court of Session as to the legality of the order. This correspondence the Court of Session submitted to the High Court for orders.

The main question involved in the reference to the Full Bench was whether the Court of Session was competent to make the order directing the admission of the convicted persons to bail under s. 390, Act X of 1872.

The order of reference by Stuart, C. J., so far as it is material for the purposes of this report, was as follows :—

That section (390) provides that " the Court of Session may, in any case whether there be an appeal on conviction or not, direct [152] that the accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced." This, it was argued, meant " whether there be *allowed by law* an appeal on conviction or *not allowed by law*." In connection with this view, however, it must be remembered that the Sessions Judge has no power under s. 297 of the Code of Criminal Procedure, or otherwise, to revise the proceedings of Criminal Courts subordinate to him, and that, in the case of an appeal not allowed by law, an application to him to admit to bail would be unmeaning and futile. If, on the other hand, the true meaning of the section is " whether there be an appeal *entered or taken* on conviction, or *not entered or taken*," then the power of the Judge would appear to be confined to appealable convictions, and not to extend to cases, like the present, where there isno appeal, the Judge at the same time having no power of revision.

Mr. *Raikes*, for the convicted persons.—The terms of s. 390 are purposely large. [TURNER, J.—It seems to me that the use of the words " accused person " in the section is sufficient to show that the Court of Session cannot admit a " convicted person" to bail under it.] The terms are synonymous, the words " accused person " are used in the sense of " convicted person " in ss. 283, 297, of the Code. Section 281 and s. 390 must be read together. The first gives the Court of Session as an appellate Court power to admit to bail, the second gives it a general power. [TURNER, J.—If s. 390 gives the Court of Session a general power, s. 281 appears unnecessary as far as that Court is concerned.] [OLDFIELD, J.—Your construction of s. 390 gives the Court of Session a greater power than the High Court as a Court of Revision possesses.] The section refers to cases where the Court of Session is proceeding under s. 296. Suppose this case had not been tried in this district but in a remote district, and the Court of Session had determined to report the case for the orders of the High Court, being satisfied that the conviction was illegal. In such a case it would be most desirable for the Court of Session to have the power of admitting the convicted persons to bail, pending the

orders of the High Court. [PEARSON, J.—Referred to the heading of Part ix of the Code.] 1876 FEB. 16.

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OPINIONS. 1 A. 151 (F.B.).

[153] The following opinions were delivered by the Full Bench :—

PEARSON, J.—The question upon which I understand that the opinion of the Full Bench is required is whether the Court of Session at Allahabad was warranted by the terms of s. 390, Act X of 1872, in directing the Magistrate to admit to bail a person who had been convicted and sentenced to one month's imprisonment under s. 352, Indian Penal Code. My answer to that question is in the negative. Section 390 declares that " the Court of Session may in any case, whether there be an appeal on conviction or not, direct that an *accused* person shall be admitted to bail." The section occurs in a part of the Code which prescribes procedure incidental to enquiry and trial; and it is thus evident that an accused person is one against whom an accusation is the subject of inquiry and trial and not a *convicted* person. That this is so further appears from the context, if s. 390 be read in connection with the preceding and following section. By " any case" is meant only any case the subject of enquiry or trial before a Magistrate, whether or not, in the event of a conviction, an appeal would lie from the Magistrate's sentence or not. The section does not refer to cases in which the Court of Session is proceeding under s. 296 of the Procedure Code.

TURNER, J.—Reading the terms of s. 390 by themselves, the natural construction appears to be that in all cases, both in those which resulting in a conviction, would not be appealable to the Sessions Judge, and in those which, resulting in a conviction, would not be so appealable, a Court of Session has power to admit to bail an accused person, that is to say, a person charged, but not as yet convicted of an offence, or to reduce the bail required by a Magistrate.

It may be dangerous to draw an inference as to the proper construction of this section from the place it occupies in the Code, because at the conclusion of the chapter we find s. 399 applying to all cases in which bail may be taken except those therein specially excepted. The proper construction of s. 190 rests on the meaning to be given to the word " accused." In its ordinary sense it is most properly applied to persons against whom a charge is made, and it is opposed to the term " convicted." But the learned counsel for the petitioner contends that, in other parts of the Code, we find the **[154]** term " accused " applied to person convicted—to which it appears a reasonable answer that, in those places, as for instance in ss. 283 and 297, it is apparent from the context that the term is used in a particular sense, whereas in s. 390 there is nothing in the context to affect its ordinary meaning. It must, therefore, be held that the provisions of s. 390 do not empower the Sessions Judge to order the Magistrate to admit to bail a person who has been convicted. Of course, as an appellate Court, a Sessions Judge has power on or after the admission of the appeal to admit the convicted appellant to bail, but in the case out of which this reference has arisen no appeal lay to the Sessions Court.

SPANKIE, J.—On the question as to the legality of the order, there can be no doubt, I think, that, if made under s. 390 of the Criminal Procedure Code, it was illegal. The section is found in Part IX of the Code, which refers to procedure incidental to inquiry and trial. Section 388

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directs when bail shall be taken when any person is accused before a Magistrate; s. 389 directs when it shall not be taken in non-bailable offences, and when it may be taken. Under those sections it is the Magistrate who orders bail. Section 390 empowers the Sessions Court in any case, whether appealable to itself or not so appealable, either to admit to trial or to reduce the amount of bail ordered by the Magistrate. But the power given is to be exercised before conviction is had, and it may be exercised in all cases and without exception.

OLDFIELD, J.—The Judge's order directing the Magistrate to release the prisoners on bail is, in my opinion, illegal. The case not being appealable, the Judge could not act under s. 281, Criminal Procedure Code, as an appellate Court and admit to bail, and the power given by s. 390, Criminal Procedure Code, appears to me to refer to the procedure incidental to inquiry and trial, and to allow the Judge in any case to admit an accused person to bail at any time during the trial, but not after conviction. Section 390 should be read with the preceding section.

To interpret s. 390 so as to permit the Judge to take bail without restriction, in any case after conviction, would be to allow the Judge a higher power in admitting to bail than is given to the High Court as a Court of Revision, since s. 297, Criminal Procedure [155] Code, limits that Court's power to take bail in cases coming before it as a Court of Revision to cases where the offence for which a person has been imprisoned is bailable.

STUART, C. J.—This reference has come back to me from the Full Bench with the opinions of the consulted Judges. They all consider that the Judge's order, purporting to direct the Assistant Magistrate to release the prisoners on bail, was illegal, and I am clearly of the same opinion. They very properly direct attention to the circumstance that s. 390 is to be found under Part ix of the code, which is entitled as "Procedure incidental to inquiry and trial;" and, keeping that consideration in view in construing the section, I am of opinion that it only applies to the case of an "accused person," that is, to the case of a person accused of an offence, the conviction of which is appealable or not appealable, and that it was not intended to apply to such a case as the present, where there has been a conviction, final and complete. Such I think is the true meaning of the section. Any other reading of it, which would take it out of the category indicated by the heading of "Procedure incidental to inquiry and trial," would involve the necessity of holding that an "accused person" in the section was synonymous with a convicted person, and that therefore the compiler of the Code had made a mistake in placing it under the heading of "Procedure incidental to inquiry and trial." The Sessions Judge, I think, must be understood to be of this mistaken opinion, for it appears from the correspondence which accompanies his letter of reference and by his directing Mr. Pears' attention to s. 390 of the Criminal Procedure Code, that his idea was that he could admit to bail in *any case after trial*, whether there had been a conviction or not. We cannot, however, put such a construction on the terms of the section, a construction entirely repugnant to them and to the whole context. "An accused person" simply means an accused person, and nothing more, and this s. 390 was only intended for a person in that position, and who on conviction would appeal or not.

But in either view of the section the Judge's order in the present case ought not to have been made. If s. 390 does not apply, as I hold it does not, there is no other provision of the Code which [156] empowered

the Sessions Judge to admit to bail, and the order was altogether *ultra vires*. But if, on the other hand, it could be shown that the section does apply to such a case as this, the order was equally invalid, for (as I have already pointed out in my referring order) the Judge having no revisional authority, his admitting these convicts to bail was inoperative for any judicial purpose or effect and therefore futile.

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1 A. 156.

APPELLATE CIVIL.

Mr. Justice Spankie, and Mr. Justice Oldfield.

HUSSAINI BIBI (*Defendant*) *v.* MOHSIN KHAN (*Plaintiff*). [13th March, 1876.]

Act VIII of 1859, *s.* 327—*Arbitration—Award—Appeal.*

The plaintiff sought to file and to enforce a private award under the provisions of s. 327, Act VIII of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after inquiry into the matter, overruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of ch. VI, Act VIII of 1859. *Held*, that the order was not open to appeal as it did not operate as a decree (1). *Jokhun Rai* v. *Bucho Rai* (2) followed.

Per SPANKIE, J.—Section 327 intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made. Where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award.

[**R.**, 17 A. 21 ; **Disappr.**, 84 P.R. 1901 (**F.B.**) = 112 P.L.R. 1901 ; **D.**, 3 A. 427.]

IN this case there had been a reference to arbitration without the intervention of a Court, and an award had been made. The plaintiff applied under s. 327, Act VIII of 1859, that the award **[157]** might be filed in Court and enforced. The original defendant, who was represented after his death by his widow, denied referring the matter decided by the award to arbitration, or giving his consent to the reference, or that he had any knowledge of the arbitration proceedings.

The first Court framed the following issue for determination, *viz.*, " Whether the agreement to refer was made by an agent of the original defendant duly empowered in that behalf with the original defendant's knowledge and consent, and the award made in pursuance of that agreement should be enforced or not. After taking evidence both oral and documentary, it decided that the reference was made by an authorized agent of the original defendant, with his knowledge and consent and that the award must be filed. It concluded its decision in these terms" :—

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(1) *Contra* see *Lakshman Shivaji* v. *Rama Esu*, 8 B.H.C.R.A.C. 17. As to whether an appeal lies from a decree enforcing the award, see *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee*, 8 B.L.R. 315 = 15 W.R.F.B. 9.

(2) N.W.P. H.C.R. (1868), 353—The Court also held in that case that the order rejecting an application for the filing of an award was not appealable. The Calcutta High Court has also held so—See *Chintamun Singh* v. *Roopa Kooer*, 6 W.R. Mis. 83 ; *Digamburee Dassee* v. *Poornanund Dey*, 7 W.R. 401 ; *Raj Kumar Singh* v. *Kali Charan Singh*, 2 B.L.R. App. 20 = 11 W.R. 58 ; *Roy Priyanath Chowdhry* v. *Prasana Chandra Roy Chowdhry*, 2 B.L.R. 249. So also the Bombay High Court—see *Vyankatish Ramchandra Jogekar* v. *Balajeerao*, 1 B.H.C.R. 184 ; *Petition of Balkrishna Bhaskar Gupte*, 2 B.H.C.R. 96.

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I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Act VIII of 1859, with costs and interest at six per cent. to be paid by the answering defendant.

The defendant appealed, taking the same objections to the plaintiff's claim as were taken in the first Court. The lower Court of appeal relying on the case of *Jokhun Rai* v. *Bucho Rai* (1) held that there was no appeal.

Against this decision the defendant filed a special appeal to the High Court.

Mr. *Mahmood* (with him Mr. *Conlan*), for the appellant, contended that the order of the first Court was appealable. It is unjust and inexpedient that the judgment of the first Court deciding that the original defendant was a party to the award should be final. He referred to *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (2); and *Hurlodhar Sungiree* v. *Ganesh Santhal* (3).

Mr. *Colvin* (with him Munshi *Hanuman Parshad*), for the respondent, contended that there was no appeal. He referred to *Jokhun Rai* v. *Bucho Rai* (1); *Bhugwan* v. *Purmishree* (4) and *Sarboree Kanto Bhattacharjee* v. *Anadya Kanto Bhattacharjee* (5).

JUDGMENT.

[158] SPANKIE, J.—The prayer of the plaintiff in this case was to be allowed to file a private award of arbitrators in Court and for the enforcement of the award. The defendant (since deceased) denied that he had authorized his agent to refer any matter to arbitration and repudiated the whole transaction. The Munsif after going into the merits admitted the award in the following terms :—"I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Civil Procedure Code, with costs and interest at 6 per cent. to be paid by the answering defendant (the widow of the original defendant deceased)." It does not appear that he made any decree enforcing the award under the provisions of ch. VI of the Act.

The defendant appealed. The Subordinate Judge treating the order as a judgment under s. 325 of Act VIII of 1859 held that it was final, and that there was no appeal. The Subordinate Judge cites as his authority the Full Bench decision of this Court in the case of *Jokhun Rai* (1) and others, appellants.

It is contended in special appeal that as it was urged in both the lower Courts that the original defendant was no party to the award the Subordinate Judge was bound to determine whether this was so or not.

For respondents the Full Bench ruling of this Court (1) and other precedents of the Presidency Court are cited as ruling that there was no appeal.

I am of opinion that we are bound by the decision of the Full Bench of this Court (1), and that we must hold that there is no appeal from the order of the Munsif allowing an award to be filed. At the same time it appears to me that s. 327 intended to provide for those cases only in which a reference to arbitration is admitted and in which an award has been made. Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself

(1) N.W.P.H.C.R., (1868) 353.
(2) 8 B.L.R. 315=15 W.R. F.B. 9.
(3) 6 W.R. 60.
(4) N.W.PH.C.R.., (1873) 179.
(5) 12 B.L.R. App. 10.

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and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award. [159] Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May 1871 (1). But the Full Bench judgment of this Court (2) must, I think, be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

OLDFIELD, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court (2), and must hold that the order of the Munsif under s. 327, Act VIII of 1859, for filing the award, does not operate as a decree, and is not appealable.

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1 A. 159 (F.B.).

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr Justice Turner, and Mr. Justice Oldfield.

KALI PARSHAD (*Plaintiff*) *v.* RAM CHARAN (*Defendant*).
[30th April, 1876.]

Hindu Law—Undivided Hindu family—Ancestral immoveable property—Partition.

In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the lifetime, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family.

[R., 10 B. 528; 16 B. 29; 5 C. 148 (P.C.)=4 C.L.R. 226=6 I.A. 88=4 Sar. P.C.J. 1; 4 M.L.T. 288.]

THE facts of the case, so far as they are material for the purposes of this report, were as follows :—

The plaintiff, his father the defendant, and his brother Lachman Pershad, were members of an undivided Hindu family. The plaintiff claimed to establish his right to a one-third share of certain shares in certain villages forming the ancestral immoveable property of the family, and to obtain possession of the same. He alleged that he was excluded from inheritance, inasmuch as the defendant, describing him as an out-caste, had made over possession of a portion of the property to Lachman Parshad and a portion to the wife of a deceased son. The defendant pleaded that, under Hindu law, such a claim by a son in the lifetime of his father was invalid. The Court of first instance overruled this plea and gave the plaintiff a decree. The lower appellate Court held that the plaintiff was only entitled, under Hindu law, to a one-fourth share of the [160] ancestral property, and that possession of the share could not be given to him in his father's lifetime (3).

The plaintiff appealed to the High Court on the ground that, under Hindu law, he was entitled to a one-third share of the property, and to possession of it.

The Court (Stuart, C. J., and Oldfield, J.) referred the following question to a Full Bench, *viz.*,—

"Whether, under Hindu law, as prevailing in this part of India, a son can obtain possession by enforcing a partition of his share in immoveable

(1) 8 B.L.R. 315=15 W.R. F.B. 9. Two of the other Judges in that case expressed opinions to the same effect.
(2) N.W.P. H.C.R.. (1868), 353. .. (3) See 1 A. 162, note (5).

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ancestral property during his father's lifetime and against his father's wish, and under what circumstances."

The learned Judges referred to the following authorities:—*Deo Bunsee Kooer* v. *Dwarkanath* (1); *Ramchandra Dada Naik* v. *Dada Mahadeo Naik* (2); and *Nagalinga Mudali* v. *Subbiramaniya Mudali* (3).

The Senior Government Pleader (Lala *Juala Parshad*), for the appellant, cited Mitakshara, chap. I, s. 1, v. 27 and chap. I, s. 5; *Goor Surun Doss* v. *Ram Suran Bhukut* (4); *Beer Kishore Suhye Singh* v. *Hur Ballub Narain Singh* (5); *Raja Ram Tewary* v. *Luchmun Parshad* (6).

Lala *Lalta Parshad*, for the respondent, contended that the law, under the Mitakshara, relating to the partition of property, whether ancestral or acquired, was laid down in chap. I, s. 2. Partition is at the will of the father if alive. Section 5 does not relate to partition. He cited Manu, chap. IX, v. 104, referred to in Strange's Hindu Law, 2 ed., chap. 9, p. 179.

OPINION.

The opinion of the Full Bench was as follows:—

The answer to the question referred to us is, it appears to us, supplied by express texts of the Mitakshara. The fifth section of the first chapter of that work treats of the rights of father and son in property ancestral, and in the fifth paragraph the author declares that for or because the right is equal or alike, therefore partition is not restricted to be made by the father's choice; and having explained [161] in the seventh paragraph that the texts which he had discussed in the second section referred to property which had been acquired by the father himself, in the eighth paragraph he distinctly announces the rule in the following terms:—"Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." In the ninth and tenth paragraphs he treats of the son's right of interference in the father's dealings with ancestral property as the consequence of their indiscriminate right, and in the eleventh paragraph, in support of his position that "the father, however reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfather," he deduces the authority of Manu from the text—"If the father recover paternal wealth not recovered by his co-heirs, he shall not, *unless willing*, share it with his sons, for in fact it was acquired by him." In which text the nature of the father's interest in the property so recovered is declared to be the same as would have been the interest of any one member of a joint family in such property so recovered, that is to say, he would have the right to treat it as his own.

The author of the Mitakshara himself reconciles what seeming discrepancy there may be between the rules as to partition expounded in s. 2 and the rules expounded in s. 5 by the statement that the texts cited in the former section refer to the father's property, and not to the ancestral property.

In the Vyavahara Mayukha, chap. iv, s. 4, v. 4, it is declared that the unqualified right of the sons to insist on the partition of ancestral property against the father's will has also the sanction of Brahaspati:—"The

(1) 10 W.R. 273. (2) 1 B.H.C.R 2nd ed., App. 76. (3) 1 M.H.C.R. 77.
(4) 5 W.R. 54. (5) 7 W. R. 502.
(6) 8 W. R. 15=B. L. R. Sup. Vol. 731.

father and sons are equal sharers in houses and lands derived regularly from ancestors, but sons are not worthy (in their own right) of a share in wealth acquired by the father himself when the father is unwilling."—"From which," says the author, "it results that sons are worthy of a share in the property acquired by the grandfather or other (ancestor), even though the father do not wish it."

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Seeing that the language of the Mitakshara is free from reasonable doubt, and that in cases governed by the Mitakshara the right **[162]** of the son to demand partition *invito patre* has been recognized in *Beer Kishore Suhye Singh* v. *Hur Bullub Narain Singh* (1); *Raja Ram Tewary* v. *Luchman Pershad* (2); *Deo Bunsee Kooer* v. *Dwarkanath* (3); *Nagalinga Mudali* v. *Subbiramaniya Mudali* (4); and that if there be no reported cases in this Court, it has been accepted hitherto as well established law in this Court, we should answer that, in the case of ancestral immoveable property, the son has, under the Mitakshara law, an unqualified right to demand partition. It is unnecessary for us in the present reference to express an opinion whether the same rule applies to ancestral moveable property (5).

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1 A. 162.

CRIMINAL JURISDICTION.

Sir Robert Stuart, Kt., Chief Justice.

QUEEN v. JAGAT MAL. [21st April, 1876.]

Act X of 1872, *ss.* 468, 471, 473—*Offence against public justice—Offence in contempt of Court—Prosecution—Procedure.*

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1872 (6).

The Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X of 1872, is not precluded by the provisions of s. 471, from trying the accused person itself for the offence charged (7).

[Overr., 1 A. 625 (F. B.); Diss., 1 B. 311.]

[163] CERTAIN persons were committed to the Court of Session for trial on a charge of causing grievous hurt. Ram Gholam, Gula Mal, and Jagat Mal gave evidence on behalf of these persons at the preliminary

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(1) 7 W.R. 502. (2) 8 W.R. 15 = B.L.R. Sup. Vol. 731. (3) 10 W.R. 273.

(4) 1 M. H. C. R. 77; also in *Laljeet Singh* v. *Rajcoomar Singh*, 12 B. L. R. 373.

(5) With regard to the plaintiff's share, under Hindu law in the ancestral immoveable property, and to the question of possession the Division Court (Stuart, C.J., and Oldfield, J.), when the case was returned to it, in delivering judgment, said:—" There appears to us to be no doubt that the Judge (lower appellate Court) has erred, the extent of the share in ancestral property to which a son is entitled being equal to that of the father, and he is entitled to such equal share at partition—Mitakshara, chap. i, s. 5, v. 3, and other texts. In the present case the family interested in the partition consisted of the father and two sons, each of these three being entitled to one-third of the ancestral estate and that is the extent of the share for which the plaintiff is entitled to a decree in this suit.

(6) So held by Oldfield, J., in *Queen* v. *Kultaran Singh*, *ante* p. 129 and by the Calcutta High Court in *Sufatoolah*, petitioner, 22 W. R. Cr. 49. But see *Reg* v. *Navranbeg Dulabeg*, 10 Bom. H. C. Rep. 73; and 7 Mad. H. C. Rep. Rulings xvii and xviii.

(7) See, however, *Queen* v. *Kultaran Singh*, *ante* p. 129; *Sufatoollah*, petitioner, 22 W.R. Cr., 49; and 7 Mad. H. C. Rep. Rulings xvii and xviii in which cases the opposite construction is placed on the section.

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inquiry. The first two were also examined at the trial before the Court of Session, and gave the same evidence which they had given at the inquiry. The Court of Session considered that their evidence was false, and directed the Magistrate of the district to try them for giving false evidence. The Magistrate of the district transferred the case to the committing Magistrate. The latter proceeded also against Jagat Mal, being of opinion that he had given false evidence at the inquiry. He convicted all three persons. The conviction was, on appeal, affirmed by the Court of Session.

They applied to the High Court for the revision of the order of the Court of Session affirming the order of the Magistrate, on the ground that the Magistrate was not competent, under s. 471, Act X of 1872, to try an offence committed before himself.

Mr. *Colvin*, for the petitioners.—The petitioner Jagat Mal has been tried and convicted on a charge of giving false evidence by the Court before which the offence was committed. This procedure is directly opposed to the provisions of s. 471, Act X of 1872, which enacts that the Court before which an offence under s. 198, Indian Penal Code, is committed, may, after making such preliminary inquiry as may be necessary, either commit the case itself, or may send the case to any Magistrate having power to try or commit for trial. It is also opposed to the spirit of s. 473, which clearly recognizes the doctrine that no man shall be a judge in his own cause. It is true that a Court of Session may, under s. 472, try an offence committed before itself, but it does not do so alone, it is aided by assessors or by a jury. It is inexpedient that the Court before which an offence is committed, and which has in all probability formed an opinion on the case, should itself try the offence. He cited 7 Mad. H. C. Rep. Rulings xvii ; *Sufatoollah*, petitioner (1) : and *Queen* v. *Kultaran Singh* (2). With regard to the petitioners Ram Golam and Gula Mal, they are in the same position as Jagat Mal. Their statements before the Court of Session were [164] repetitions of what they had stated before the committing Magistrate. Their offences were really committed before the Magistrate. The transfer of the case under the last paragraph of s. 471 by the Magistrate of the district to whom it was sent to the committing Magistrate did not give the latter jurisdiction, if my argument is good, and his jurisdiction was barred by the preceding portion of the section. If such transfer did do so, then the last portion of the section nullifies the first. The last portion has been enacted to obviate a practical inconvenience, the Court having held under the old Code that the Magistrate to whom a case was sent for trial could not transfer it to a Magistrate subordinate to him, but was obliged to try it himself—6 Mad. H. C. Rep. Rulings, ii, xli.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.—No question can arise under s. 471 with respect to the petitioners Ram Golam and Gula Mal. Their offences were committed before the Court of Session. Section 471 does not deprive the Magistrate before whom an offence mentioned in the section is committed of any power which he may possess to try the case.

JUDGMENT.

STUART, C.J.—This is an application for revision of the order of the Judge of Farakhabad made in an appeal to him by Ram Gholam, Gula Mal, and Jagat Mal. These three persons were, along with others, tried

(1) 22 W.R. Cr. 49.

(2) 1 A. 129.

and convicted by M. C. W. Watts, Joint-Magistrate of Farakhabad, of false swearing, under s. 193, Indian Penal Code, and respectively sentenced by that officer, to two years' rigorous imprisonment.

The circumstances out of which the case arose are these: In January last three men, Kanhaiya, Bishan, and Lalman, were prosecuted and convicted by the Judge on a charge of grievous hurt under s. 326, Indian Penal Code. After convicting and sentencing them, the Judge directed that ten of the witnesses who had been examined in the case before him, including Ram Gholam and Gula Mal, should be tried by the Magistrate of the district on a charge of giving false evidence. On receipt of the Judge's order Mr. Harrison, the Magistrate, transferred the case to Mr. Watts, the Joint-Magistrate, who had made the commitment in the grievous hurt [165] case to the Sessions Court. In the course of his investigation for that commitment Jagat Mal had been examined as a witness, and had then, in Mr. Watts' opinion, given false evidence; and Mr. Watts, having represented this state of things to the Magistrate, received sanction for Jagat Mal being included in the proceedings directed by the Judge under s. 193. Mr. Watts having concluded the inquiry, committed the whole eleven accused for trial before himself, and convicted Ram Gholam, Gula Mal and Jagat Mal, and another (deferring judgment as regards the remaining seven). There was an appeal to the Judge, but the result was its dismissal by him.

Ram Gholam, Gula Mal and Jagat Mal, now apply to this Court in revision, urging that Mr. Watts had no jurisdiction to try and convict them, because, according to the terms of s. 471 of the Criminal Procedure Code, he should have sent the case to another competent Magistrate. This, however, is a clearly mistaken view of the law, Mr. Watts being fully competent for all he did. The only case where a Criminal Court cannot itself try is that described in s. 473, which relates exclusively to contempts of Court. Here the charge was not for a contempt, but under s. 193 for false swearing. The conviction and sentence in the case of the three applicants are approved and confirmed, and their application to this Court is refused.

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1 A. 165 (F.B.).

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

RATAN SINGH AND ANOTHER (*Defendants*) *v.* WAZIR (*Plaintiff*).
[24th April, 1876.]

Act VIII of 1859, *s.* 354—*Remand—Objection—Procedure.*

Where an appellate Court, under s. 354, Act VIII of 1859, refers issues for trial to a lower Court and fixes a time within which, after the return of the finding, either party to the appeal may file a memorandum of objections to the same, neither party is entitled, without the leave of the Court, to take any objection to the finding, orally or otherwise, after the expiry of the period so fixed without his having filed such memorandum.

[F., 2 A. 908; 6 A. 391=A.W.N. (1884) 129; R., 7 A. 70 (F.B.).]

ON special appeal by the defendants in this suit to the High Court, the Court (Turner and Spankie, JJ.), under s. 354, Act VIII of 1859, referred certain issues for trial to the lower Court [166] and fixed a period

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of one week within which either party to the appeal might file a memorandum of objections to the finding of the lower Court. No such memorandum was filed by the appellants within the time fixed. At the further hearing of the appeal it was contended on their behalf that, notwithstanding this omission, they were entitled to urge objections to the finding.

As it appeared to the Court that the rulings of the Calcutta High Court in *Ashrufoonnissa Begum* v. *Stewart* and *Woomesh Chunder Roy* v. *Jonerdun Hajrah* and of this Court in *Munrakhun Lall* v. *Raheem Buksh* and *Sheo Gholam* v. *Ram Jeawun Singh* were at variance (1), the Court referred the question raised by the appellants' contention to a Full Bench.

Munshi *Hanuman Prashad* (with him Pandit *Nand Lal*), for the appellants.—An appellate Court can admit an appeal presented after time. It can also allow an objection to the decision of a lower Court not taken in the memorandum of appeal to be taken at the hearing. It can therefore allow a party who may not have filed a memorandum of objections under s. 354, Act VIII of 1859, within the time fixed, to urge objections at the hearing. The Court is not bound by its order fixing a period, but can extend the period.

[167] Babu *Oprokash Chandar* (with him Lala *Ram Parshad* and Babu *Ram Das*), for the respondent.—The appellate Court has to fix a time within which the parties may file objections. This implies that the memorandum cannot be filed after that time. The section gives it no such discretion to extend such period as is given it to admit appeals presented after time or to hear objections not taken in the memorandum of appeal. The objections under s. 354 must be taken in writing and not orally.

JUDGMENT.

STUART, C. J.—I am cleary of opinion that objections to findings, on remand, whether in writing or taken orally at the hearing of the appeal, may, with permission of the Court, be considered. Whether such objections may be allowed as of right may be doubted. I am rather inclined to think that the hard line drawn by the language of the Code excludes them. But that, on the other hand, we may, in our judicial discretion and in the

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(1) In *Ashrufoonnissa Begum* v. *Stewart*, 9 W.R. 438, the Calcutta High Court (Loch and Macpherson, JJ.) declined to allow the respondent's counsel to object to the finding of the lower Court at the further hearing of the appeal, as no memorandum of objections had been filed within the time fixed. In *Sheo Gholam* v. *Ram Jeawun Singh*, N.W.P.H.C.R. (1873), p. 114, this High Court (Pearson and Jardine, JJ.) held that the lower appellate Court was not bound to receive memoranda of objections presented after time. In the first-mentioned case, however, it does not appear that the appeal was determined by the Court affirming without consideration the finding of the lower Court, and in the judgment in *Woomesh Chunder Roy* v. *Jonardun Hajrah*, 15 W.R. 235, it is stated that it was not the intention of the Court in *Ashrufoonnissa Begum* v. *Stewart* to take the view contended for and overruled in *Woomesh Chunder Roy* v. *Jonardun Hajrah*, *viz.*, that where a party has failed to file a memorandum of objections, the appellate Court is at liberty to decide the appeal without considering the finding. In the second-mentioned case, although the lower appellate Court refused to receive the memoranda of objections, no further objections were offered at the hearing, but, on the contrary, the parties agreed to abide by the finding. In *Munrakhun Lall* v. *Raheem Buksh*, N.W.P.H.C.R. (1872), p.72, Stuart, C.J., and Pearson, J., held that the Court was not precluded by any thing in the law from hearing an objection taken after time. See, however, *Noorun* v. *Khoda Buksh*, N.W.P.H.C.R. (1866), p. 50 in which case this High Court (Morgan, C.J. and Pearson, J.) held, where an appellate Court had remanded a case under s. 354, Act VIII of 1859, and fixed time within which objections might be taken, that the appellate Court was not competent to interfere with the portion of the lower Court's revised judgment to which no objection had been taken within time.

interests of justice and the legal requirements of a suit, permit such objections to be taken. I should be sorry to think there can be any doubt. This is a High Court of Judicature, and when the Code of Procedure is merely silent, and does not expressly prohibit any particulur action, we are entitled to use all necessary and proper means and appliances, the power to permit or refuse which must reside within the inherent authority of a Court of Record.

My answer to this reference, therefore, is that the objections to which it refers, whether in writing or taken orally, may, with permission of the Court, be received and considered, but that they cannot be admitted without such permission.

I may add that I have looked into the cases referred to in the order of reference and entirely concur in the rulings in the two cases of this Court (1). One of them, that of *Munrakhun Lal* v. *Raheem Buksh* (2), was decided by Mr. Justice Pearson andmyself, and I firmly and advisedly adhere to every word of our judgment. There we said—"The terms of s. 354 are permissive ; the parties *may* prefer objections within a specified time, after which the appellate Court shall proceed to determine the appeal. There is nothing in the law to the effect that an objection **[168]** made after the time fixed shall not be listened to; and, indeed, when the Court proceeds to determine the appeal in reference to the evidence submitted, any objection made, or suggesting itself in the course of the hearing, would necessarily have to be considered, whether a memorandum of it had been previously filed or not, unless the Court determined the appeal by simply affirming without consideration the finding received. Such a course is not one which the section directs the Court to take in the event of no objection having been put forward in writing within the time specified. We are aware that it has been held that the objections cannot be received after the time fixed, but so strict a ruling is, in our opinion, beyond the terms, and not within the intention of the law. Here we allowed a week, and our meaning was that that should be the time *at least* ; in other words, that a week should be allowed, subject to any further orders of the Court, for reasons assigned or cause shown." That to my mind is a most satisfactory statement of the law on this point. The Calcutta cases (3) do not seem to apply, but, so far as I can understand them, I dissent from their conclusions.

PEARSON, J.—On full consideration I am of opinion that the intention of the law was effectively to limit the time within which objections might be taken to the findings submitted to the appellate Court under s. 354. The words that either party may, within a time to be fixed by the appellate Court, file a memorandum of any objection to the finding, imply that the memorandum may not be filed after that time. It seems unreasonable to hold that although an objection may not be preferred in writing, it may nevertheless be urged orally after the expiry of the fixed period. Such an interpretation would defeat the object of the law. Just as the law fixes a time within which the appeal against the original decree or decision must be presented, so in the like manner the objections to the supplementary

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(1) *Sheo Gholam* v. *Ram Jeawan Singh*, N. W. P. H. C. R., 1873, p, 114 ; *Munrakhun Lal* v. *Raheem Buksh* N. W P. H. C. R. 1872, p. 25.
(2) N.W.P.H.C.R.. 1872, p. 25.
(3) *Ashrufoonissa Begum* v. *Stewart*, 9 W.R. 438 ; *Woomesh Chund Roy* v. *Jonardun Hajrah*, 15 W. R. 235.

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findings on fresh issues remitted for trial under s. 354 must be put in within the time fixed for the purpose. The Court might probably, on application and sufficient cause shown, extend the time in the same manner as an appeal may be admitted after time on sufficient cause being shown for the [169] delay in preferring it. The objections under s. 354 being of the nature of an appeal, s. 5, Act IX of 1871, might be applicable. I also presume that ss. 348 and 374 of the Code would be applicable in respect of findings under s. 354.

TURNER and SPANKIE, JJ.—If an appeal is presented from the decree of a subordinate Court and in the memorandum of appeal no objection is taken to the finding of the subordinate Court on a question of fact, the appellant cannot of right urge or be heard in support of the objection at the hearing; he must obtain the special leave of the Court. And although in deciding the appeal the Court is not confined to the grounds set forth by the appellant in his memorandum, it would not ordinarily, we apprehend, be justified in interfering with a finding of fact to which no objection had been taken in the memorandum of appeal, unless the appellant could show that from some sufficient cause the objection was not taken at the proper time. Now when it becomes necessary for the right determination of the suit on the merits that an appellate Court should remit an issue to the Court below for trial, the Court in s. 354 directs the Court below to try the issue and return its finding with the evidence to appellate Court; it declares that such finding and evidence shall become part of the record, and it authorizes either party, *within a time fixed by the appellate Court*, to file a memorandum of any objection to the finding, and on the expiration of that period it directs the appellate Court to proceed to determine the appeal. There is no provision empowering a party to take objection to the finding at any other time than within the period fixed by the appellate Court. It cannot be contended then that either party is as a matter of right empowered to take an objection at the hearing which he has neglected to take within the period allowed him by law.

There remains the question, can he do so by leave of the Court? After the return of the finding and evidence which by the terms of the law form part of the original record, the appellate Court ought, in our judgment, to proceed as if the necessary issue had formed part of the record originally submitted to it, with this difference, that it must determine not only the pleas in appeal but also any objection preferred within due time to the finding on the [170] issue remitted—and in determining the appeal the Court is not deprived of the powers conferred on it by s. 334. The finding on the issue remitted falls within those powers as much as the findings on the issues originally tried. If this be so, it follows that the Court might at the hearing allow a party to urge an objection to the finding which had not been taken at the proper time, and in deciding the appeal is not confined to the grounds set forth in the original memorandum or in any statement of objections to the finding on the issue remitted taken within due time; but the Court ought not as a matter of course to allow an objection to be urged which has not been taken at the proper time; it should satisfy itself that there are grounds which warrant the indulgence.

OLDFIELD, J.—It appears to me that a party who has failed to file a memorandum of objections within the time fixed by the appellate Court under s. 354, Act VIII of 1859, cannot afterwards claim as of right to be

allowed to urge objections; but I do not consider that it was intended to leave no discretion to the Court whether it should admit objections, either orally or in writing, after the time fixed had expired. I apprehend that the appellate Court can always extend the time within which the written memorandum of objections can be filed.

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1 A. 170 (F.B.).

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

GANGA BAI (*Plaintiff*) v. SITA RAM (*Defendant*) [8th May, 1876.]

Hindu Law—Hindu Widow—Maintenance.

Held, by the Full Bench that a Hindu widow is not entitled, under the Mitakshara, to be maintained by her husband's relatives merely because of the relationship between them and her husband. Her right depends upon the existence in their hands of ancestral property.

Held, on the case being returned to the Division Bench, that the fact that the defendant in this case was in possession of ancestral immoveable property at the death of his son and had subsequently sold such property to pay his own debts, did not give the son's widow any claim to be maintained by him.

[F., 2 B. 573 (622); 7 B. 127 (130); R., 11 A. 194 (199, 206) (F.B.)=A.W.N. (1889) 30; 2 B. 494 (519); 3 B. 44 (45); 23 B. 608 (609); Expl., 4 A. 296 (F.B.).]

THE plaintiff was the daughter-in-law of the defendant Sita Ram. Her husband died in May 1858. For about 15 years [171] after his death she lived with and was maintained by Sita Ram. She then left his protection and went to live with her brother. A moiety of the house in which she had lived with Sita Ram was the ancestral property of her husband's family. The other moiety was acquired by Sita Ram by purchase. In January 1874 he sold the house to the defendant Kailash Nath in order to satisfy certain debts contracted by him. This sale the plaintiff sued to set aside, claiming a declaration of her right to live in a certain portion of the moiety of the house which was ancestral property and possession of the same. She also claimed maintenance from her father-in-law at the rate of Rs. 5 per mensem out of a certain charitable allowance made him by Government. She also claimed to recover certain jewels which she alleged he had appropriated. He pleaded that the sale of the property was valid, being made to satisfy his debts, that the plaintiff was not entitled to be maintained out of the charitable allowance, as it was not ancestral property, and that, as no ancestral property remained in his hands, he could not be legally compelled to maintain the plaintiff; and denied having appropriated the jewels. The defendant Kailash Nath pleaded that the sale was valid.

The first Court gave the plaintiff a decree declaring that she was entitled to reside in the house on the ground that such right was not extinguished by the sale. It dismissed her claim to be maintained out of the charitable allowance on the ground that it was not of the nature of ancestral property and held that, as no ancestral property remained in the defendant Sita Ram's possession, she was not entitled to be maintained by him. It also dismissed her claim in respect of the jewels on the ground that she had failed to prove that the defendant had appropriated them. On appeal by the plaintiff the lower appellate Court affirmed the

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decision of the first Court. The defendant Kailash Nath was not a party to the appeal.

On special appeal by the plaintiff to the High Court it was contended on her behalf that the right of a daughter-in-law to be maintained by her father-in-law did not depend upon the existence in his hands of ancestral property; that the pension could not be considered as the exclusive and acquired property of the defendant, and that [172] the lower appellate Court had not given the claim in respect of the jewels sufficient consideration.

The Court (Pearson and Turner, JJ.) made the following reference to a Full Bench :—

The plaintiff in this suit claimed an allowance of Rs. 5 per mensem, by way of maintenance from her father-in-law, the (defendant) respondent, and to be allowed to occupy two rooms in a house in which her deceased husband had an equal right with him, and to recover certain trinkets. The lower Courts have dismissed the first and last portions of the claim, and decreed the second; and in regard to that portion of the claim which has been decreed objection to the decree has not been made by the defendant who, as purchaser of the house, is interested in the matter.

The plaintiff is the appellant whose pleas we have to consider, and we at once disallow the second and third of the pleas set forth in the memorandum of appeal, concurring as we do in the lower Court's finding that the allowance drawn by Sita Ram is not of the nature of ancestral property, and being of opinion that the Judge has sufficiently disposed of the issue relating to the trinkets in suit.

There remains the question as to the plaintiff's right to receive a money allowance by way of maintenance from her father-in-law under the circumstances found by the lower Courts. Those circumstances are as follows :—Her husband died about 15 years ago, and after his death, until lately, she resided with her father-in-law, and was maintained by him, and she has not forfeited by misconduct any right which she may possess to be maintained by him. He has recently sold a moiety of a house, which descended to him from his grandfather, to Kailash Nath Sukul, the other defendant in the suit, who is not a party to the appeal nor an appellant here; the value of the moiety is reckoned at Rs. 850. But the plaintiff's claim to occupy two rooms in the house has been decreed. There is no ancestral property left in Sita Ram's possession, and it is for this reason that her claim to a maintenance payable by him has been dismissed.

It is now contended on her behalf that, notwithstanding the non-existence of any ancestral fund or property in the hands of her [173] father-in-law applicable to the maintenance, she is, under the provisions of the Hindu law, entitled to be maintained by him, and our attention has been drawn to a recent ruling of the Bombay High Court in a case decided by West and Nanabhai Haridas, JJ. (1) to the effect that a Hindu father-in-law is legally bound to maintain his deceased son's widow, notwithstanding that no property belonging to his son may have come into his hands. The Court appears to have also held in other cases that a Hindu father is liable for the maintenance of his son's widow, notwithstanding a separation in estate of father and son. These rulings do not absolutely support the present contention, because they do not negative the hypothesis of ancestral property being in the father's possession. A Full Bench of this Court has recently recognized the right of the widow of a son who

(1) *Udaram Sitaram* v. *Sankabai*, 10 B. H.C.R. 483.

predeceased his father to be maintained out of ancestral funds or properties in the latter's possession (1). Whether such a widow has a right to be maintained by her husband's relations, irrespectively and independently of the existence in their hands of such funds or properties, under the law obtaining in this part of India, is a novel question, which, with regard to its importance, we think it proper to refer to a Full Bench for determination.

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Munshi *Hanuman Parshad*, for the appellant.—A daughter-in-law can, in default of better heirs, succeed to the estate of her father-in-law, and can present funeral oblations.—West and Bühler's Digest of Hindu Law Cases, Bk. i, pp. 169, 170. When her husband is dead his kin become her guardians and she looks to them for support—West and Bühler's Digest, Bk. i, p. 355. She in fact becomes a member of her husband's family. It is nowhere said that her right to maintenance depends upon the existence of property. Moreover in this case there originally was property. By selling it the father-in-law has rendered himself personally liable.

Pandit *Bishambar Nath* (with him the *Senior Government Pleader*, Lala *Juala Parshad*) for the respondent.—There is no text which lays down that a father-in-law, or other relative of the husband, is bound to maintain the daughter-in-law, in the absence **[174]** in his hands of ancestral property. Whenever the subject of maintenance is considered the existence of property is assumed—Mitakshara, Ch. II, s. 1, v. 35 : Smriti Chandrika, Ch. XI, s. 1, v. 34 ; and Vyavahara Mayukha, Ch. IV, s. 8, v. 7. In *Udaram Sitaram* v. *Sankabai* (2) the question is not fully considered. No texts are cited and only European authors referred to.

OPINION OF THE FULL BENCH.

STUART, C.J., TURNER and SPANKIE, JJ., concurred in the following opinion :—

As we understand the question put to us, we must assume for the purpose of this reference that the father-in-law is in possession neither of ancestral nor immoveable property, that he has no fund with the disposal of which his son, if alive, could interfere, that he has inherited nothing from his son, nor have his rights in any property become enlarged by his son's death. Under these circumstances the plaintiff's pleader has failed to satisfy us that her father-in- law is under any legal obligation to provide her with maintenance. No text has been cited from any work of authority in these Provinces which supports the claim, nor has any decision been produced in which it has been ruled by any Court in these Provinces or in this Presidency, or in those parts of the Presidency of Madras which are governed by the Mitakshara, that such a claim has been allowed. The right, then, of the daughter in-law appears to be one of moral and not of legal obligation.

Hindu law no doubt imposes on the daughter-in-law the duty of living in the house of her father-in-law, yielding him obedience and ministering to his needs, but the Privy Council, in *Raja Pirthee Singh* v. *Rani Rajkooer* (3) has ruled that this is merely a moral obligation, and that she does not even forfeit her right to maintenance if she incapacitates herself from performing her duty to her father-in-law by electing to reside elsewhere than in his house. Except in so far as the possession of property liable to a charge of maintenance alters the nature of the obligation of the father-in-law to the daughter-in-law, there is no more ground for holding that he is legally bound to support her than there is for asserting that

(1) N.W.P. H.C.R. 1875, p. 261. (2) 10 B.H.C.R. 483. (3) 12 B.L.R. 238.

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[175] she is legally bound to live in his house and minister to his wants. Of both duties the neglect is discreditable in this world, and may, according to the Hindu religion, subject the offender to punishment hereafter.

PEARSON, J.—My answer to the question put to us must be in the negative. In the case of *Lalti Kuar* v. *Ganga Bishan* (1) to which allusion is made in the referring order, I assented, not without doubt and hesitation, to the doctrine that a Hindu widow was entitled to be maintained out of the joint ancestral estate of the family of which her husband was a member, although he had predeceased his father. That doctrine, although not expressly laid down in the Hindu law, was supported by many considerations of reason and equity, and had been recognized by several decisions. But I am not prepared to go further and to allow that a widow is legally entitled to be maintained by her husband's relations after his death *merely* in consequence of such relationship. The text which countenance such a view appear to be of the nature of moral or religious precepts. In the oral pleading before us it has indeed been mainly urged that the respondent is liable to the claim of the plaintiff, appellant, *because* he sold an ancestral house; but this argument was not the plea set forth in the first ground of the appeal, and we can only address ourselves to the question referred to us.

OLDFIELD, J.—The legal right of a widow to maintenance from her husband's family can, I apprehend, scarcely be supported with reference solely to those texts of Hindu Law which indicate the position a woman obtains by marriage in her husband's family, and those which generally inculcate the duty of maintenance of the female members of a family.

It is said that by marriage a woman leaves her own family or gotra and enters that of her husband, and her connection with her own family is at an end. There is the passage of Vijnanesvara translated in West and Bühler's Digest of Hindu Law Cases, Bk. i, p. 141, declaring the wife and husband to be Sapinda relations to each other because they together beget one body (the son), the Sapinda-relationship arising by connection with [176] one body, either immediately or by descent; and there are other texts on the connection formed by marriage, such as—"Women by marriage are born again into the family of the husband."—"By marriage a husband and wife become one person."

These texts admittedly do not mean that a woman on marriage enters into her husband's family or gotra in the sense that she enters it assuming the rights of a daughter. Were it so, she would inherit in the same way as a daughter, and if she cannot claim under these texts the full rights of a daughter by reason of entering the family or gotra of her husband, I do not see how any legal claim to maintenance can be supported on that ground; the ground, if good at all, should be good for entitling her to the full position of a daughter.

The above texts and others which inculcate in general terms on women dependence on their husband's family and impose a duty of maintenance on the husband's family do not necessarily impose any legal obligation. This distinction, which is one to be carefully observed in applying texts of the Hindu writers, was pointed out by Sir Barnes Peacock, Chief Justice of Bengal, in *Khetramani Dasi* v. *Kashinath Das* (2), and the rule appears to be that when the deceased member of a family has left property, they

(1) N.W.P. H.C.R. 1875, p. 261. (2) 2 B.L.R.A.C. 15=10 W.R.F. B.89.

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who take it to the exclusion of his widow will be legally bound to maintain her out of the property. There is the following passage in Viramitrodaya cited at the hearing of this reference:—" The brother and others taking the wealth of the husband of an istri widow other than a putni capable of receiving her husband's share should allow subsistence to her." "To give" means " must give." " Regarding this is also the text of Narada—that all virtuous widows should be allowed food and raiment by the husband's eldest brother or father-in-law, or by a person born in the same family. This text means all those taking the wealth of the husband, for subsistence is allowed because of taking wealth," and there are other texts to the same effect—Colebrooke's Digest, vol. ii, Bk. v, ch. i, s. 1, cccexii, Smriti Chandrika, ch. xi, s. 1, v. 34. This particular obligation, so expressly declared, is probably founded on the intimate connection which marriage is held to give rise to between husband and wife, as shown by the texts. I have already cited, and which is said **[177]** to extend to the property; for instance, we have the text Smriti Chandrika, ch. ix, s. 2, v. 14—" It must be understood that in husband's property the wife by reason of marriage possesses always ownership, though not of an independent character"—and Colebrooke's Digest, vol. ii, Bk. v. ch. viii, s. I, ccccv.

In a joint family where there is ancestral property such a legal obligation will lie on the father-in-law to maintain his son's widow—*Lolti Kuar* v. *Ganga Bishan* (1); but in a case like the present, where the property is entirely the self-acquired property of the father, the son in his father's lifetime cannot be said to have had such an interest in the property as will impose at his death an obligation on his father to maintain the widow.

When the case came back to the Division Court (Turner and Pearson, JJ.) for disposal,—

Munshi *Hanuman Parshad*, for the appellant, contended that the respondent had made himself personally liable for the appellant's maintenance. He has sold for his own benefit property which, as he held it as ancestral property, was charged with the maintenance of his son's widow.

Pandit *Bishambar Nath*, for the respondent, was not called upon to reply.

JUDGMENT OF THE DIVISION BENCH.

The judgment of the Court so far as it related to the contention on behalf of the appellant, was as follows:—

We accept the opinion of the Full Bench on the general rule that a father-in-law who is not in possession of ancestral property is not legally bound to maintain his daughter-in-law. The appellant's pleader now contends that there are peculiar circumstances which take this case out of the purview of that general rule, namely, that one moiety of a house valued at Rs. 425 was held by the respondent as ancestral property and was sold by him. This is true, but it is shown that the sale was made to pay debts. It was then a sale which the son himself, if alive, could not have resisted, for it is not suggested the debts were contracted for immoral purposes. Consequently, in our judgment, the alienation by the father-in-law does not in this case impose on him personal liability of maintaining the appellant.

(1) N. W. P. H. C. R., 1875, p. 261.

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[178] BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

IN THE MATTER OF THE PETITION OF HARSHANKAR PARSHAD.
[11th May, 1876.]

Act VIII of 1859, *s.* 338—*Act XXIII of* 1861, *s.* 38—*Execution of Decree—Appeal—Miscellaneous Proceedings.*

Pending the determination of the appeal against an order passed in execution of decree, the appellate Court has power, under s. 338, Act VIII of 1859, and s. 38, Act XXIII of 1861, to stay execution (1).

[R., 1 A. 180 (F.B.); 1 A. 668 (F.B.); 28 C. 734.]

THIS was an application to the High Court by the judgment-debtor for the postponement of a sale in the execution of a decree pending the determination of a miscellaneous regular appeal to the Court against the order of the Court of first instance refusing to postpone the same. The application was referred to a Full Bench by the Court (Pearson, J.), the order of reference being as follows :—

This application is stated to be preferred under the provisions of s. 338, Act VIII of 1859, a section which refers to the subject of staying the execution of decrees under appeal. There is no appeal pending in this Court against the decree which is in course of execution. I am, therefore, of opinion that s. 338 is *prima facie* inapplicable to the present case. Whether it can be held to be applicable under s. 38, Act XXIII of 1861, is a question which I refer to the Full Bench, as I am informed that the practice of the Court in dealing with applications of the nature of the present is not uniform. To allow the present application would in effect be to allow the appeal beforehand.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the petitioner.

OPINION.

[179] The opinion of the Full Bench was as follows :—

Proceedings in execution of decree would not, in our opinion, ordinarily fall within the term "miscellaneous proceedings." They should be regarded rather as stages in the suit or proceeding in which the decree or order under execution was passed; whereas by miscellaneous proceedings, we should understand ordinarily those applications commenced by petition, and not by plaint, of a less formal character than suits, and generally if not universally calling on the Court to exercise special powers conferred on it by the Legislature, such as applications for certificates to collect debts, applications for probate or letters of administration, applications for appointment of guardians, &c.; and possibly also the term miscellaneous proceedings may also be applied with propriety to those proceedings which the Court is empowered to institute of its own motion, such as proceedings for the institution of prosecutions in certain cases.

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(1) The following sections of Act VIII of 1859 have been held applicable to proceedings in execution of decree :—section 6, see next case; s. 110, *Rajpal* v. *Chooramun*, N.W.P.H.C.R., 1872, p. 10; s. 119, *Seetul Pershad* v. *Mahamed Kureem Khan*, N.W.P.H.C.R., 1873, p. 164; s. 170, *Syud Deshan Hossein* v. *Khodeja*, 8 W.R., 64; s. 372, *Tara Chand Ghose* v. *Anand Chandra Choudhry*, 2 B.L.R., A.C. 110=10 W.R., 450; s. 378, *Narayanbhai* v. *Ganga-krishna*, 4 B.H.C.R., A.C., 87. See, however, the case of *Jodoo Monee Dossee*, 11 W.R., 494.

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But unless we hold that the term miscellaneous proceedings in s. 38 has a wider significance, and applies to all proceedings for which no special provision is made, the Court appears to be left without powers which are necessary to enable it to deal with such proceedings. It would have no power to deal with them in default of appearance; it would have no power to enforce the attendance of witnesses; and there are no directions as to the form of the order nor as to the form of appeal from an order passed in such proceedings in cases in which an appeal lies (1). We would, therefore, read the term in this section as embracing all proceedings, not being regular suits or appeals, for which no procedure is expressly provided, and in that sense it embraces proceedings in execution of decree (2). In support of this contention, it may be mentioned that, in mofussil Courts, proceedings in execution have been treated as falling within the class [180] of "*mutafarrikat*," or miscellaneous proceedings or cases, as opposed to "*nambari*," or regular suits, and appeals from orders passed in proceedings in execution have up to the present time been filed as miscellaneous appeals. We are, therefore, of opinion that the Court has power to stay execution under the circumstances stated in the reference.

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1 A. 180 (F.B.).

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

GAYA PARSHAD (*Decree-holder*) *v.* BHUP SINGH AND OTHERS (*Judgment-debtors*). [11th May, 1876.]

Act VIII of 1859, s. 6—*Act XXIII of* 1861, s. 38—*Execution of decree—Miscellaneous proceedings—Transfer.*

A District Court is competent, under s. 6, Act VIII of 1859 and s. 38, Act XXIII of 1861, to transfer to its own file proceedings in execution of decree pending in a Court subordinate to it (3).

[N.F., 15 C. 177 ; F., 22 B. 778 ; R., 1 A. 668.]

THE District Judge of Mirzapur was informed by the Subordinate Judge that a person applying in his Court for the execution of a decree was a person to whom he owed money, and that he considered himself precluded by that fact from entertaining the application. The District Judge consequently transferred the case to his own file by an order purporting to be made under s. 25, Act VI of 1871, and eventually rejected the application.

On appeal to the High Court by the decree-holder it was contended that the District Judge was not competent to transfer the case.

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(1) The section gives no right of appeal in such proceedings—see *Hureenath Koondoo* v. *Modhoo Soondan Saha*, 19 W. R. 122.

(2) The following, in addition to proceedings in execution of decree, have been held to be "miscellaneous proceedings" within the meaning of s. 38, Act XXIII of 1861—

Proceedings under s. 246, Act VIII of 1859—*Bapu* v. *Lakshuman Baji*, 10 B. H. C. R. 19.

Enquiries by Civil Courts under s. 171, Act XXV of 1861, corresponding to s. 471, Act X of 1872—The case of the *Collector of Tirhoot*, 14 W. R. 390.

Applications to the Bombay High Court for the exercise of its Extraordinary Jurisdiction under Bombay Regulation II of 1827, s. 5, cl. 2—

The petition of *Nagappa*, 5 B. H. C. R. A. C. 215.

(3) See preceding case 1 A. p. 178, note (1).

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The Court (Pearson and Oldfield, JJ.), observing that the Subordinate Judge was not precluded from executing the decree himself by the provisions of s. 25, Act VI of 1871, and that that enactment contained no provisions enabling a District Judge to call up and place on his own file a case of execution of decree pending on the file of a subordinate Court, referred the following question to a Full Bench, *viz.*—

"Whether he was competent to do so under the terms of s. 6, Act VIII of 1859, or s. 38, Act XXIII of 1861, or otherwise?"

[181] The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Munshi *Hanuman Parshad*, for the appellant.

Pandit *Ajudhia Nath* and Babu *Oprokash Chandar*, for the respondents.

The *Junior Government Pleader.*—There is no law which authorizes the transfer of proceedings in execution of decree. The term "suit" in s. 6, Act VIII of 1859, does not include them. The term "appeal" in the same section means an appeal against a decree. Proceedings in execution of decree are not miscellaneous proceedings within the meaning of s. 38, Act XXIII of 1861.

Pandit *Ajudhia Nath.*—The term "suit" embraces all proceedings relating to the suit whether before or after decree. The term "appeal" includes miscellaneous appeals. The terms of s. 38 are large enough to include proceedings in execution. The intention of the section is clear, and a reasonable construction must be placed on it. It is a curious state of things if such proceedings cannot be transferred, and other kinds of cases can.

OPINION.

The opinion of the Full Bench was as follows:—

In our judgment the provisions of s. 6, Act VIII of 1859, are extended to miscellaneous proceedings, and inasmuch as we have this day held on a reference in the case of *Harshanker Parshad* that proceedings in execution fall within the term "miscellaneous proceedings" in s. 38, we reply that the Judge had power to transfer the proceedings in the case out of which this reference arose.

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1 A. 181 (F.B.).

BEFORE A FULL BENCH.

Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

Ramdial and others *v.* Ram Das and another.* [11th May, 1876.]

Act VIII of 1859, *s.* 254—*Sale in execution—Defaulting purchaser—Appeal—High Court—Appellate Civil Jurisdiction—Division Court—Letters Patent, cl.* 10.

An appeal lies from an order passed on an application under s. 254, Act VIII of 1859, to make a defaulting purchaser liable for the loss occasioned by a re-sale.

[182] *Held* (Spankie, J., *dissenting*) that the appeal given to the Full Court under cl. 10, Letters Patent, is not confined to the point on which the Judges of the Division Court differ.

[**Diss.** 12 A. 397 (**F.B.**); 14 A. 201 (**F.B.**) = 12 A. W.N. (1892) 74; **F.**, 16 C. 535; **App.**, 11 M.L.J. 10 (**F.B.**); **R.**, 18 M. 439; **D.**, 23 M. 73.]

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* Appeal under cl. 10, Letters Patent, No. 3 of 1875.

THE facts of this case, so far as they are material for the purposes of this report, were as follows :— 1876 MAY 11.

Ram Das and Gobind Parshad, decree-holders, sought under s. 254, Act VIII of 1859, to charge Ram Dial and certain other persons, as being defaulting purchasers at an auction-sale of certain property, with the deficit on the resale of the property, alleging that the said Ram Dial and others had bid for the property through one Kali Charan, that the property was knocked down to Kali Charan, and that he had paid the deposit out of monies belonging to them and given their names as purchasers. The alleged defaulting purchasers repudiated the purchase of the property, denying that Kali Charan had authority to bid for it on their behalf. The Court of first instance rejected the application of the decree-holders on the ground that it was not satisfactorily proved that the alleged defaulting purchasers had authorized Kali Charan to purchase the property in question on their behalf. On appeal to the High Court by the decree-holders against the order of the first Court, the objection was taken on behalf of the alleged defaulting purchasers, the respondents, that no appeal lay.

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The Senior Government Pleader (Lala *Juala Parshad*), for the respondents.—Under s. 11, Act XXIII of 1861, an appeal lies only as between the parties to the suit. In this case only one of the parties to the appeal was a party to the suit. Had the order of the lower Court been against the respondents, as auction-purchasers, they could not have appealed from it. Section 254, Act VIII of 1859, gives no appeal.

Mr. *Conlan*, for the appellants.—The argument that an auction-purchaser as such cannot appeal against an order passed in execution of decree is not applicable. Section 254, Act VIII of 1859, places the defaulting purchaser in the position of a judgment-debtor when it makes all the rules for enforcing the payment of money in satisfaction of a decree of Court applicable to him. Under those rules a judgment-debtor can appeal, and therefore the person whom the law places in a similar position can appeal. He cited *Sooraj Buksh Singh* v. *Sree Kishen Doss* (1) and *Joobraj Singh* v. *Gour Buksh Lal* (2).

[183] Pandit *Ajudhia Nath*, for the respondents, in reply:—The decree-holder is not the proper person to proceed against the defaulting purchaser, but the judgment-debtor.

STUART, C.J.—A preliminary objection is taken by the pleader for the respondents that this appeal does not lie, on the ground that the order complained of is one relating to the execution of a decree as provided by ss. 363 and 364 of the Code, which limit appeals from orders passed in execution of a decree to the parties to the suit in which the decree was passed, and that the defaulting purchaser, by the enforcement of s. 254, is not a "party" within the meaning of s. 11 of Act XXIII of 1861. But this is an objection which, in my opinion, cannot be maintained. Section 254 applies to the case of default by a purchaser within the prescribed time, and it provides that—" If the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court;" and several rulings of the Calcutta High Court were referred to in support of the contention that a defaulting purchaser was, under s. 254, placed in the position of a judgment-debtor, and therefore a "party" within the meaning of s. 11,

(1) 6 W.R. Mis. 126.
(2) 7 W.R. 110; see also *Sree Narain Mitter* v. *Mahtab Chund*, 3 W.R. 3.

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Act XXIII of 1861. Our attention was, among others, particularly directed to a ruling to this effect by Mr. Justice Loch and Mr. Justice Macpherson (1), and such ruling I approve. The question, however, does not appear to have been finally determined in Calcutta, for in a case (2) decided there so late as August, 1873, before a Full Bench on appeal from a Division Bench, the Chief Justice, after disposing of the case, observed that —" This decision must not be understood as in any way deciding that an appeal will lie in such a case as this. It has not been necessary for us to determine that." I shall be glad to be instructed by the High Court of Calcutta [184] when it finally and advisedly delivers its mind on this question : but meanwhile I am not relieved of the duty of forming and expressing my own opinion, which is in accordance with the judgment of Mr. Justice Macpherson. And meanwhile I may observe that, in the above case, and notwithstanding the remark of Sir Richard Couch, the appeal was entertained, and apparently without objection. Even if I was more doubtful than I am on the subject, the reasonableness and convenience of procedure by appeal in such a case as the present appears to me to be so great as to afford a presumption in its favour, and I feel bound to decide in favour of its competency, and that the order therefore of the Subordinate Judge is open to appeal. [After considering the appeal on its merits and expressing his opinion that the decision of the Court of first instance was erroneous, the learned Chief Justice proceeded as follows :—] The appeal must therefore be allowed, and the order of the Subordinate Judge reversed with costs against the respondents in both Courts.

SPANKIE, J.—This is a case in which action was taken under s. 254 of Act VIII of 1859, under the following circumstances :—The holders of a decree against Shaikh Iradatullah, judgment-debtor, took out execution of the same, and caused the rights and interests of their debtor in Tal Ratwi, amongst other properties, to be sold on the 21st July 1873. Four persons, Champa Ram, Ram Dial, Bundhu Ram, and Kaidar Ram, purchased the rights in Tal Ratwi through their agent for Rs. 9,600. They paid the earnest-money, but failed to deposit the balance within the prescribed time. The property was resold and was purchased on the 21st November of the same year for Rs. 1,000. The second purchaser also failed to make the necessary deposits. The property was again put up for sale and was bought on the 20th May 1874 by Shaikh Muzhur Ali for Rs. 1,000, and the sale was confirmed. The decree-holders now claim that the difference, Rs. 8,600, between the sale eventually consummated and the price bid by the defaulting purchasers, shall be levied from them under the rules for enforcing the payment of money in satisfaction of a decree of Court (s. 254, Act VIII of 1859).

The Subordinate Judge held that the difference would be claimable from the first auction-purchaser who defaulted; but in [185] this case he was of opinion that there was not sufficient proof that Kali Charan had authority from Champa Ram, &c., to purchase for them the rights and interests in Tal Ratwi. He therefore rejected the application of the decree-holders as against these persons.

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(1) *Joobraj Singh* v. *Gour Buksh Lal*, 7 W.R. 110.
(2) *Huree Ram* v. *Hur Pershad Singh*, 20 W.R. 397 and see *Sooruj Buksh Singh* v. *Sree Kishen Doss*, 9 W.R. 500 *and Bisokha Moyee* v. *Sonatun Doss*, 16 W.R. 14, in which some doubt is expressed on the point.

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An appeal is filed by the decree-holders, which is met by a preliminary objection on the part of the respondents that no appeal lies, the other auction-purchasers on the first sale being no parties to the suit, so as to bring them under the provisions of s. 11, Act XXIII of 1861.

I am aware that there are decisions bearing on the point in the Calcutta High Court, two of them being cited from the 6 and 7 W. R. In the latter case, the view taken would appear to be that the terms of the section (254) bring any one proceeded against under it amongst the parties of the suit. I am not, however, satisfied that this is so. The section certainly does not say so. The section recites that the difference shall be leviable from the defaulting purchaser under the rules for enforcing the payment of money in satisfaction of a decree of Court, that is to say, by an application for execution against him by arrest, or by attachment of his property. But the section does not go on to say that when any application has been made against such defaulting purchaser, he is to be regarded as one of the parties to the original suit in which execution was taken out. On the other hand, s. 364 recites that no appeal shall lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided. The appeal is not expressly provided for in s. 254. It is provided for in s. 257. So s. 283 provides for an appeal. But that section has been repealed by s. 11, Act XXIII of 1861, and this section, though it greatly enlarges the matter of which the Court executing a decree may take cognizance, inasmuch as, after expressly stating what it may do specifically, it includes any other question arising *between the parties* to the suit in which the decree was passed and relating to the execution of the decree. does not meet the difficulty. The question before us certainly relates to the execution of the decree, but is it one between the decree-holder and the judgment-debtor ? It might be convenient to hold so, as giving the defaulting [186] purchaser, the decree-holder, and the judgment-debtor an opportunity of being heard by the appellate Court. On the other hand, it may have been intended not to give a defaulting purchaser the benefit of an appeal on the summary side. There could be no doubt of his default, where, in consequence of it, resale has been rendered necessary ; and there can be no doubt as to the injury such default may do both to the decree-holder and judgment-debtor. The defaulting purchaser appears to me to be in the position of a man who has allowed judgment to go against him by default. He has nothing to say for himself, and execution follows against him as a matter of course. But then, if there be an appeal, it would lie because he was the judgment-debtor in another suit between the original decree-holder and himself, or the judgment-debtor and himself. I do not find that the Presidency High Court's decisions (1) already referred to have been accepted as conclusively settling the point. On the contrary, I find an appeal in a case (2) very similar to the one before us, wherein it was held that the party purchasing at an execution-sale under the Civil Procedure Code in the character of an agent cannot be made liable as a principal, and a proceeding upon the contract under s. 254 of the Act in such a case must be taken against the principal. This was an appeal under cl. 15 of the Letters Patent from a Divisional Bench, and the Full Bench decided which of the two judgments before it was to be followed ; but the Chief Justice added at the close of the judgment that " this decision must not be understood as in any way deciding that an appeal will lie in such a case

(1) W. R. Mis. 126=7 W. R. 110. (2) 20 W. R. 397.

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as this. It has not been necessary for us to determine that." From this I conclude that the point was not held to be definitely determined by the High Court of the Lower Provinces. It has not, to my knowledge, been determined by this Court.

I think that it would be better that we should take the opinion of the Full Bench before disposing of the appeal on its merits. At the same time, if the learned Chief Justice should hold that there is an appeal, his judgment would prevail, and I should have no hesitation in concurring with his decision on the merits, as we were both satisfied at the hearing that all the evidence was in favour of the appellants.

[187] The respondents appealed to the Full Court against the judgment of the learned Chief Justice, under cl. 10 of the Letters Patent of the High Court.

Munshi *Hanuman Parshad* (with him the *Senior Government Pleader* and Pandit *Ajudhia Nath*), for the appellants.—The question whether an appeal lies from the order of the Court of first instance depends on the intention of s. 254 and the sections of the Civil Procedure Code relating to the procedure in execution of decree. The Code is clearly framed on the principle that there shall be no appeal except by parties to the suit in which the decree is passed. The defaulting purchaser does not, under s. 254, stand in the place of a judgment-debtor. He is subjected to a penalty under that section, and provision is made for the recovery of such penalty. The section does not say that the proceedings taken to recover the penalty shall be taken as part of the execution of the decree. No appeal has as yet ever been allowed to an auction-purchaser. He proceeded to argue that the evidence did not satisfactorily prove that Kali Charan was authorized by the appellants to purchase Tal Ratwi.

Mr. *Conlan* (with him Mr. *Colvin* and Pandit *Bishambar Nath*) for the respondents.—The learned Judges are agreed on the merits of the case. They find that the appellants were auction-purchasers. This finding cannot be questioned in appeal to the Full Court. He referred to *Roy Nandipat Mahata* v. *Urquhart* (1).

Munshi *Hanuman Parshad*, for the appellants.—The appeals allowed under cl. 10 of the Letters Patent are in the nature of regular and not of special appeals. I can argue in this case on the merits.

JUDGMENT.

The judgment of PEARSON, TURNER, and OLDFIELD, JJ., in so far as it is material for the purposes of this report, was as follows:—

We proceed to consider in the first place the issue on which the learned and honourable Judges differed.

The provisions of s. 254, Civil Procedure Code, declare that, if the purchaser of immoveable property at an auction-sale held in execution of a decree, after payment of the deposit, fails to make good the full amount of the purchase-money before sunset of the **[188]** fifteenth day from that on which the sale took place, * * * the deposit after defraying the expenses of the sale shall be forfeited to Government, and the property shall be resold, * * * and that, if the proceeds of the sale which is eventually consummated be less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules for enforcing the payment of money in satisfaction of a decree of Court.

(1) 4 B. L. R. A. C. 181=13 W. R. 209.

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Had the law simply declared the liability of the defaulting purchaser without going on to declare how that liability should be enforced, the proceeding must have been by suit. To avoid the circuity of the proceeding by suit, the Legislature has given to the decree-holder and judgment-debtor a more speedy remedy, and the defaulting purchaser is placed in a position which is very similar to that which he would have filled had a suit been brought against him. It is true there is this difference, that in a proceeding by suit the question now in issue between the parties would have been determined prior to and not subsequently to decree. In other respects his position is assimilated to that of a judgment-debtor and the rules for enforcing a decree against the judgment-debtor are made available to enforce the demand arising out of his default against the defaulting purchaser. Among these rules is the rule ordained by s. 11, Act XXIII of 1861, which gives a right of appeal to the parties to a suit on all questions arising in the execution of the decree and relating to the execution thereof. There seems no difficulty in applying this rule *mutatis mutandis* to the proceeding taken against the defaulting purchaser. The judgment-debtor and (if his claim be not satisfied out of the proceeds of the resale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default; the defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has passed. They are parties to the proceeding which is substituted for the suit, and inasmuch as s. 254 declares without exception that the difference in price, which is the amount of the damages, shall be leviable under the rules for enforcing payment of a money-decree, the rule relating to appeals must be applied *mutatis mutandis* equally with any other of those rules.

[189] Having disposed of this plea, the appellants contend the Court is bound to go on to consider the appeal on the merits. The respondents, on the other hand, argue that only the appeal must be confined to the point on which the Judges constituting the Division Bench differed, and in support of their argument they refer to the ruling of the High Court of Bengal in *Roy Nandiput Mahata* v. *Urquhart* (1).

This ruling came before the Privy Council, but no question arose upon it, and the Right Honourable Committee, while alluding to it, expressed neither dissent from nor assent to it.

The 10th clause of the Letters Patent constituting this Court declares that an appeal shall lie to the Court from the judgment of one Judge of the said Court or of one Judge of any Division Court, pursuant to s. 13 of the High Courts' Act, and that an appeal shall also lie to the Court from the judgment of two or more Judges of the Court or of such Division Court wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the Court.

Now there can be no question that, on the hearing of an appeal from the judgment of a single Judge, the whole case may come before the Court in appeal, and it is competent to the Court to entertain objections to any part of the judgment, and it is a fair argument that the word judgment must be read in the same sense whenever it occurs in the same section, and that it must be held to mean the whole judgment in the second paragraph as it does admittedly in the first paragraph, unless its sense is

(1) 4 B. L. R. A. C. 181=13 W. R. 209.

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restrained by the context. The question then must turn on the construction to be put on the word "wherever." Does it mean "on any point on which," or does it mean "in any case in which." Let us substitute these different meanings for the doubtful term and read them with the rest of the sentence. Adopting the former, the passage will then run "on any point on which such Judges are equally divided in opinion, and do not amount in number to the majority of the whole of the Judges." This construction would, it is clear, accord with the first clause of the sentence, but not with the latter. Adopting [190] the other construction, the passage would run "in any case in which the Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges." This construction accords with both clauses of the section. Ordinarily where an appeal is given it must be taken to be a general appeal, and express language should be used to restrict it. For this reason, because the construction of the doubtful term which appears to accord best with the context ought to be accepted, it must be held that the appeal given to the Full Courts is not confined to the point on which the Judges of the Division Bench differed in opinion. We have then to consider the objection taken to the judgment of the Division Bench on the merits (1).

SPANKIE, J.—After fuller consideration of the question, I now am of opinion that, when the decree-holder or judgment-debtor proceeds against a defaulting purchaser under s. 254, Act VIII of 1859, the latter must at any rate be regarded as a party to a suit as between himself and the person insisting on the enforcement of the provisions of the section, and therefore, as the proceedings are in execution, there is an appeal under s. 11, Act XXIII of 1861. Another question, however, has been raised during the hearing of the appeal. Is the Court at liberty to go into the merits of this case, or should it have confined itself to the point regarding which the Judges of the Division Bench have differed?

The appeal permitted by cl. 10 of the Letters Patent is from the judgment of two or more Judges or of a Division Court wherever such Judges are equally divided in opinion. It will be observed that the word *whenever* is not used, but wherever, and cl. 27 provides that when the Judges of a Division Court are divided in opinion as to the decision to be given on any point, *such point* shall be decided according to the opinion of the majority of [191] the Judges, and if the Judges be equally divided, then the opinion of the senior Judge shall prevail. When this happens, the door is opened for an appeal. If the difference of the Division Court has been on a particular point, and on such point the decision of the senior Judge has prevailed, it would seem to follow that the appeal to the Court at large would be confined to that point of difference alone. Then no violence is done to cl. 10, which provides for an appeal from the judgment of one Judge, or from the judgment of two or more Judges, or of the Division Court, wherever such Judges are equally divided in opinion. This seems to refer to the particular point upon which they are equally divided in opinion, and so far cls. 10 and 27 are consistent. "Wherever" also would appear

(1) The learned Judges eventually directed the Court of first instance, under s. 356, Act VIII of 1859, to take the evidence of Kali Charan. When this was done and the appeal came on for final hearing, observing that, in their judgment, there was not sufficient evidence to prove that Kali Charan was authorized by the appellants to make the purchase of Tal Ratwi on their behalf and therefore they could not be charged with the deficiency in the price obtained on the resale, the learned Judges decreed the appeal and reversed the decree of the Division Court.

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to indicate the point of difference respecting which the Court at large is to pronounce an opinion. When the difference of opinion goes to the entire case, the Court at large in appeal would of course deal with all the questions raised before the Division Bench. When the opinion of the senior Judge has prevailed on any point, the Court on appeal would confine itself to that point alone.

I am fortified in this opinion by the precedents cited in the margin.

Shahzadi Hajra Begam v. Khaja Hossein Ali Khan(1).

In the first case it was observed by the learned Chief Justice—"In deciding upon the point which the two Judges considered to be the only one before them for decision, there was a difference of opinion. The judgment of the senior Judge, that of Mr. Justice Kemp, therefore prevailed. An appeal lies to us, because the Judges have differed, and I think that on this appeal it is not now open to the parties to go into the whole of the case and to raise before us points which were not raised before the Judges of the Division Bench"(2). In the second case the judgment just cited was quoted in support of the ruling that in appeal under the Letters Patent no point can be argued except a point on which the two Judges of the Division Bench have differed [192] in my opinion. The Officiating Chief Justice remarked—"The 36th clause of the Charter of 1865 provides 'that if the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, but if the Judges shall be equally divided, then the opinion of the senior Judge shall prevail.' The point on which the learned Judges differed was whether the appellant proved that there had been any material injury by reason of the irregularity. The 15th section gives an appeal from the judgment of two Judges, wherever such Judges are equally divided in opinion. In the case of *Shahzadi Hajra Begam* v. *Khaja Hossein Ali Khan*, which has already come before the Chief Justice and two Judges, on the construction of s. 15, it has been determined that an appeal only lies in respect of that part of the judgment upon which the two Judges differ" (4).

Roy Nandipat Mahata v. Urquhart (3).

The third case (5) was before Mr. Justice Macpherson on the petition of the Court of Wards on behalf of the Rajah of Darbanga. I cite it to show that that learned Judge, who was a party to the first judgment quoted, had not changed his opinion. His remarks that "it is most desirable and fit that, under the peculiar circumstances of this case, the appeal should now lie to the Privy Council, and not to the High Court. The Division Court decided to a certain extent in favour of the present petitioner; and to that extent the Judges were not divided in opinion. There being no appeal under cl. 15 from that portion of the decree, Rajah Lilanand Singh has appealed to the Privy Council, as he has an undoubted right to do" (6). Accepting the decisions quoted as authority on the point, and also for the reasons assigned by me, I am of opinion that the Court was not at liberty to go into the merits of this case, but should have confined itself to the point of difference between the two Judges of the Division Bench.

Entertaining this opinion, I do not think it necessary to go into the evidence. I would merely remark that I am of the same opinion as I was at the hearing of the appeal, that the evidence was in favour of the appellants.

(1) 4 B L R.A.C. 86=12 W R. 498.
(2) 4 B.L R.A.C. 101=12 W.R 499.
(3) 4 B.L.R.A.C. 181=13 W.R. 209.
(4) 4 B.L.R.A.C. 193=13 W.R. 212.
(5) 7 B.L.R. 730.
(6) 7 B.L.R. 736.

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CRIMINAL JURISDICTION.

1 A. 193.

1 A. 193.

[193] CRIMINAL JURISDICTION.

(*Mr. Justice Pearson.*)

QUEEN v. GUR BAKSH AND OTHERS. [11th May, 1876.]

Act X of 1872, *ss.* 467, 468, 469, 471—*Prosecution—Procedure.*

Section 471, Act X of 1872, does not deprive the Court, which possesses the power of trying an offence mentioned in ss. 467, 468 and 469, of the power of trying it when committed before itself(1).

[Overr., 1 A. 625 (F.B.).]

THE petitioner in this case gave evidence on behalf of certain persons who were accused of assault and robbery and pleaded an *alibi.* The accused persons were convicted, and the Magistrate who tried them then tried the petitioners for giving false evidence, under s. 193, Indian Penal Code, and convicted them. His order was affirmed by the Court of Session on appeal.

The petitioners applied to the High Court for a revision of the Magistrate's order on the ground that, under s. 471, Act X of 1872, he was not competent to try them himself, being the Court before which the offence was committed.

Mr. *L. Dillon*, for the petitioners.

The *Junior Government Pleader*, Babu *Dwarka Nath Banerji*, for the Crown.

JUDGMENT.

PEARSON, J.—Section 471 of the Code does not expressly prohibit the procedure adopted by the Magistrate in this case, and unless it does so, it is not contended that he was not competent to adopt it. What that section does is only to authorize any Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into any charge such as one under s. 193, Indian Penal Code, after making necessary preliminary inquiry, either to commit the case itself, or to send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged. This provision is very necessary for a Court not having power to try the offence itself, as for instance a Civil Court, but does not necessarily deprive a Magistrate of any power which he may possess to try the case himself. I therefore decline to interfere in the present case and reject this petition.

(1) So held in *Queen* v. *Jagat Mal*, 1 A. 162 ; *contra see Queen* v. *Kultaran Singh*, 1 A. 129.

1 A. 194 (F.B.).

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FULL BENCH.

1 A. 194 (F.B.).

[194] BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfild.*)

RATAN KUAR *and others* (*Defendants*) *v.* JIWAN SINGH *and others* (*Plaintiffs*).* [22nd May, 1876.]

Redemption of Mortgage—Burden of proof as to Ownership—Act I of 1872, *s.* 110—*Partial Relief.*

The plaintiffs averring that their ancestor had mortgaged three villages to the ancestors of the defendants in 1842 for Rs. 2,500, putting the mortgagees into possession, sued to recover possession of 15 biswas of each village, asserting that the mortgage-debt had been redeemed from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged, as to 10 biswas of each village, that they were sold to their ancestors in 1842, by him for Rs. 1,250; and, as to the other 10 biswas of each village that they were subsequently mortgaged to their ancestors by him for Rs. 14 000, borrowed by him from them for the purpose of defending a suit arising out of the previous sale, which sum had not been satisfied from the usufruct.

Held (STUART, C. J. dissenting) that the burden of proving the mortgage of the 10 biswas of each village of which the defendants alleged the sale, lay on the plaintiffs (1).

Per STUART, C. J. *contra.*

Held also (STUART, C. J. and TURNER, J. dissenting), that the plaintiffs having failed to prove the averments on which their suit was based, were not entitled to any relief in respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees

Per STUART, C. J. and TURNER, J. *contra.*

[R., 11 A. 438 (451); 18 A. 403 (406) = A.W.N. (1896), 132; A.W.N. (1899) 132.]

THE plaintiffs in this suit, heirs of Tej Singh, alleging that their ancestor had in 1842 mortgaged three villages to Kirat Singh and Moti Singh, the ancestors of the defendants, for Rs. 2,500, claimed possession of 15 biswas of each village, deducting 5 biswas, the share of a heir who did not join in the suit, on the ground that the mortgage-debt had been satisfied from the usufruct. They also claimed mesne profits. The suit was instituted on the 19th April, 1873.

The defendants alleged, as to 10 biswas of each village, that Tej Singh had sold them in 1842 to their ancestors for Rs. 1,250; [195] as to the remaining 10 biswas of each village, that the said ancestors had been put into possession thereof by Tej Singh, by way of mortgage, on account of a sum of Rs. 14,000, which he had borrowed from them, in order to defend a suit arising out of the above-mentioned sale, and for other purposes; that that sum had not yet been recovered from the usufruct of those 10 biswas; and that the claim of the plaintiffs, to the extent of the property sold, was barred by limitation, as they, the defendants, had been in adverse possession thereof for upwards of 12 years.

It appeared that Tej Singh died on the 5th September, 1860, up to which date his name had been recorded as lambardar and as proprietor of the villages. On the 21st October, 1860, the general agent of the defendants objected to the names of Tej Singh's heirs being recorded as proprietors, asserting before the tahsildar the title and possession of the

* Appeal under cl. 10, Letters Patent, No. 5 of 1875.

(1) See besides the cases cited post, *Balaji Narji* v. *Babu Devli* 5 Bom. H. C. R. A. C. 159; and *Rughoonath Rai* v. *Chundoo Lall*, N. W. P. H. C. R. 1867 p. 395.

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defendants under the sale and mortgage. The plaintiffs having applied that their names might be recorded, alleging that Tej Singh was in proprietary possession of the property up to the day of his death, and denying the sale and mortgage, their application was allowed by the Deputy Collector, but on appeal, by an order made in April, 1861, which recognized the possession of the defendants, the Collector reversed his subordinate's order, and directed that their names should be recorded as lambardars. The Collector's order was subsequently affirmed by the Commissioner.

The Court of first instance held that, as the defendants admitted the title of the ancestor of the plaintiffs, they were bound to prove the sale and mortgage; and holding that they failed to do so, gave plaintiffs a decree. With reference to the plea of limitation, it held that the claim of the plaintiffs was within time, taking the date of the Collector's order as the period from which the possession of the defendants could be considered adverse.

On special appeal by the defendants to the High Court the plea of limitation was again raised, and it was also contended that the burden of proof was wrongly thrown on the defendants.

The judgment of the Court (Stuart, C. J., and Oldfield, J.), so far as it was material to the grounds of appeal above set out, was as follows:—

[196] On the first ground of appeal we are of opinion that there is not such a clear adverse possession by the defendants, appellants, for 12 years, as will bar this claim.

Though the defendants assert their purchase to have been made in 1842, yet there is no very clear evidence of their possession under it till Tej Singh's death, for up to that time he continued to be recorded in the revenue records as proprietor, and there is no evidence of any acts of proprietorship on the part of defendants betokening possession. They have produced some dakhilas, or receipts for revenue, in their names for 1841, but these are prior to the alleged sale, and made by them as lessees, and there is no other material evidence, except some entries in certain papers, one copy of a khewat of 1268 Fasli or 1856 (No. 103 exhibit), where it is entered that Kirat Singh is in possession as purchaser, and similar entries in certain nikasis: these may be of use to support the sale, but not sufficient to support the averment of a possession under the sale adverse to the plaintiffs. We then come to the time of Tej Singh's death, 5th September, 1860, and find that, on the 21st October, the defendants, through their agent, Parshadi Lal, applied for mutation of names in their favour, and set up their title under sale and mortgage as now claimed, but the plaintiffs' ancestors at once disputed their title. The Deputy Collector found the plaintiffs were entitled to have their names recorded, but the Collector reversed this order, and entered the names of the defendants' ancestors in the column of manager, or lambardar, and this order was affirmed on appeal to the Commissioner. Since the last order was passed the plaintiffs appear to have taken no steps against the defendants till the suit was brought, and from that time the possession held by defendants may properly be considered adverse to the plaintiffs, but not so from the time during which their title was in dispute in litigation, and 12 years have not run so as to bar this claim.

It has also been contended that the three years' limitation will apply to this suit, but this is not so, as there was no such award by the revenue authorities in 1860 as is contemplated in the Limitation Act. We now take the last plea in appeal, as to the burden of proof. It is of the utmost

importance in this case, as the [197] evidence on both sides is so unsatisfactory, and the cases of both parties so full of inconsistencies, that the case will be determined mainly by the determination of this point.

There is no dispute that Tej Singh, through whom plaintiffs claim, was originally owner, and, *prima facie*, the burden of proof to show the present proprietary or mortgage possession of defendants will be on them; but this burden can be shifted if the defendants show that they have ostensibly for a length of time been in possession under the titles they now set up, and we think that is the case here, and that the Subordinate Judge has wrongly put the onus on them.

It is shown that on Tej Singh's death in 1860 they set up the very same titles to the estates that they do now, and that they were held by the higher revenue authorities to be in possession under such titles (see the Collector's order) and their possession has ever since continued, that is, for very nearly 12 years. Under such circumstances, the plaintiffs can now only succeed by proving their averments that the defendants hold under a mortgage of the entire estates for Rs. 2,500 executed in 1842. (The learned Judges, holding that the plaintiffs failed to prove these averments, dismissed the suit).

The plaintiffs applied for a review of judgment on the ground that, as to the 10-biswa share in each village of which the defendants admitted they were mortgagees, no proof of their title was necessary, and, as to the remaining shares, that the burden of proving the sale alleged by the defendants lay on them. The application was admitted by Stuart, C. J., Oldfield, J., dissenting.

The judgments of the learned Judges in review of their former judgments were as follows:—

STUART, C.J.—I have repeatedly and anxiously considered this case since the argument in review of our first judgment was addressed to us, and I have also had the advantage of perusing the opinion of my colleague, Mr. Justice Oldfield, but I cannot concur in his conclusion. The plaintiffs' ancestral and hereditary right is undoubted, it is admitted, while the defendants' story is, to my mind, very doubtful, if not suspicious, and on this broad view of the case I hold the burden of proof is on the defendants. The [198] facts are not the same as those in the Privy Council case referred to (1). Their clear actual possession for forty-four years was satisfactorily shown on the part of the defendants, and on the simple intelligible statement that they had held such possession as purchasers under a deed of a sale to one of their ancestors; the plaintiffs, on the other hand, alleging that the defendants' possession had been that of usufructuary mortgagees. But whatever the origin of the possession, the fact of it for forty-four years was undoubted, and the burden of proof was therefore justly put on the party who alleged an hereditary title against the defendants.

Here the circumstances are not quite the same. The defendants show, indeed, or rather suggest, their ostensible possession since 1842, but I think we must take it as a fact that their possession from that year till 1860, when Tej Singh died, was the possession of mortgagees, and therefore was not adverse to the plaintiffs. But it was not till the 19th April, 1861, that their possession was recorded, so that the defendants can barely show 12 years of absolute or clearly adverse possession; in fact, the 12 years had not expired when the present suit was instituted. Then the defendants'

(1) *Valoji Kristnan Gopalar v. Nayana Chetti*, 10 M. I. A. 151.

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plea of possession, such as it is, is accompanied by statements of a very doubtful, and even, as I have said, of a suspicious nature; and their suggestion respecting the sale to their ancestors of a 10-biswa share for Rs. 1,250 is scarcely credible, and is certainly inconsistent with their other statement that the other 10-biswa share had been mortgaged to them for Rs. 14,000. Generally, I agree with the Subordinate Judge in his view of the facts so far as we know them, and I consider the plaintiffs' statement the more reasonable of the two, and their hereditary title is undisputed. On the other hand, the defendants' account of the origin of their possession is so doubtful and even improbable, as respects both its character and duration, that it ought not, in my opinion, to be allowed to shift the burden of proof from their shoulders to those of the plaintiffs.

Therefore, holding that the burden of proof is on the defendants, I would affirm the judgment of the Subordinate Judge, in which I substantially concur, and dismiss the appeal with costs.

[199] OLDFIELD, J., (who, after stating the facts, continued) :—The plea of limitation in bar by adverse possession urged by the defendants has no weight, for the plaintiffs' suit is to redeem a mortgage, and they can sue any time within 60 years. Long ostensible possession on the part of the defendants as owners would throw the burden of proving the mortgage on the plaintiffs; but it would not be adverse so as to bar the institution of the suit for redemption; and the plea of three years' limitation also fails, as there has been no award by the revenue authorities in 1860, such as is contemplated in the Limitation Act. But in my opinion the lower Court has wrongly placed the burden of proof on the defendants. The plaintiffs' ancestors are admittedly the original owners of the estate, but it is very clear that the defendants' ancestors have held possession at least since 1842 up to the present time; the plaintiffs admit so much, ascribing it to the mortgage. This possession the defendants ascribe to sale of half the estate and mortgage of the remainder, but however this may be, possession on their part from 1842 is clear, and since 1860, if not before, this possession by them has been openly held under the titles they now set up. Tej Singh died on 5th September, 1860, and defendants, through their agent, Parshadi Lal, applied for mutation of names in their favour, averring they had purchased half the estates and become mortgagees of half in the same way as they contend in this suit; the plaintiffs' ancestors disputed their titles, but the Collector, on 19th April, 1861, recorded the defendants' names as being the parties in possession, and since then the plaintiffs have not taken any steps against defendants till this suit was instituted.

It appears to me that, in the face of this lengthened possession of the estate by defendants, the plaintiffs can only succeed by proving the mortgage which they sue to redeem, and the ruling of the Privy Council in *Valoji Kristnan Gopalar* v. *Nayana Chetti* (1) I think supports this view.

The defendants appealed to the Full Court against the judgment of Stuart, C. J., under cl. 10 of the Letters Patent, on the ground that the burden of proof should have been thrown on the [200] plaintiffs; and that the plaintiffs failed to prove the mortgage under which they claimed.

Babu *Oprokash Chandar* (with him the Junior Government Pleader, Babu *Dwarka Nath Banerji*, and Pandit *Ajudhia Nath*), for the appellants :—It is admitted that the defendants are in possession of the property in suit and have been so for upwards of 30 years. Since 1860, at the

(1) 10 M. I. A. 151.

least, they have been in possession under the titles now set up. As to the moiety of the property therefore which they say was sold to them, the burden of proving their qualified ownership lies on the plaintiffs—section 110, Act I of 1872; *Sheoruttun Gir* v. *Doorga* (1). In view of their long enjoyment of possession the plaintiffs cannot succeed in their suit unless they prove the mortgage which they sue to redeem—*Valoji Kristnan Gopalar* v. *Nayana Chetti* (2). This they have failed to do.

Mr. *Howard* (with him Pandit *Bishambur Nath*), for the respondents.—The cases cited and the present case are distinguishable. In the present case there was no ostensible possession by defendants as owners of the moiety of which they allege the sale. They were recorded as managers only. There has been no adverse possession of the moiety for 12 years. They admit their possession as mortgagees of half the property. The plaintiffs are entitled to relief in respect of this portion, and the amount of the mortgage-debt should be determined.

JUDGMENT.

PEARSON, J.—As regards the 10-biswa share which is said to have been sold by Tej Singh to Kirat Singh more than 30 years ago, and which is undeniably in the possession of the defendants, it appears to me that s. 110 of the Law of Evidence, (Act I of 1872) entirely supports the first ground of the appeal before us. It is therefore scarcely necessary to refer to the doctrine laid down by the Privy Council in the case to be found at p. 151, vol. 10, Moore's Ind. App. (3). The law declares that "when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." The plaintiffs are then clearly bound by the law to prove that the defendants are not the owners of the 10-biswa [201] share in their possession, and we have to consider whether they have discharged the burden thus imposed upon them. I hold that they have done so, being of opinion that the evidence adduced by the defendants in proof of the sale alleged by them is more weighty and trustworthy than that which the plaintiffs have brought forward to substantiate their assertion of a mortgage having been made of the three entire mahals in 1842 for Rs. 2,500. I am further of opinion that, although the suit as brought in respect of this portion of the claimed property is not barred by the law of limitation, the plaintiffs are nevertheless precluded from recovering possession of it by the fact that the defendants have held adverse possession of it for more than 12 years. For it appears in evidence that, on the 21st October, 1860, the defendants publicly asserted their title by purchase to a moiety of each of the mahals by applying to the Revenue Department for the recognition and registration of their title and possession, and in my judgment their possession must not be reckoned as adverse only from the 19th April, 1861, the date of the order passed on their application by the Collector in appeal, but at least from the date on which their title as purchasers was openly set up in the face of Tej Singh's heirs. From this point of view their possession had certainly become adverse to the latter more than 12 years before the date of the institution of the present suit.

(1) N. W. P. H. C. R. (1874), p. 36. (2) 10 M. I. A. 151.
(3) *Valoji Kristnan Gopalar* v. *Nayana Chetti*.

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It remains to deal with the remaining portion of the claim, in respect of the 5-biswa share of each of the three mahals admitted by the defendants to be held in mortgage by them in lieu of Rs. 14,000 and to be redeemable on payment of that amount. The allegation on which the suit was brought, that the entire mahals were mortgaged for Rs. 2,500, an allegation quite inconsistent with that made by the plaintiffs, or those whom they represent, in 1860, has broken down; and it appears to me that we should not be warranted by the evidence on the record in ruling that the 5-biswa share now in question was redeemable whenever Rs. 625—a fourth part of Rs. 2,500,—had been recovered with interest from the usufruct, and has been accordingly redeemed. The plaintiffs must establish their right to re-entry, but they have failed to prove that they are entitled to re-entry, on any other terms than those stated by the defendants. I would therefore restore and [202] affirm the decision of the Bench, dated the 16th June, 1874, and decree this appeal with costs.

TURNER, J.—That the appellant and her predecessors-in-title have held possession of the property in suit for upwards of 12 years is virtually admitted by the respondents and is abundantly proved. It is shown that in 1860 they opposed the entry of the names of Tej Singh's heirs in the revenue registers, on the ground that they were in possession, and in April, 1861, the Collector allowed their objection and ordered their names to be entered. Although they did not ascribe the same date to the origin of their title, they virtually asserted the same title as that on which she now relies. She now claims one moiety of the property under a sale effected by Tej Singh in favour of Kirat Singh in 1842, and she alleges that legal proceedings having been instituted to contest the right of Tej Singh to sell the property, debts were incurred by Tej Singh to Kirat Singh, and that the other moiety of the estate was in consideration of these debts " made over in possession" to Kirat Singh. The phrase used respecting this last transaction is somewhat ambiguous both in the written statement filed by the appellant and in other proceedings, but the case was argued on the hypothesis that the alienation of the second moiety of the property was of the nature of a mortgage and not an absolute sale. In their petition filed in the Revenue Office on the 26th December, 1860, the heirs of Kirat Singh alleged they were in possession by virtue of sale and mortgage effected by Tej Singh in their favour. In their appeal to the Collector they alleged that in 1839 the estate was mortgaged and sold by Tej Singh to Kirat Singh and Moti Singh, their ancestors. This appears from the Collector's decision, dated the 20th February, 1861. Moreover, the witnesses they have produced in this suit were called to speak to a sale of one moiety of the property and to a mortgage of the other moiety. I see no sufficient ground for the suggestion, that, although the property was nominally mortgaged, it was not intended it should be redeemed.

The appellant asserts that whatever documents of title she possessed were lost when Kirat Singh's house was plundered in the mutiny, and the kanungo who appears to be impartial con-[203] firms her statement that the residence was destroyed in the manner stated by her. Now, inasmuch as possession of Kirat Singh and his heirs for so long a period has been proved, the presumption that they were in possession as proprietors must be rebutted. In respect of one moiety it is rebutted by the admission and proof that their possession was that of mortgagees. But in respect of the other moiety which they claimed to hold as purchasers the respondents must adduce evidence to rebut the presumption arising out of possession or must fail. The circumstance that one moiety of the

property is admittedly held under mortgage might lend corroboration to evidence, if there was any, that Kirat Singh's heirs held entire property as mortgagees, but by itself it will not relieve the respondents from the burden of rebutting the presumption arising from the possession of Kirat Singh's heirs. No reliable evidence has been produced by them. The witnesses called by either party to speak to the contents of deeds executed so many years ago would in this respect be untrustworthy, even if it were proved that they were at the time made acquainted with the contents of the deeds which from the position in life of some of them is hardly probable. They may, or rather some of them may, have been present when the deeds were executed, and if they were present they may be able to recall the fact of the execution of the deeds, but it would be unsafe to accept their testimony beyond this point.

Putting aside the parol evidence, there remains the circumstance that Tej Singh's name was retained in the revenue registers as proprietor up to the time of his death. The appellant seeks to explain this by asserting that Tej Singh's title to the estate was disputed by one Daulat Singh, in the name of whose ancestor Tej Singh had purchased in *ismfurzi*, and that, in consequence of proceedings taken by Daulat Singh, the entry of Kirat Singh's name in respect of the 10 biswas purchased by him was postponed. That Tej Singh's title was in fact disputed by Daulat Singh is shown by the petition of Jiwan Singh, Himmat Singh and Mussammat Radha, when as the heirs of Tej Singh they applied in 1860 to have their names recorded in the registers. But to whatever cause the retention of Tej Singh's name may have been due, this circumstance would not by itself warrant the conclusion that the [204] possession of Kirat Singh's heirs was merely that of mortgagees. The claim then for one moiety of the property must be dismissed. The question arises whether the respondents, although they have failed to prove that the whole estate was mortgaged, should be allowed any relief in this suit? The circumstances are peculiar; the appellant admits that she holds one moiety of the property claimed by way of mortgage; ordinarily a deed would have been executed creating such an interest. Now she does not produce any mortgage-deed. She avers that large sums were expended in defending the sale of one moiety of the property and that other sums were advanced to the original proprietor, and that in consideration of these expenses and advances, which altogether are said to amount to a sum wholly disproportionate to the sum alleged to have been paid for one moiety of the property, the other moiety of the property was made over to Kirat Singh. That it was transferred to Kirat Singh by absolute sale is not asserted, and, as has been pointed out, in 1860 it was admitted that the title to a portion of the property was in virtue of mortgage, and, on the hypothesis that the mortgage was admitted, the case was argued at the bar.

The appellants do not state at what date this assignment was made The sale of the one moiety is ascribed to the year 1842, the date assigned by the respondents to the mortgage of the entire village. If the assignment of the other moiety was made for the consideration alleged by the appellant, it must have taken place some years after the sale. In 1860 the dates ascribed to the sale and mortgage were the year 1839. There is some slight evidence in the revenue proceedings to show that Kirat Singh held a mortgage of the estate before 1842, and it is apparent from the circumstance that in 1860 the appellant alleged her title originated in 1839, that she is uncertain of the date on which the assignment of the second moiety was made. It is possible that a mortgage subsisted

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prior to 1842; that in 1842 that mortgage was paid off, and one moiety of the property sold to Kirat Singh; and it is not improbable that subsequently the second moiety was mortgaged; and assuming that the title to the second moiety is admittedly founded on a mortgage, I can see no good reason to debar the respondents from having an account taken in this suit of what may be due on the mortgage of the moiety of the estate and [205] of obtaining such relief as they may be found entitled to on the taking of the account. It is impossible to ascribe any date to this mortgage save that it occurred after the sale in 1842 and before 1860. If the respondents are not allowed to obtain relief in this suit, they may hereafter be met with the plea that they ought to have obtained relief in this suit. There are cases in which this Court has allowed mortgagors to recover a portion of the property claimed by them; there are cases in which a mortgagor has asserted the debt to be less than the mortgagee has proved it to be; and nevertheless the mortgagor has been allowed to proceed with his suit, and accounts have been taken and such relief granted as on taking the accounts he was shown to be entitled to. A claim for the whole surely includes a claim for a part, and if the plaintiff fails to prove his whole claim, he may nevertheless obtain such relief as falls fairly within the purview of his claim. Seeing that the parties to this suit are not the persons who were parties to the original transactions, and that whatever documentary evidence existed of those transactions is not now forthcoming, it appears inequitable to require the same correspondence of proofs and allegations which might have been required from persons who were themselves parties to the original transactions. If the respondents are entitled, as in my judgment they should be held to be, to obtain partial relief in this suit, I am of opinion that, in respect of the moiety of the property which is admittedly under the mortgage, the burden of proof lay on the appellant. The respondents alleged the mortgage-debt was Rs. 2,500, and that it had been discharged from the usufruct. The appellant alleged the debt was Rs. 14,000, and that a large balance was still owing. She may yet have in her possession accounts to prove the sums advanced, and she must have accounts of the profits of the estate. In my judgment the suit should not be wholly dismissed, but issues should be remitted to ascertain the amount of the mortgage-debt on the moiety held in mortgage, and to ascertain the amount of profits received by the mortgagee.

STUART, C.J.—I think there is considerable force in the latter part of Mr. Justice Turner's judgment, and *pro tanto* I concur in the account and remand he suggests. But I consider that such account and remand might justly be extended to the whole property in suit; and generally, after giving the case the most careful consi[206]deration, and hearing all that has been urged before the Full Bench, I am not satisfied that my first judgment was wrong. The question before us is simply on which of the parties the burden of proof is laid, and I remain of the opinion that it is on the defendants. Anything like adverse possession by them cannot, I think, be considered to have commenced till the 19th April, 1861, and 12 years had not elapsed from that date when the present suit was instituted. The presumptions therefore are all in favour of the plaintiffs, and the defendants must make out their case. I would affirm the judgment of the Division Bench.

SPANKIE, J.—I am of opinion that the burden of proof in this case was on the plaintiffs. It is true that the ancestor of plaintiffs is admitted

to have been the original owner of the property. But the defendants and their ancestors have held possession, as shown by Mr. Justice Oldfield, since 1842 up to the present time. This plaintiffs allow, but say that they hold as mortgagees. On the other hand, the defendants have held possession since 1860, and have set up a proprietary title to half the estate since 1860, and contend that they are mortgagees of the other half. Their title was disputed in 1861. But the Collector recorded their names as being in possession. Plaintiffs took no steps to establish their own title until this suit was instituted, in which they claim to have their right declared and full proprietary possession of 15 biswas by redemption of mortgage, asserting that the mortgage had been liquidated from the income of the property. They were bound to establish the mortgage, but they could not produce the deed said to have been executed so far back as 1842, and the parol evidence in support of it is suspicious and unreliable. On the other hand, though the defendants cannot produce a sale-deed, the fact of the sale is supported by the kanungo and by entries in the village papers and statement of proprietary charges for 1263 Fasli. The patwari, too, supports their statement. The witnesses generally are not better than those of plaintiffs. But it is for the former to establish their case, and a weak defence cannot set up a weak claim. I think that the circumstance that on Tej Singh's death, when application was made for mutation of names in favour of the predecessor of plaintiffs, any mortgage was denied, tells against the case of the plaintiffs; and if their statements now are correct the mortgage in 1842 [207] was but for a small term, and mutation of names was not considered necessary, as it was thought that the mortgage would be redeemed from the income in two or three years. Even no attempt has been made to get back the property until this suit was entered.

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I think that the appeal must be admitted, and that the suit as brought was, in the first instance, properly dismissed on appeal. Whether, on the admission of defendants that they held as mortgagees of a portion of the property under a mortgage on which a large sum is still due to them, the plaintiffs can claim to redeem that portion after getting an account is another question. I do not think that they are entitled to ask for it in this suit, in which their claim as brought had not been established.

OLDFIELD, J.—I adhere to the view of this case which I have expressed at length in the previous judgments, and I would restore the judgment and decree of this Court, dated the 16th June, 1874, and dismiss the suit with cost in all Courts.

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(*Mr. Justice Pearson and Mr. Justice Turner.*)

RAJA RAM (*Plaintiff*) *v.* BANSI AND OTHERS (*Defendants*).*
[22nd May, 1876.]

Pre-emption—Minor—Legal Disability—Limitation—Act IX of 1871, s. 7 and sch. II, cl. 10.

The provisions of s. 7, Act IX of 1871, are applicable in computing the period of limitation in suits to enforce a right of pre-emption (1).

Where a condition for pre-emption contained in a record-of-rights was intended to take effect at the time of a sale and its language implied that the co-sharers in whose favour it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage.

Nanoo v. *Tirkha* (2) observed upon.

[208] Remarks on the right of pre-emption existing in villages in the North-Western Provinces.

THIS was a suit by a co-sharer in a village to enforce his right of pre-emption in respect of a 2-anna share, under a condition for pre-emption contained in the village adminstration-paper.

The share was sold to the answering defendants, who were strangers, on the 17th January, 1870, while the plaintiff was a minor. The plaintiff had no legally-constituted guardian at the time of the sale. His mother was alive and was managing his estate. The share was not offered to him or to any one on his behalf, nor did he or any one on his behalf assert his right of pre-emption at the time of the sale. He became of age in October, 1874, and instituted the present suit on the 23rd July, 1875.

The Court of first instance gave him a decree. The lower appellate Court, relying on the ruling of the Sudder Court in *Nanoo* v. *Tirkha* (2), held that his right of pre-emption had lapsed for want of its assertion within a reasonable period after the sale. The plaintiff appealed to the High Court against this decision.

Lala *Lalta Parshad*, for the appellant.

The Senior Government Pleader (Lala *Juala Parshad*), Munshi *Hanuman Parshad* and Maulvi *Mehdi Hussein*, for the respondents.

JUDGMENT.

The judgment of the Court was as follows :—

The *haqq-i-shufa* or right of pre-emption known to the Muhammadan law, and of which some of the expounders of that law declare the operation limited to houses and parcels of enclosed land, had in some instances become a village custom and attached to the alienation of shares in revenue-paying mahals when the first settlement under Reg. IX of 1833 was made in these Provinces. These instances were, we believe,

* Special Appeal No. 132 of 1876, from a decree of the Judge of Gorakhpur, dated the 26th January, 1876, reversing a decree of the Subordinate Judge, dated the 20th November, 1875.

(1) So held under Act XIV of 1859 in *Jungoo Lal* v. *Lalla Alum Chund*, 7 W.R. 279.
(2) S.D.A. Rep. N.W.P. (1865), 97.

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not numerous, but inasmuch as it was deemed conducive to the welfare and tranquillity of village communities that some such provision should be made to prevent the incursion into the community of strangers in race or religion, the officers engaged in the preparation of the record-of-rights induced the proprietors to consent to the introduction of a stipulation binding each co-sharer when transferring his share to [209] give the first refusal of it to one of his own family or to the other co-sharers in the patti or mahal. These stipulations vary in their terms, and while they are not clogged with the formalities which attach to the Muhammadan *haqq-i-shufa* they also differ from that right, in that while the latter is regarded by Muhammadan law as a feeble right, the former, arising out of contract, are enforced with the same rigour as contracts.

Unfortunately, the introduction of these restrictions on the freedom of alienation has worked results wholly unexpected, and produced evils scarcely less than those they were designed to avert. So long as land possessed no great value in the market, the consequences were not plainly apparent. Now that land has acquired greater value, and that in some districts there is an active demand for it, the results of these restrictions cannot escape observation.

Except under the pressure of necessity, land-owners rarely part with their landed property. It is therefore of the utmost moment to them to obtain its fair value and without unreasonable delay. Now in a village held by a number of co-sharers it is almost impossible to obtain within a reasonable time from every co-sharer an explicit refusal of an offer of sale, or such evidence of the refusal as will thereafter be incontrovertible. Not unfrequently when a co-sharer desires to sell his share, and in fulfilment of the stipulation offers it to his co-sharers, some one or more of them will neither explicitly accept nor decline the offer, but haggle to obtain it at a price far below its value. When the patience of the seller is exhausted, or the urgency of his need no longer permits delay, he is driven to effect a sale with a stranger, which is followed after the longest delay allowed by law by the institution of one or more suits to enforce the right of pre-emption. The stranger, aware of the risk to which his purchase is exposed, either at once takes account of it by offering less than the property ought to fetch if it could be sold freed from the risk, or retains a portion of the purchase-money until it be seen whether the sale is contested, or, if contested, the result be known. Fictitious considerations are entered in sale-deeds, fictitious payments made before the registering officers, fictitious receipts executed, and wholesale perjury committed on the one side or the other when the Courts come to inquire into the prices actually paid.

[210] In the case now before us a claim is made which, if allowed, will render the condition for pre-emption still more onerous, and impair still further the value of property to which it attaches. The plaintiff seeks to disturb sales made some years before suit at a time when he was a minor and unrepresented by any person competent on his behalf to conclude a purchase. Having brought a suit within a year from the date on which he attained his majority, he is not barred by limitation from enforcing his claim, and the main question is whether or not the right accrued to him. The Court of first instance assumed that the right accrued to the plaintiff, notwithstanding his minority, and decreed the claim. The Judge on appeal considered that, inasmuch as no claim had been advanced either by the minor or his mother, who managed her son's property within a reasonable period after the sale, the right was lost. The Judge relied on the decision of the late Sudder Court, North-Western

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Provinces, in *Nanoo* v. *Tirkha* (1) in which it was held the nature of a pre-emptive right to be such as to require immediate assertion as a condition essential to its recognition, and that minority will not excuse laches in the assertion of the claim.

In special appeal the propriety of this ruling has been impugned, it does not appear from the report whether the claim which was before the Sudder Court was based on the Muhammadan *hagq-i-shufa* or on a special condition in the record-of-rights. Under the Muhammadan law immediate demand is certainly essential, but, as we have said, the formalities which are requisite under that law do not apply to rights of pre-emption created by contract, unless it appear that it was the intention of the parties to attach to the exercise of the right the same formalities as are required by Muhammadan law.

In all cases in which the right is asserted as based on a stipulation entered in the record-of-rights, the terms of the stipulation must be regarded, and those conditions only imposed which the language of the stipulation warrants.

In the case before us the stipulation has been thus translated :—

"Every co-sharer is to the extent of his possession at liberty to [211] alienate his share by sale or mortgage, but at the time of alienation there is this condition, that whoever desires to alienate his share first of all the nearest co-sharer will be entitled to it, and in the event of his refusal it shall be transferred to the other co-sharers in the other thoke, and when all have refused or do not give the proper price, than a transfer may be made to another (*i.e.*, a stranger), and after that the right of alienation shall belong to no co-sharer.

There is nothing in the language of this stipulation to show that the formalities of the Muhammadan law were attached to the right of pre-emption, nor that the right, if it accrued, would be forfeited if it were asserted at any time within the period allowed by the law of limitation. But, while we cannot support the decree of the Court below on the ground on which it proceeded, we see other grounds which in our judgment justify us in affirming it.

It could not have been the intention of those who framed or accepted the stipulation, that no complete alienation should be made so long as there was a co-sharer in the village under a disability to make a binding contract; and the language of the stipulation so far from supporting militates with the suggestion that there could have been any such intention. The condition was clearly to take effect at the time of the sale, and its language implies that the co-sharers in whose favour the condition was created were to be persons who were competent at the time to make a binding contract to accept or refuse the offer. The generality of the reservation of right to all the co-sharers of the several classes is controlled by other terms which imply that the option of purchase is to be exercised at the time of the sale ; and that it is to be given to those who are competent to accept or refuse it. It is admitted that the plaintiff was at the time of the sale impugned a minor, and it is not alleged that there was at that time any person competent at that time to conclude a contract which would be binding on him.

It follows from the construction we put on the stipulation that the seller was not bound to make the offer to the plaintiff, and that the sales cannot be invalidated by reason of the absence of proof of refusal on his part.

(1) S. D. A. Rep. N. W. P. (1865) 97.

We have assumed the stipulation in the record-of-rights arose out of contract, because such we believe to have been the more general origin of these stipulations; but assuming the clause in the record-of rights to be a record of custom, we are still at liberty to collect its incidents from the terms in which it is recorded. Indeed, were the clause merely a record of custom, and [212] its language were ambiguous, a custom to be a good custom must be reasonable, and we could not hold a custom reasonable which allowed the validity of transfers of property to remain for an indefinite period in suspense.

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For the reasons we have stated we affirm the decree of the lower appellate Court and dismiss the appeal with costs.

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BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

GHAZI AND OTHERS (*Defendants*) v. KADIR BAKSH AND ANOTHER (*Plaintiffs*).* [24th April, 1876.]

Execution of Decree—Irregularity—Sale in execution—Act VIII of 1859, *s.* 257.

G and *M* obtained a money-decree against *K* in the Court of the Principal Sudder Amin on the 12th December, 1864. This decree was reversed by the District Judge, but on the 5th March, 1866, the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May, 1866, the District Judge affirmed the decree of the Court of first instance. On the 3rd December, 1866, the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January, 1867, the District Judge again affirmed the decree of the Court of first instance, and no appeal being preferred, the decree became final. The decree-holders had in the meantime taken proceedings to execute the decree dated the 5th May 1866, and from time to time, and finally on the 7th November, 1870, they renewed these proceedings, in each instance referring to the decree, dated the 5th May, 1866, even after it was set aside and the decree, dated the 14th January, 1867, passed. On the last application a sale of certain immoveable property belonging to *K* was ordered, and took place on the 15th February, 1871. *K* objected to the confirmation of the sale on the ground of the irregularity in the application, but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction purchaser on the ground that the sale was a nullity. *Held, per* STUART, C.J., and PEARSON, TURNER and SPANKIE, JJ., that the sale ought not to be set aside, as the irregularity in applying for execution of the decree, dated the 5th May, 1866, was an irregularity which did not prejudice the judgment-debtor.

[213] *Per* OLDFIELD, J.—That, with reference to s. 257, Act VIII of 1859, the suit was not maintainable.

THIS was a suit to recover possession of the one-third share of a dwelling-house, being the plaintiff Kadir Baksh's share by inheritance in the said dwelling-house, and to eject the auction-purchaser at a sale of the share in execution of a decree held on the 15th February, 1871. It was instituted on the 7th September, 1873, and was brought on the allegation that the decree in execution of which the share had been sold had been reversed, and that the sale and all other proceedings relating to the execution were therefore null and void.

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* Special Appeal No. 1557 of 1874, from a decree of the Subordinate Judge of Allahabad, dated the 25th September, 1874, reversing a decree of the Munsif, dated the 24th December, 1873.

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The defendant Ghazi, and Mangli, the deceased ancestor of the defendant Zahuran, obtained a decree for Rs. 1,500 against the plaintiff Kadir Baksh in the Court of the Principal Sudder Amin of Allahabad on the 12th December, 1864. This decree was reversed by the District Judge on the 28th July, 1865; but on the 5th March, 1866, the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May, 1866, the District Judge affirmed the decree of the Court of first instance. On the 3rd December, 1866, the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January, 1867, the District Judge again affirmed the decree of the Court of first instance, and no appeal being preferred, the decree became final. The decree holders had in the meantime, on the 12th June, 1866, taken proceedings to execute the decree, dated the 5th May, 1866. They renewed these proceedings on the 5th July, 1866, and again on the 2nd June, 1869, referring in each instance to the decree, dated the 5th May, 1866. Finally on the 7th November, 1870, they applied for the sale of the property in suit, referring in this application, as in their previous applications, to the decree, dated the 5th May, 1866, and stating that the amount which was entered therein as due by the judgment-debtor was due under that decree. A sale of the property was ordered and took place on the 15th February, 1871. The notifications of sale stated that the property was for sale in satisfaction of the decree, dated the 5th May, 1866. On the 10th March, 1871, the judgment-debtor objected to the confirmation of the sale on the ground of [214] the error in the application for execution, but his objections were disallowed, and the sale was confirmed on the 22nd March.

Other properties were at the same time sold under the same circumstances. Kadir Baksh sued to recover these other properties, and obtained a decree in the Court of first instance. The lower appellate Court reversed the decree, holding that the error in the application of the 7th November, 1870, for the sale of the properties was a mere clerical error which caused the judgment-debtor no substantial injury, and an error which he was bound to have pointed out before the sale. On special appeal, the decision of the lower appellate Court was reversed on the ground that the reference in the application of the 7th November to the decree, dated the 5th May, 1866, was not a clerical error, and that, if it could be held to refer to the decree, dated the 14th January, 1867, that application would have been barred by limitation.

In the present suit the Court of first instance held that the claim was barred by limitation under art. 14 (*a*), sch. II, Act IX of 1871. The lower appellate Court held that the limitation applicable to it was that provided in art. 145, sch. II, Act IX of 1871, that is to say, 12 years. It therefore remanded the suit for a new trial.

On special appeal by the defendant to the High Court it was contended that the suit was not maintainable, with reference to s. 257, Act VIII of 1859, and that the clerical error in the application for execution was not a sufficient reason for holding the sale invalid, the judgment-debtor having suffered no substantial injury thereby.

TURNER, J. (who, after setting out the facts and referring to the grounds of the former decision of the High Court, continued):—These two grounds appear to resolve themselves into one ground, or if the date of the decree given in the application of the 7th November, 1870, be held to be a clerical error, then the dates of the decree mentioned in the other applications made subsequently to the decree of the 14th January, 1867,

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were clerical errors, and those applications would be sufficient to keep alive the decree. Having succeeded in setting aside other sales, the judgment-debtor [215] has now brought the present suit to set aside the sale of the property in suit.

As I entertain doubt whether the sale ought to be set aside for an error which in no way prejudiced the judgment-debtor, I propose that the case should be submitted to the Full Bench that the propriety of the former ruling may be considered.

SPANKIE, J.—I concur in the reference.

Pandit *Bishamber Nath*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Pandit *Ajudhia Nath*, for the respondents.

The *Junior Government Pleader*.—The application for execution of the decree, dated the 5th May, 1866, was an irregularity, as it was not the proper decree to execute; and inasmuch as the decree-holders sought to recover under that decree a larger sum than was due under it, the irregularity inflicted substantial injury on the judgment-debtor.

Pandit *Bishamber Nath*.—The sale took place in satisfaction of an existing judgment-debt. The judgment-debtor was not in reality affected by the irregularity. No objection was taken by him in the course of the execution proceedings. The sale was duly notified and conducted.

OPINIONS.

The opinions of the Full Bench were as follows :—

STUART, C.J.—The wrong date given to the decree in the application for execution must have been, I think, not so much a clerical error as a legal mistake on the part of the pleader or other person who prepared the application. But it is a mistake, an innocent mistake perhaps, which clearly appears as such on the face of the record, and which, I think, we are entitled to disregard, being, as the reference suggests, a mere error which in no way prejudiced the judgment-debtor.

PEARSON, J.—What is called a clerical error appears to me to have been rather erroneous procedure; but I am bound to admit that the ruling of which the propriety is called in question is not one which on re-consideration I am prepared to maintain, and that [216] the view that the sale ought not to be set aside for an error which did not prejudice the judgment-debtor commends itself to my judgment.

TURNER, J.—The decree which Mussamut Zahuran obtained in the Court of the Principal Sudder Amin in December, 1864, was affirmed in appeal on the 5th May, 1866, and although the decree of the appellate Court was set aside, and a re-hearing of the appeal ordered in December, 1866, the original decree was again affirmed in January, 1867. When then the decree-holder in 1869 and in 1870 applied to continue the proceedings in execution which she had commenced in 1866, although she erroneously referred in the heading of her application to the decree of the appellate Court passed in May, 1866, which had been set aside, both the decree of the Court of first instance subsisted and a decree of the appellate Court affirming that decree.

The proceedings in 1869 and in 1870 were a continuation of the proceedings commenced in 1866, wherein she had sought to execute not only the decree of the appellate Court, but the decree of the Court of first instance, which the decree of the appellate Court affirmed.

Under these circumstances, it seems inequitable to hold that an innocent purchaser is to be damnified by an error which in no way

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prejudiced the judgment-debtor, and which, had he thought fit to intervene before the sale was ordered, might easily have been corrected. In my judgment the sale ought not to be set aside.

SPANKIE, J.—I am of opinion that the error was more than clerical and amounted to a material irregularity, but not to one by which the judgment-debtor could be really said to have been prejudiced, and therefore I do not think that the suit can be maintained.

OLDFIELD, J.—The application for execution contained this error, that it referred to the decree of which execution was sought as bearing date May 5th, 1866, whereas the subsisting decree which alone was capable of execution was of date December 12th, 1864.

[217] Notwithstanding this error in the application, the execution proceedings were made in effect, though not nominally, with reference to the latter decree, and the irregularity, such as it was, pervaded the entire proceedings in execution, including the publication of the sale, and it was made the ground of an objection to the confirmation of the sale under s. 256, Act VIII of 1859, and the objection was disallowed. This being so, I am of opinion that this suit cannot be maintained with reference to s. 257, Act VIII of 1859.

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1 A. 217 (F.B.).

BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.*)

TAJUDDIN KHAN (*Defendant*) *v.* RAM PARSHAD BHAGAT (*Plaintiff*).*
[27th April, 1876.]

Act XVIII of 1873, *s.* 93, *cl.* (*a*)—*Bhaoli—Money-equivalent—Rent—Revenue Court—Civil Court—Jurisdiction.*

Held (PEARSON, J., dissenting), that a suit for the money-equivalent of arrears of rent payable in kind is a suit for arrears of rent within the meaning of s. 93, Act XVIII of 1873, and therefore cognizable by a Revenue Court.

Per PEARSON, J.—Such a suit, being a suit for damages for a breach of contract, is cognizable by a Civil Court.

[F., 1 C.W.N. 55; Observed, 16 C.W.N. 89 (91) = 13 Ind. Cas. 29 (31).]

THIS was a suit to recover Rs. 29-1-2, being the market-value of the plaintiff's share in the produce, for the years 1278, 1279 and 1280 Fasli, of two bighas, two biswas, and 17 dhurs of land situated in patti Ram Dihal Rao. The defendant denied that he was a tenant, alleging that he was a co-sharer with the plaintiff in the patti and that the land was his *sir*-land.

The Revenue Court of first instance found that the defendant held the land as a tenant, and gave the plaintiff a decree. The first Court of appeal held that the suit was barred by s. 106, Act XVIII of 1873, and that the land was the defendant's *sir*-land, and dismissed the suit. The second Court of appeal agreed with the Court of first instance and also gave the plaintiff a decree.

On appeal to the High Court by the defendant, the Court (Pearson and Turner, JJ.), with reference to the second ground [218] taken in the

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* Special Appeal No. 1018 of 1875, from a decree of the Judge of Ghazipur, dated the 23rd June, 1875, reversing a decree of the Collector, dated the 23rd January, 1875.

memorandum of appeal, *viz.*, that a suit for the value of grain was not cognizable by the Revenue Court, referred to a Full Bench the following question :— 1876 APRIL 27.

FULL BENCH.

1 A. 217 (F.B).

" Whether, when rent is payable in grain, it is competent for the landlord to sue in a Revenue Court for the equivalent in cash?"

Munshi *Hanuman Parshad* (with him the Senior Government Pleader, Lala *Juala Parshad*), for the appellant.—There is express provision made in s. 43, Act XVIII of 1873, for the recovery of rent payable in kind. The other provisions in the Act relating to rent are applicable only to rent payable in cash. The provisions of s. 50, for instance, as to the deposit of rent in Court, are not applicable, nor are the provisions as to distress. The suit is a suit for damages, the value of the produce to which the plaintiff was entitled being the measure of the damages, and is cognizable by a Civil Court.

Pandit *Bishambar Nath*, for the respondent.—It was never suggested that the suit was not cognizable by the Revenue Court until it came up in special appeal. Whether the rent is paid in cash or in kind, the provisions of Act XVIII of 1873 are applicable generally. The provisions of s. 56 and of s. 24 are applicable in either case. He referred to *Lachman Parshad* v. *Holas Mahtoon* (1).

JUDGMENT.

STUART, C.J.—The referring order in this case is as follows :— " Whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash," and the second plea in appeal to which our attention is directed is in these terms :— " The decision is bad in law ; the present action for the value of grain was not cognizable by the Revenue Court." The reference therefore goes further than the bare question whether the money-equivalent of a grain-rent can be sued for in the Revenue Court. The reference also assumes that the rent agreed to be paid by the defendant was a grain-rent, or a rent payable in kind. But the suit is for arrears of rent, Rs. 29-1-2, being the price or money-value of the grain from 1278 to 1280 Fasli, and this suit is brought in the Revenue Court.

[219] If the question had simply been, as put in one portion of the referring order, whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash, I would have no hesitation in answering it in the negative. But the second plea in appeal to which the referring order directs our attention raises the question in a simple form. By s. 3 rent is defined to mean " whatever is to be paid delivered, or rendered by a tenant on account of his holding, use, or occupation of land ;" by which I understand to be meant that the contract or agreement for rent may be either that it be paid in money or delivered in kind or by services to be rendered. It does not mean that the rent may be satisfied in any one of these three ways, or that the tenant is to be at liberty to substitute one mode of compliance with his agreement for another; in other words, the definition does not mean that where the rent is a grain one it can be either claimed or recovered in money. The other provisions of the Rent Act to be considered are s. 93, which provides that no Courts other than Courts of Revenue shall take cognizance of the disputes in matters therein mentioned, and the very first there mentioned are " suits for arrears of rent on account

(1) 2 B. L. R. App. 27=11 W. R. 151.

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of land." We thus see in the first place that a grain rent is a good rent according to the Rent Act, and is recoverable as such, and in the next place that a suit for "arrears of rent" is exclusively cognizable by the Revenue Court. There is, however, no explanation given in the Act as to what these arrears may be, or whether, in regard to any particular form or kind of rent, the arrears meant by this section are arrears of the same kind or form of rent; in other words, whether, in the case of a grain-rent, the arrears here intended are arrears in grain or according to their value in money. There could, of course, be no difficulty where the stipulated rent is a money one, and a suit for a year's rent in grain brought immediately upon the rent becoming due could be easily worked out to decree, which would be for the delivery of the stipulated quantity of grain. But the claim made in the present case is not only for arrears of rent, but for arrears to be made good not in grain, but in money. Such a claim in the form of damages could, of course, be made in the Civil Court. But is such a claim for rent to be sued for in the Revenue Courts? In other words, is the suit in the present case a proper application of s. 93 of the Rent [220] Act? It would almost appear to be not. But, on the other hand, there are difficulties. It is not easy to understand how arrears of grain-rent can be recoverable at all, or can be even made intelligible excepting in regard to their money-equivalent. I observe that the Assistant Collector refers in his judgment to certain decrees which had been obtained by the plaintiff against his tenants for arrears of rent, and it would have been desirable to have seen these decrees. If the rent in those cases was also a grain one, what did those decrees, being decrees for *arrears*, give the plaintiff? Did they decree the arrears in grain, leaving the rest to the execution department, or did they directly decree in money? It would have been interesting to have known this. But we must dispose of this reference as best we can on the papers before us. Supposing a decree for arrears of rent payable in grain, how can such a decree be executed by the Revenue Court? Strictly it ought to be a decree for specific performance. But how can there be specific performance with respect to arrears of a grain-rent extending over several years? and what kind of grain is to be delivered at the end of the period, not surely and specifically the particular grain which alone can be had at the end of the period? Thus, in the present case, the claim is for arrears from 1278 to 1280 Fasli. Would the delivery for the whole period of the grain of 1280 be valid performance on the part of the defendant? Unless there be some facilities, of which I am not aware, in the execution department for conversion into money, serious difficulties present themselves to my mind against such procedure. Mr. Justice Pearson, with reference to the summary procedure provided by s. 43 of the Act without having recourse to a regular suit, very pertinently remarks that such a suit "would be of little use if the tenant had already appropriated and dissipated the whole crop." No doubt, unless you allow the landlord to sue for the money-equivalent for the produce, a suggestion which appears to me to be pregnant with some relevancy to this reference. This s. 43, it will be observed, does not enact that if a landholder does not avail himself of it he shall have no other remedy; nor does it follow that because this section has not been acted upon, therefore the landlord may not fall back upon s. 93 and sue in the Revenue Court for his arrears. On the whole, the conclusion would seem to be that, as suits for arrears of rent are exclusively cogniz- [221] able by the Revenue Court, they can only be so where grain is the rent, either by

the claim for a money-equivalent being allowable in them, or by the decree in them being made capable of being satisfied in money; otherwise it seems to me that a suit for arrears of a grain-rent can in no case be instituted in a Revenue Court and that s. 93, therefore, has no application to such a suit. But this would be a conclusion rather too violent. I have little doubt that the intention of the legislature was to give every reasonable facility for recovery of such arrears as are mentioned in s. 93, and I think we may help that intention by holding that conversion into, or recovery in, money, is such a reasonable facility, and that such recovery may either be made by a claim to that effect in the plaint, or by allowing the decree to be executed to the same effect.

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It is not without doubt and hesitation that I have formed this opinion, but it suggests a view of the question before us which appears to me to be the only one that can possibly be entertained, unless we hold that, in no case, can arrears of rent in grain be recovered in a Revenue Court, s. 93 notwithstanding.

The argument maintained in the judgment of my honourable and learned colleague, Mr. Justice Turner, is unfavourable to the jurisdiction of the Revenue Court, but he says that suits of this nature have for a very long period been regarded as suits for rent, and tried in the Revenue Courts, and he points out that in Mr. Thompson's Directions to Revenue Officers such suits are mentioned as cognizable by the Revenue Courts. These may be very proper considerations, although I must remark that Mr. Thompson's work, however useful, is not a legal authority, and I could not allow it to influence my mind on the law of any case. What I go upon is not so much the habits or customs of the authorities in such matters, or the sentiments or ideas contained in Revenue Books, as our duty to recognise the legal necessities of the Rent Act, and to make the law and procedure provided by it reasonably practicable and available for the purposes for which the Act was enacted. My answer, therefore, to this reference is in the affirmative.

PEARSON, J.—The question referred to us for determination must, in my opinion, be answered in the negative. If a tenant agreed to make over to his landlord a certain portion or proportion [222] of the produce of the holding, *or* the money-value thereof according to market-rates, as rent, a suit for the recovery of the rent in either form might doubtless be brought. But the question referred to us imports or implies that the rent is payable in grain only; and this being so, it is impossible to hold that the money-value of the grain is the rent which the landlord is entitled to demand. What is really sought in this suit is not the stipulated rent, but an equivalent for it; or, in other words, damages for the tenant's breach of contract by having failed to pay it. A suit for damages on account of such a breach of contract would be not in the Revenue, but in the Civil Court, and the period of limitation applicable to such a suit would not be the same as that which applies to a suit for arrears of rent under s. 94, Act XVIII of 1873. Section 43 of that Act provides a mode whereby, whenever rent is taken by division of the produce in kind, a landholder may summarily obtain his share of it, without having recourse to a regular suit, which would be of little use if the tenant had already appropriated and dissipated the whole of the crop.

TURNER, J.—The 93rd section of the Rent Act declares that, except in the way of appeal as thereinafter provided, "no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in that section might be brought, and

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such suits shall be heard and determined in the said Courts of Revenue * * * and not otherwise."

The terms of this section admit of a very wide construction. Reading the paragraphs separately, not only is it declared that such suits as are mentioned in the section are to be tried only in the Revenue Courts, but there is also a direction that no Courts other than Revenue Courts are to take cognizance of any dispute or matter in which any suit of the nature mentioned in the section might be brought.

If this direction be construed strictly, there are classes of cases constantly entertained by the Civil Courts erroneously. There are disputes and matters in which suits of the nature mentioned in s. 93 might be brought in the Revenue Courts, but of which the Civil Courts take cognizance for the purpose of granting other relief than could be granted by the Revenue Courts. If those [223] Courts ought not to entertain them, the provisions of the Rent Act worked a far more extensive change than has been generally understood. Possibly the proper construction of the first paragraph of the section, reading it with the second, would be this, that it prohibits the Civil Courts from entertaining claims when relief substantially similar to that sought might be obtained by a suit in the Revenue Court of the nature mentioned in s. 93. Otherwise I can conceive instances in which suitors would be debarred from obtaining relief which, before the passing of the Act, they might have obtained in the Civil Court, and which the Revenue Court is not competent to grant.

I cannot then rest the conclusion at which I have arrived altogether on the ground that, if this suit be not a suit for rent, the dispute or matter is one in which a suit for rent might be brought, and that the jurisdiction of the Civil Courts is excluded.

That the suit is not strictly what would be termed a suit for rent is, I think, clear. Rent is defined in the Rent Act (and the definition expresses the ordinary sense of the term) as meaning "whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land." It was admitted in the course of the argument that the suit was brought on an alleged contract or understanding to deliver a certain share of the crop as the rent of the holding, and that there was no contract or understanding to pay money in the event of a failure to deliver the share of the crop. If the contract or understanding had been in the alternative, for the delivery of the crop or its market-value at the date on which delivery should have been made of the share of the crop, then a suit for the share of the crop or a suit for its money-value would have been a suit for rent : it would have been a suit for that which was to be paid, delivered, or rendered by the tenant, but inasmuah as in the case referred there was no such alternative contract, the only suit for rent in its strict sense which the landlord could have brought would have been a suit for the share of the crop, and in claiming the money-value of the crop he is claiming not rent, but damages or compensation for the non-payment of rent. I would here notice that the decision of the Sudder Court in *Phulloo Kooaree* v. *Immam Bandee* (1) has been overruled by innumerable [224] decisions of this Court, and the suits of the nature of that suit are now brought in the Civil Court and tried as suits for damages.

In a strict sense, then, I cannot allow that the suit out of which this reference arises is a suit for rent, but suits of this nature have, I believe, for a very long period been regarded as suits for rent and tried in

(1) S.D.A. Rep. N.W.P. (1864), Vol. II, 671.

the Revenue Courts. In Mr. Thompson's Directions for Collectors of Land Reveune, s. 265, they are expressly mentioned as suits cognizable by the Revenue Courts. When Act X of 1859, was in force, and subsequently to the passing of Act XVIII of 1873, I believe I am right in asserting that such suits have been instituted in the Revenue Courts as rent suits, and heard on appeal by this Court, and that hitherto no objection has been taken to the competency of the Revenue Courts to entertain them. On the other hand, I do not remember any case in which such a suit has been instituted in the Civil Court. Under these circumstances, I think the rule *curses curiæ lex curiæ* should be applied, and that we should hold that such suits, although they may not be strictly suits for rent are to be regarded as embraced in that term in s. 93 of the Rent Act, and that the large terms in which the first paragraph of s. 93 is couched may fairly be read as prohibiting the Civil Courts from entertaining a suit of the nature mentioned in the reference.

SPANKIE, J.—The claim here was for the balance of the corn-rent of the *sir*-land in suit, amounting to Rs. 29-1-2, being the market-price of the grain to which plaintiff was entitled as his share of the produce from 1278 Fasli to 1280 Fasli.

The defendant entirely repudiated any relation of landlord and tenant between the plaintiff and himself, and urged that the land on account of which rent was claimed had been in his possession as his *sir*, he being a sharer in the mahal.

The Assistant Collector found that the farmers (they are thus described by the Assistant Collector) of the plaintiff's share, and other sharers had always received corn-rent out of the produce of the land in suit, and other lands paying rent in kind, and held by the defendant, in proportion to their shares. In 1278 Fasli, plaintiff's land was released from possession of the farmers and defendant was found to be in arrears. He also found by [225] reference to the Revenue Court's decisions that the plaintiff in this suit and other sharers had brought suits against their tenants for arrears of rent of their shares and had obtained decree. The defendant was a sharer in the mahal, but he was a cultivator only of the lands on account of which rent was claimed. He made no objection to the amount of the price of grain. But the Assistant Collector made an inquiry and found that it had been entered correctly in the balance-sheet furnished by the patwari according to the market-rate. He therefore made a decree for the sum claimed.

There was an appeal to the Collector. It was urged that as the Assistant Collector had admitted that defendant was a sharer in the mahal, he could not decree against him for rent, and that defendant held the land as his *sir* and not as a cultivator. The Collector held that the evidence in support of the plea that plaintiff's lessees used to get a portion of the produce of these three bighas was unworthy of credit. The plaintiff allows that he never received a share of the rent, and therefore there was no custom of previously receiving a share of the rent proved. He also found the land to be defendant's *sir*.

The Judge in appeal held that there was proof that the rent had been received by plaintiff, who distinctly deposed that he had received it, and during the lease that the lessees had received it. There was no proof that defendant had ever held these lands in any other character than as a cultivator. The land was not his *sir*.

Amongst other pleas in special appeal it was contended that an action for the value of grain was not cognizable by the Revenue Court. The

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Division Bench before whom the appeal was heard has referred the following question to the Court at large—whether, when rent is payable in grain, it is competent to the landlord to sue in a Revenue Court for the equivalent in cash.

It has been necessary to set out the facts in order that we may thoroughly understand the question before us. In my opinion the suit cannot be regarded as merely an action for the value of grain, or as one for damages on account of rent wrongfully with held. It is substantially a claim for rent to which the plaintiff considers himself entitled, and which the defendant refuses to pay, as he sets [226] up his own proprietary title. The rent is payable in kind after a division of the produce. Now rent under Act XVIII of 1873 is defined to be whatever is paid, delivered, or rendered by a tenant on account of his holding, use, or occupation of land. Where rent is due and withheld, the remedy provided by Act X of 1859, which had not been repealed when the cause of action arose in this case, was distraint (1) or a summary action. But distraint could have been had for a balance of one year and no more (2). The present suit is for a balance of three years. Under the new law, as under the old, the produce of all land in the occupation of a cultivator shall be deemed hypothecated for the rent payable in respect of such land (3), and under s. 43 of the Act provision has been made in cases where the rent is taken in kind by division of the produce, or by estimate or appraisement of the standing crop, or other procedure, of a like nature requiring the presence both of the cultivator and landholder. If either the landholder or the tenant personally or by agent neglect to attend at the proper time, or if there is a dispute as to the amount or value of the crop, an application may be made by either party to the Collector requesting that a proper officer may be deputed to make the division, estimate or appraisement. After following the procedure set forth in the section, written authority shall be given to the party applying for it to divide the crop or cut the crop. But this section would not apply to a case like the one before us, in which rent is claimed for a period of three years. Moreover, s. 43, in my opinion, contemplates a case in which there is no denial of the relationship of landlord and tenant between the parties, and in which it is not disputed that the rent is ordinarily taken in kind by division, or by estimate or appraisement. It would not apply to a case in which the tenancy was denied and proprietary right was asserted by the person occupying the land. The procedure to be followed under s. 43 is a summary one for the purpose of enforcing division when the crop, already hypothecated to the landlord, is ripe, and the latter is at liberty to take his share of the produce as his rent, the rent being due when the crop is ready to be cut or is cut. But I do not understand that the remedy provided by s. 43 would [227] deprive the landlord of his right of action under s. 93 for arrears of rent. .

Prior to the passing of Act X of 1859 the landlord was at liberty to distrain the crop of his tenant for rent due for one year ; but, if he did not do so, he was at liberty to bring a summary suit for the arrear. So, as noticed above, Act X provided similar remedies, which have been continued under Act XVIII of 1873, and indeed enlarged as regards cases in which the rent is payable by division of the produce. But there is nothing in s. 43 which bars recourse to any other remedy provided by the Act. Nor does

(1) Act X of 1859, s. 112.
(2) Act X of 1859, s. 113.
(3) Act XVIII of 1873, s. 56.

s. 93 bar any suit for arrears of rent that is not paid in cash. Bearing in mind that rent is whatever is to be paid, delivered, or rendered by a tenant, it would seem to me that the suit would be for cash-rent, for rent payable, in kind, or, if the produce itself is not to be had, that a suit would lie for its equivalent in money. It is clear that when a crop is ripe it must be cut, or it would wither and be lost, and if cut, a share of it could not be recovered in a summary suit under the Act, for the grain would have disappeared, or if not cut, it would be worthless as some time must elapse before a suit could be brought or a decree obtained. Again, the dispute may be one, as this is, in which the right to recover any rent is denied, and if there could be no suit under s. 93, then the landlord would be deprived of all remedy under the Act, or he must have recourse to an action in the Civil Courts, and if so, what becomes of the provision of s. 93 that, except in the way of appeal, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in the section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in the Act and not otherwise? Amongst these suits are suits for arrears of rent on account of land or on account of any rights of pasturage, forest rights, fisheries, and the like. In such suits the plaint is to state the subject-matter of the claim. Now merely looking at the plaint in this case, the subject-matter of the claim is that the landlord wants his rent and nothing else. It has not been paid for three years, so he cannot get the share of the produce in actual grain, therefore he asks for the equivalent, *i.e.*, the market value of the crop proportionate to the share to which he was entitled. [228] It is not urged by the defendant that the suit was bad because a claim could not be heard in the Revenue Court for an equivalent in cash of the share of the grain to which the plaintiff was entitled as rent. It was not so urged in appeal until the case came to this Court. Prior to the passing of Act X of 1859 it was the custom of our Revenue Courts to hear such suits as this. After quoting the law applicable to distraint, Mr. Thomson says:—"By summary suit the landlord may establish his right to a certain quantity of grain, or *its money-equivalent* at the market-price of the day" (1). This section, it is true, has been superseded, but it indicates the practice of the Courts prior to the passing of Act X of 1859, which superseded the law on which the remarks in s. 265 and other sections on the same subject are based; and, as pointed out above, Act X of 1859 re-enacted the same remedies, and Act XVIII of 1873 has enacted and even enlarged those of Act X of 1859. I cannot doubt that the same practice of suing in some cases, such as this, for the equivalent in money was followed as long as Act X was in force. I would here refer to the case marginally cited, in which the Sudder Dewanny Adawlat held that, where a zemindar sued a ryot to recover the value of half the produce of two fruit-trees standing on the cultivated land held by the latter, the suit was one for arrears of rent due on account of a manorial right contiguous to a forest right and cognizable under cl. 4, s. 23, Act X of 1859. It will be observed that the Collector in the case now before us calls attention to the fact that rent had been taken from the defendant and other tenants in the village in which the parties reside, and I apprehend from his remarks that these rents were payable in the same way as the rent in this suit is said to be payable—that is, in kind.

Phulloo Kooaree v. Immam Bandee Begam (2).

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(1) Directions for Collectors of Land Revenue, s. 265.
(2) S. D. A. Rep., N. W. P., 1864, vol. ii. 671.

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I may add that in the Lower Provinces suits of this nature are heard and determined under the Bengal Revenue Act. I find in the case cited in the margin that it was held, in a suit to recover money due on payment in kind for the use of plaintiff's land by stacking timber thereon, that the claim was of the nature of one for rent. In this [229] case the suit "was in substance a suit brought to recover money due, or the value of a certain proportion of goods which ought to be paid in kind." I cannot say whether this particular suit was brought under the Bengal Revenue Act (VIII of 1869); possibly it was not so brought, but whether it was so or not, it is a case which shows that a suit may be entertained for money due or the value of a certain proportion of goods which ought to be paid in kind. The case now to be cited was one for arrears of rent and brought under the special Revenue Act. The rent was said to have been payable in kind, and the plaintiff's suit was for the value of his share. So again, in another case, the suit was for arrears of rent, and with respect to a portion of the claim the Court remarked:—"In respect to what are called cesses, we think they are not so much in the nature of cesses as of rent in kind (3)." In this case money was sued for. I notice these cases to show that suits, such as this is, appear to have been admitted without question, and such a plea as that raised in special appeal which has led to the present reference was never, as far as I can discover, brought before the Calcutta High Court (4).

Jamna Doss v. Gawsee Meah (1).

Bibee Jan v. Bhajul Singh (2).

Looking therefore at past practice, at what appears now to be the practice of the Courts, having due regard to the definition of rent in Act XVIII of 1873, to the fact that the jurisdiction of all Courts but the Revenue Courts is barred in these Provinces in suits which are of the nature of those mentioned in s. 93, and considering that the suit before us is one substantially and entirely for rent, I would say, in answer to the reference, that the landlord is competent to sue in the Revenue Court for the equivalent in cash where rent is payable in grain.

OLDFIELD, J.—I concur in the view taken by Mr. Justice Spankie on the question referred and in his proposed answer to the reference.

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1 A. 230.

[230] APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

SKINNER (*Plaintiff*) *v.* ORDE AND OTHERS (*Defendants*).* [29th May, 1876.]

Act VIII of 1859, *s.* 308—*Pauper Suit—Institution of Suit—Presentation of Plaint—Limitation.*

Where an application for permission to sue in *forma pauperis* is numbered and registered, and deemed to be the plaint in the suit, not in consequence of proof of the plaintiff's pauperism, but in consequence of his abandoning his claim to sue

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* Regular Appeal No. 115 of 1875, from a decree of the Subordinate Judge of Meerut, dated the 6th July, 1875.

(1) 21 W.R. 124. (2) 21 W.R. 438.

(3) *Budhna Oraw in Mahtoon* v. *Jugessur Doyal Sing*, 24 W.R. 4.

(4) See *Mullick Amanut Ali* v. *Ukloo Pasee*, 25 W.R. 140, where a similar plea was raised, with a reference to Act VIII (Bengal) of 1869, the Calcutta High Court ruling that a suit for the value of rent payable in kind was cognizable under that Act.

as a pauper and paying for the stamps required for the institution of the suit, the date of such payment, and not the date of the application, must be taken, in computing the period of limitation, to be the date of the presentation of the plaint and the institution of the suit (1).

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APPELLATE CIVIL.

1 A. 230.

THE plaintiff in this suit presented to the Subordinate Judge of Meerut on the 21st February, 1873, a petition for leave to sue as a pauper. This petition contained a statement of his claim to certain immoveable property and such particulars as are required in a plaint, the cause of action being stated to have arisen in August 1861. After various proceedings to which it is unnecessary for the purposes of this report to refer, the 27th November, 1874, was fixed for hearing the application; but on the 27th November the plaintiff, instead of following up his application, filed the stamps requisite for the institution of the suit. On the 29th December the Subordinate Judge directed that the application should be numbered and registered, and deemed to be the plaint in the suit.

At the hearing of the suit the Subordinate Judge held that it must be taken to have been instituted on the 27th November, 1874, and therefore dismissed it as barred by limitation.

The plaintiff appealed against this decision to the High Court.

Mr. *Conlan* and Pandit *Nand Lal*, for the appellant.

Mr. *Mahmood*, the Junior Government Pleader (Babu *Dwarka Nath Banerji*), and Pandit *Bishambar Nath*, for the respondents.

JUDGMENT.

[231] The judgment of the Court was as follows :—

The cause of action in this suit accrued to the plaintiff in August 1861, when his father died; and the period during which the suit might legally be brought is 12 years. If the suit can be held to have been instituted on the 21st February, 1873; the date on which the application for permission to sue *in forma pauperis* was first presented to the Subordinate Judge of Meerut, it is clearly within time; and there can be no doubt that, had the application of the 21st February 1873, been granted, the suit would rightly be deemed to have been instituted on that date. But that application never was granted, and was indeed virtually withdrawn on the 27th November 1874, by the plaintiff's offer to pay the amount of the fee chargeable on the plaint under the Court Fees Act before the inquiry into his pauperism had been concluded; and his application was not numbered and registered and assumed to be the plaint in the suit under the provisions of s. 308, Act VIII of 1859, in consequence of proof of his pauperism, but in consequence of the payment by him of the proper fees. But there is no provision in the law which allows the application presented under s. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees; and we are therefore unable to rule that the lower Court has erred in declaring the present suit to have been instituted after the lapse of the period allowed by the law. We have no alternative but to dismiss the appeal with costs.

(1) Where an application to sue as a pauper is granted, and numbered and registered as a suit, the period of limitation should be reckoned, not from the day on which the application was granted, but from the day on which it was presented—*Seeta Ram* v. *Goluck Nath*, Marsh 174 = 1 Hav, 3, 7 8 and Ind. Jur. 66 ; *Bipro Pershad Mytee* v. *Kanye Deyee*, 1 W. R. 341 ; *Vinayak K Dhavle* v. *Bhau B. Samvat*, 4 B H.C.R A.C J. 39 and see the Indian Limitation Act, 1871, s. 4, Explanation.

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APPELLATE CIVIL.

1 A 231=
1 Mad. L.R.
309.

1 A. 231=1 Mad. L.R. 309.

APPELLATE CIVIL.

(*Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*)

RAM AUTAR AND OTHERS (*Judgment-debtors*) *v.* AJUDHIA SINGH AND OTHERS (*Decree-holders.*).* [29th May, 1876.]

Execution of Decree—Act IX of 1871, *sch. II,* 167*—Limitation.*

An application for the partial execution of a joint decree by one of the [232] decree-holders is not an application according to law (1) and consequently has not the effect of keeping the decree in force (2).

Where a decree of the Sudder Court awarded costs in the lower Court to certain defendants separately and to eight sets of defendants collectively, and costs in the Sudder Court to three sets, and the only applications which were made for execution of the decree within the period of limitation were made by one of the defendants to recover his costs in the lower Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants, a subsequent application by him and the other defendants for execution of the decree was held to be barred by limitation.

[F., 5 A. 27=A.W.N. (1882), 140; Appr., 4 A. 72; R., 15 B. 242.]

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* Miscellaneous Regular Appeal No. 50 of 1875, from an order of the Subordinate Judge of Gorakhpur, dated the 28th July 1875.

(1) See also *Balkishoon* v. *Mahomed Tazam*, N. W. P., H. C. R., 1872, p. 90; *Rai Damodur Dass* v. *Bholanath*, N. W. P. H. C. R., 1870, p. 413; *Prannath Mitter* v. *Mothooranath Chuckerbutty*, 6 W.R. Mis. 64; *Maharanee Indurjeet Koonwar* v. *Mazum Ali Khan*, 6 W.R. Mis. 76; *Thakoor Dass Singh* v. *Luchmeeput Doogur*, 7 W.R. 10; *Judoonath Roy* v. *Ram Buks Chuttangee*, 7 W. R. 535; *Purna Chandra Mookerjee* v. *Sarada Charan Roy*, 3 B.L.R., App., 21=11 W.R. 241; *Huro Sunkur Sandyal* v. *Taruck Chunder Bhuttacharjee*, 11 W.R. 488; *Indro Coomar Dass* v. *Mohinee Mohun Roy*, 15 W.R., 159; *Nubo Kishore* v. *Anund Mohun*, 17 W.R. 19; *Faez Buksh Chowdhry* v. *Sadut Ali Khan*, 23 W.R., 282; and *Nund Coomar Foutehdar* v. *Bunso Gopal Sahoy*, 23 W.R. 342.

(2) The decisions under s. 20 of Act XIV of 1859 (corresponding to Act IX of 1871, sch. ii, 167) may be summarised as follows:—

(i) It has been held in *Chooa Sahoo* v. *Tripoora Dutt* (13 W.R. 244) that, when a decree is passed severally in favour of a number of persons distinguishing a certain portion of the aggregate amount decreed as payable to each and one of those persons takes proceedings in execution for the recovery of his own portion, such proceedings do not keep the decree alive for the benefit of the others.

(ii) It has been held in *Brijo Coomar Mullick* v. *Ram Buksh Chatterjee* (1 W. R., Mis., 2) that when a decree is passed jointly in favour of a number of persons and one of those persons is allowed under s. 207 of Act VIII of 1859 to proceed for the recovery of the whole amount decreed, proceedings taken by him keep the decree alive for the benefit of the others. *Johiroonissa Khatoon* v. *Ameeroonissa Khatoon* (6 W. R., Mis. 59) would seem to have been a case of this class.

(iii) In cases where the decree has been joint, but one of the decree-holders has been allowed to take proceedings to realize what, as between him and the others, has been regarded as his share, or where one of the heirs of a decree-holder has taken proceedings to realize his share of the decree, it has been held that such proceedings, even where irregular (see note (1) *supra*), kept the decree alive for the benefit of the others—*Maharanee Indurjeet Koonwar* v. *Mazum Ali Khan* (6 W.R., Mis., 76); *Azizunnissa Khatun* v. *Soshi Bhushan Bose* (2 B.L.R., App., 47=11 W.R., 343; *Shib Chunder Dass* v. *Ram Chunder Poddar* (16 W.R., 29) and cases there cited.

Where there is a decree *against* a number of persons, it has been held.

(i) That where such decree is against all jointly proceedings taken to enforce it against one keep it alive against all—*Shaikh Buneead Ali* v. *Juggessur Singh*, 6 W.R. Mis., 25; *Mohesh Chunder Biswas* v. *Sreemutty Taramonee Dossee*, 9 W.R., 240.

(ii) That when such decree is against the defendants separately distinguishing the shares payable by each, proceedings taken against one do not keep it alive against the others—see *Wise* v. *Rajnarain Ckuckerbutty*, 10 B.L.R., 258, by Full Bench, adopting the view taken in *Stephenson* v. *Unnoda Dossee*, 6 W.R., Mis., 18, and *Khema Debea* v. *Kumolakant Bukshi*, 10 B.L.R., 259 note=10 W.R. 10 and overruling *Mohesh Chunder Chowdhry* v. *Mohun Lal Sirkar*, 8 W.R. 80.

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APPELLATE CIVIL.

1 A. 231 = 1 Mad. L.R. 309.

THE judgment-debtors in this case had sued 126 defendants to recover the value of certain property. The Court of first instance, on the 30th May 1862 gave them a decree against [233] thirteen of the defendants for a portion of the sum claimed, dismissing the suit against the rest. Eight of these thirteen appealed to the Sudder Court. The plaintiffs also appealed against so much of the first Court's decision as was in favour of the defendants. The Sudder Court, dismissing the plaintiffs' appeal, reversed the decree against the defendants, including those who had not appealed from the decree. The decree of the Sudder Court, dated the 31st March 1864, awarded costs in the Court of first instance to certain of the defendants, among whom was Ajudhia Singh, separately, and to eight sets of defendants collectively, and costs in the Sudder Court to three sets. On the 23rd March 1867, execution of the decree was stayed pending the determination of an appeal preferred by the plaintiffs to the Privy Council. On the 11th February 1870, the Privy Council reversed the decree of the Sudder Court so far as it reversed the decree of the Court of first instance and restored and affirmed that of the Court of first instance.

On the 7th September 1871, an application for enforcing the Sudder Court's decree by the imprisonment of the judgment-debtors was made to the Court of first instance by Ajudia Singh, who sought to recover his costs in that Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants. On the 8th September the Court directed notice to issue to the judgment-debtors to show cause on the 27th September why the decree should not be executed against them. On the 28th September the Court directed them to be arrested, and fixed the 1st November for the further hearing of the application. On the 7th November it directed that the application should be struck off, Ajudhia Singh having failed to deposit talabana. On the 13th August 1874, Ajudhia Singh made a similar application. This application was also struck off owing to his failure to deposit talabana. On the 20th May, 1875, application for execution of the decree was made by him and the other decree-holders. The judgment-debtors objected that execution of the decree was barred by limitation, but the objection was overruled by the Court of first instance.

On appeal by the judgment-debtors to the High Court, it was again contended that execution of the decree was barred by limitation.

[234] The *Senior Government Pleader* (*Lala Juala Parshad*), for the appellants.

Lala Lalta Parshad and *Lala Kashi Parshad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court:—

STUART, C. J.—The application of the 7th September, 1871, prayed only for the partial execution of the decree and had not therefore the effect of keeping the decree alive for the other defendants. The same may be said of the application of the 13th August 1874. The application of 1871 itself is before me, and it is difficult to understand how any contention to the contrary could have been expected to succeed. It recites previous applications by Ajudhia Singh in conjunction with other defendants, and also the judgment of the Privy Council, and it then proceeds:—"As the other persons do not join me in executing the decree, and in the decree the first Court's costs are separately entered in my name,

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while the costs of the Sudder Court, amounting to Rs. 969-12-0, are entered in my name and in those of the other persons collectively, who do not join in executing the decree, I apply for execution in respect of a 1-11th share, leaving out 10-11ths, the share of the said persons, and pray that it may be realized from the judgment-debtors." The application of 1874 appears to have been in similar form; and terms more carefully and precisely restricted to the applicant's own share could scarcely have been used, and how in the face of them, the Subordinate Judge could have issued his orders of the 8th and 28th September 1871, is, to say the least of it, not very intelligible.

This decree is a joint decree, and no application for its partial execution could keep it alive for the defendants as a body; and Ajudhia Singh's applications of 1871 and 1874, having been confined to his own individual interest in it, in the very clear and unmistakeable terms to which I have adverted, could not be availed of so as to bring the present application within the three years. The order therefore recognizing and proceeding upon it cannot stand. The appeal must be allowed, and with costs.

PEARSON, J.—It appears that the execution of the decree was stayed in pursuance of this Court's order, dated 23rd March 1867, [235] in consequence of an appeal lying having been lodged in the Privy Council against the decree of the late Sudder Court, dated 31st March, 1864. The appeal was disposed of by the Privy Council's decree, dated 11th February, 1870.

If it be assumed that the application made by Ajudhia Singh alone on the 7th September, 1871, for the execution of a small part of the decree was within time, under art. 167, sch. II, Act IX of 1871, as having been presented within three years from the date of the Privy Council's decree, it must, nevertheless, be held that, inasmuch as it prayed for the partial execution of a joint decree, it was not an application according to law and had not the effect of keeping the decree in force. The same remark applies to Adjudhia Singh's last application of 13th August, 1874.

The present application by Ajudhia Singh and others of the 20th May, 1875, is therefore beyond time. I would accordingly decree the appeal with costs, and reversing the lower Court's order disallow the application.

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1 A. 235.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spankie.*)

PURAN MAL (*Defendant*) *v.* ALIKHAN (*Plaintiff.*)* [1st June, 1876.]

Act VIII of 1859, s. 260—*Execution of decree—Certified purchaser.*

A sued for a declaration that *P*, the certified auction-purchaser of certain immoveable property, was merely a trustee for *R*, *A's* judgment-debtor, that the purchase in *P's* name was made with the intent of defeating or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor.

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* Regular Appeal No. 18 of 1876, from a decree of the Subordinate Judge of Bareilly, dated the 26th February, 1876.

Held, following *Sohun Lall* v. *Gya Parshad*, N.W.P. H.C.R. 1874, p. 265, that s. 260, Act VIII of 1859, was in no way a bar to the suit.

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APPEL-
LATE
CIVIL.

1 A. 235.

[Ap., 18 A. 461; 21 C. 519; R., 21 A. 29=A.W.N. (1898), 187; 26 A. 82; A.W.N. (1896) 151.]

As this case merely follows the decision in *Sohun Lall* v. *Gya Parshad*, it is not reported in detail.

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1 A.236 (F.B.)=1 Ind. Jur. 100.

[236] BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

AKHE RAM (*Plaintiff*) *v.* NAND KISHORE (*Defendant*).* [1st June, 1876.]

Act XX of 1866, *s.* 53—*Bond—Mortgage—Money-decree—Sale in execution.*

The obligee of a simple mortgage-bond was only entitled, under s. 53, Act XX of 1866, to a money-decree.

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title and interest of the judgment-debtor at the time of the sale (1).

Where, therefore, a decree given under s. 53, Act XX of 1866, declared the right of the obligee of a simple mortgage-bond to bring to sale the hypothecated property, and such property was sold in execution of the decree, the auction-purchaser could not claim in virtue of the lien created by the bond to defeat a second mortgage.

[F., 1 A. 240; R., 34 M. 188 (196)=8 Ind. Cas. 1072=21 M.L.J. 320=9 M.L.T. 235=(1910) M.W.N. 799.]

THE property in suit, a 6-biswa share in a certain village, belonged originally to one Gardener. On the 10th November, 1870, Mathra Dass and Mulchand, the obligees of a bond for the payment of money personally, executed in their favour by Gardener on the 9th December, 1867, in which the property was hypothecated as collateral security, applied, the bond having been specially registered for the amount secured thereby, under the provisions of s. 53, Act XX of 1866. They obtained a decree against him on the 22nd November, 1870, which was in these terms :—"The claim is decreed in favour of the plaintiffs against the defendant and the hypothecated property." The property was sold in execution of this decree on the 20th December, 1873, and was purchased by the plaintiff.

At the time of the sale the defendant in the present suit was in possession of the property under a mortgage from Gardener, dated the 5th January, 1870.

The plaintiff now sued to set aside the mortgage to the defendant and for possession of the property.

The Court of first instance dismissed the suit.

[237] The plaintiff having appealed to the High Court, the Court (TURNER and SPANKIE, JJ.) referred the following question to the Full Bench, *viz.* :—

"Whether or not when property hypothecated in a bond is sold at auction in execution of a decree passed on the bond under the special

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* Regular Appeal No. 80 of 1875, against a decree of the Subordinate Judge of Aligarh, dated the 18th May, 1875.

(1) See the following case.

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provisions of s. 53, Act XX of 1866 the purchaser acquires merely the rights and interests of the judgment-debtor remaining at the time of the sale or can claim in virtue of the lien to defeat a second mortgagee."

Pandit *Bishambar Nath* (with him Munshi *Hanuman Parshad*), for the appellant.—There is no prohibition in Act XX of 1866 against a Court granting a decree declaring the right to bring to sale the property pledged in the obligation. The appellant is entitled, in virtue of the lien created on the property in suit by the bond dated the 10th November 1870, to oppose all liens subsequently created. He referred to *Momtazoodeen Mahomed* v. *Rajcoomar Dass*(1) and *Ramu Naikan* v. *Subbaraya Mudali*(2).

Mr. *Mahmood* (with him the Junior Government Pleader, Babu *Dwarka Nath Banerji*), for the respondent.—The decree in execution of which the appellant purchased the property in suit is only to be regarded as a money-decree inasmuch as no decree could be given under s. 53, Act XX of 1866, declaring the right of the obligee to bring to sale property pledged in the obligation as collateral security—*In the matter of Rajmohun Mookerji* (3); *Grish Chunder Chowdhry* v. *Kristo Soondur Sandyal* (4). The purchaser at a sale in execution of a money-decree takes only the rights and interests of the judgment-debtor at the time of the sale.

OPINIONS.

The opinions of the Full Bench were as follows :—

STUART, C. J.—My answer to this reference is, that a decree passed under s. 53, Act XX of 1866, is and can only be a mere money-decree, and that a sale in execution of such a decree can only give the purchaser the rights and interests of the judgment-debtor in the property hypothecated, and that such purchaser [238] cannot claim in virtue of his lien to defeat a second mortgagee. I hold this opinion so clearly, and it is suggested to my mind so simply and directly by what I consider to be the true meaning of s. 53 of Act XX of 1866, and by the relative position of the two bond-holders, that I think it unnecessary to support it by any argument or by any reference to authorities. The Calcutta and Madras cases referred to at the hearing (5) do not, in my opinion, apply.

PEARSON, J.—Section 53, Act XX of 1866, distinctly states the nature of the decree which may be given to a petitioner on production in Court of the obligation and the record of agreement mentioned in the preceding section. He shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) up to the date of the decree. The decree can be only a decree for money; and the purchaser of any immoveable property sold in execution thereof under s. 259, Act VIII of 1859, could only be held to have purchased the right, title, and interest of the judgment-debtor in the property sold.

In the case out of which the reference has arisen, it appears that the decree which was given to Mathra Das and Mulchand, under s. 53 of the Act above named, was in its terms against the property hypothecated in the bond executed by Mr. Gardener in their favour on the 9th December, 1867, as well as against him; but I concur in the opinion expressed by the

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(1) 14 B.L.R. 408=23 W.R. 187. (2) 7 M.H.C.R. 229. (3) 11 W.R. 222.

(4) 14 W R. 277 ; see, also, *Juggun Nath* v. *Komal Singh*, N.W.P. H C R. 1871, p. 123 ; *Boistub Churn Digputty* v. *Gobind Pershad Tewaree*, 13 W. R. 203 ; *Asma Bibee* v. *Ram Kant Roy*, 19 W.R. 251 ; and *Poorno Chunder Ghose* v. *Gobind Chunder Mookerjee*, 22 W.R. 28.

(5) *Moomtazoodeen Mahomed* v. *Rajcoomar Dass*, 14 B.L.R. 408=23 W.R. 187 ; *Ramu Naikan* v. *Subbaraya Mudali*, 7 M.H.C.R. 229.

Subordinate Judge that so much of the decree as declares the property liable must be regarded as null and void for want of jurisdiction.

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The plaintiff in the case purchased the property at auction on the 20th December, 1873, subject to the lien which had been created in the defendant's favour by the instrument of the 5th January 1870, and cannot in my opinion derive any benefit from the circumstance that, under the bond of the 9th December, 1867, Mathra Das and Mulchand possessed a lien which would have taken precedence of that possessed by the defendant under the instrument of the 5th January 1870, had it been a question which of the two liens should prevail over the other; but there is no such question. The debt [239] secured by the earliest lien is understood to have been realized by Mathra Das and Mulchand; at all events they are not trying to enforce the lien, if it has not been altogether extinguished with the debt which it was intended to secure. The plaintiff as auction purchaser of Mr. Gardener's rights and interests could not acquire by the purchase of them the lien which belonged to Mathra Das and Mulchand, nor indeed were those rights and interests, being sold in execution of what must be regarded as a mere money-decree, sold in virtue and pursuance of that lien. He cannot therefore in virtue thereof successfully resist the defendant's claim to enforce his lien under the instrument of the 5th January 1870.

TURNER, J.—The provisions of s. 53, Act XX of 1866, were intended to apply to personal obligations for the payment of money, and where such an obligation was found combined with an hypothecation of property as collateral security, the creditor was entitled to obtain a summary decree on the personal obligation only. A decree duly passed under the provisions of the Act would be what is known in these provinces as a mere money-decree, and where it appears on the face of the decree that, although it professed to declare the lien, it was passed under the special provisions of s. 53, it could only be held valid as a money-decree, and if the holder of such a decree attached and sold the hypothecated property, for the reasons given in my judgment in *Khub Chand* v. *Kalian Das* (1), I am of opinion nothing would pass under the sale but the rights remaining in the judgment-debtor at the time of the sale.

SPANKIE, J.—I would say, in reply to this reference, that with regard to the provisions of s. 53, Act XX of 1866, the decree could only have been for money, and the purchaser at the execution-sale could only acquire the rights and interests of the judgment-debtor remaining at the time of the sale, and could not claim by the virtue of the lien to defeat a second mortgagee.

OLDFIELD, J.—A decree made under s. 53, Act XX of 1866, on a bond can properly only be a decree for the recovery of money, and not for enforcing any lien against property hypothecated in the bond; and the general practice under a course of [240] rulings of this Court has been to hold that a purchaser at auction in execution of a mere money-decree acquires merely the rights and interests which the judgment-debtor had at the time of the sale, and cannot benefit by any lien that the decree-holder may have had under the bond. On the principle of *stare decisis*, I would reply to that effect to this reference.

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(1) Next case.

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FULL BENCH.

1 A. 240 (F.B.).

1 A. 240 (F.B.).

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

KHUB CHAND (*Defendant*) v. KALLIAN DAS (*Plaintiff*).* [9th June, 1876.]

Bond—Mortgage decree— Sale in execution—Condition against alienation.

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment-debtor at the time of the sale.

Where, therefore, the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The view of the Full Bench of the Calcutta High Court in *Momtazooddeen Mahomed* v. *Rajcoomar Das* (1) and the decision in *Ramu Naikan* v. *Subbaraya Mudali* (2) dissented from.

Held further, that the holder of the money-decree in this case could not avail himself of a condition against alienation contained in his bond to resist the foreclosure. *Raja Ram* v. *Bainee Madho* (3) impugned.

[N.F., 4 B. 57 ; 22 C. 33 (44); F., 4 A. 518 ; 29 C. 537 ; A.W.N. (1881) 127 ; Ap., 1 A. 236 ; 1 A. 433 (435) ; R., 8 A. 324 (339); 10 A. 520=A.W.N. (1888) 210 ; 13 A. 432 (443) (F.B.) ; 7 B. 146 (150) ; 7 C. 677 (683) ; D., 6 A.W.N. 18 ; 9 C. L. R. 369.]

ON the 10th July 1865, the owners of the property in suit, a fractional share in a certain village, executed a bond for the payment of money personally to Khub Chand, defendant, in which they hypothecated the property as collateral security for such payment, [241] stipulating to make no transfers of it until payment. In 1868 Khub Chand sued on this bond, obtaining only, however, a decree on the personal obligation. On the 28th March 1869, the owners of the property mortgaged it to the plaintiff. The property was subsequently attached in execution of Khub Chand's decree, and was eventually brought to sale on the 20th November 1871, when it was purchased by Khub Chand.

The plaintiff now sued to foreclose his mortgage.

The lower Courts gave him a decree.

On special appeal to the High Court by the defendant, the Court (Turner and Oldfield, JJ.) referred the case to the Full Bench, the order of reference being as follows:—

The plaintiff has brought this suit to obtain possession of property by foreclosure of a mortgage under a deed dated the 28th March 1869, executed by one Sukh Lal, and, *inter alia*, to have declared null and void the right of the defendant Khub Chand to the mortgaged property as purchaser at an auction-sale on the 20th November 1871, of the rights and interests of Sukh Lal and Akhe under a money-decree obtained by him apparently in 1868 against them on their bond dated the 10th July 1865.

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* Special Appeal, No. 43 of 1875, against a decree of the Judge of Mainpuri, dated the 27th November 1874, affirming a decree of the Subordinate Judge, dated the 10th September 1873.

(1) 14 B. L. R. 408=23 W. R. 187 ; this case has been followed in *Aruth Soar* v. *Juggunnath Mohapattur*, 23 W.R. 460 ; see also *Byjnath Singh* v. *Goburdhun Lall Mohashoree*, 24 W.R. 210.

(2) 7 M. H. C. R. 229. (3) H.C.R. N.W.P. (1873) p. 81.

It appears that the bond in favour of Khub Chand hypothecated the property, and contained a stipulation on the part of the obligors that they would not make transfers of the property hypothecated, and Khub Chand has contended, amongst other pleas, that the mortgage under which the plaintiff claims is in contravention of this stipulation and therefore in defraud of his rights, and that his purchase must be held free of the plaintiff's claim.

Khub Chand also pleaded that the plaintiff was in collusion with Sukh Lal to defraud him, but the lower Courts have decided that the plaintiff's mortgage is a *bona fide* transaction so far as the plaintiff is concerned.

The question which arises, and which we refer to a Full Bench is this, whether, under the circumstances stated, Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, or whether he has, in [242] consideration of his bond, a further right, and can successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865.

Amongst other decisions bearing more or less on the question, we notice the following of this Court:—*Rajah Ram* v. *Bainee Madho* (1); *Lahan Bibi* v. *Gauri Parshad* (2); *Sheobart Lal* v. *Ramnandan Lal* (3); *Kulwant Sahu* v. *Ragho Nath* (4); *Oomrao Singh* v. *Shimbhoo Nath* (5); also of the Calcutta Court—*Momtazooddeen Mahomed* v. *Rajcoomar Dass* (6); and on the Madras Court—*Ramu Naikan* v. *Subbaraya Mudali* (7).

Babu *Oprokash Chunder*, for the appellant, relied on *Rajah Ram* v. *Bainee Madho* (1).

Munshi *Hanuman Parshad* (with him Maulvi *Mehdi Hussain*), for the respondent.—The decree in execution of which Khub Chand purchased the property in suit was a money-decree only, and did not enforce his lien on the property. The purchaser at a sale in execution of a money-decree purchases the rights and interests of the judgment-debtor at the time of the sale, and therefore, if the property he purchases is encumbered at the time of the sale he purchases it subject to the encumbrance. He referred to *Madho Das* v. *Maina Bibi* (8), and *Kelly* v. *Seth Gobind Das* (9). As auction purchaser Khub Chand cannot avail himself of the condition against alienation, because as such he is not a party to the bond, and cannot therefore make use of the condition.—*Koondun Lal* v. *Wazer Ali* (10).

JUDGMENT.

STUART, C. J.—My answer in this reference is that, under the circumstances stated, Khub Chand's purchase cannot prevail against or be held free of the plaintiff's claim, but that the plaintiff is entitled to a decree against the property under his foreclosure suit. Khub Chand's decree was merely a money-decree, and the condition in his bond against alienation to others was merely personal to him and Sukh Lal, and although it might give Khub Chand a claim, for [243] damages against his debtor, it could in no way affect the right of a subsequent mortgagee

(1) H.C.R. N.W.P. (1873), p. 81. (2) Unreported. (3) Unreported.
(4) Unreported. (5) H.C.R. N.W.P. (1870), p. 38.
(6) 14 B.L.R. 408=23 W.R. 187. (7) 7 M. H. C.R. 229. (8) Unreported.
(9) Unreported. (10) H. C. R. N. W.P. (1871), 205.

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in enforcing his lien. No other or further right can be allowed to Khub Chand, and he therefore cannot be permitted to contest the plaintiff's claim.

PEARSON, J.—The rights and interest of his judgment-debtors were sold, not in virtue and pursuance of the lien created by the instrument of the 10th July 1865, but in execution of the decree of 1868, which was merely a money-decree, and were purchased by Khub Chand subject to the rights which had been acquired by the plaintiff under the instrument of the 28th March 1869. The stipulation in the earlier instrument, by which the mortgagor was precluded from alienating the property hypothecated for the purpose of securing the debt while the debt should remain unpaid, was only intended to preserve and fortify the lien which the hypothecation created and cannot be enforced apart from that lien. Khub Chand has never enforced that lien; he contented himself with a money-decree and chose to buy himself the rights and interests remaining to his debtors in the property at the time of the auction-sale. The rights and interests which they had conveyed to the plaintiff by the instrument of the 28th March 1869, were not affected by that sale; and so long as Khub Chand abstains from enforcing his prior lien, he cannot plead the stipulation in the instrument executed in his favour as invalidating the transfer subsequently made to the plaintiff. That stipulation does not place him on the footing of a purchaser in virtue of the lien to which the stipulation is attached. On the contrary, the position which he holds at present is no better than would be that of any stranger who might have purchased the property which he purchased in execution of his own decree. It cannot be pretended that any stranger so purchasing it could have claimed to be protected in the purchase by reason of the stipulation in the bond. The sale did not carry with it the lien which belonged to the bond holder, but only disposed of such rights and interests as still belonged to the bond-debtors. The foregoing remarks embody the opinion which I desire to express in answer to the question referred to the Full Bench.

TURNER, J.—To determine the question raised in this reference it is necessary to consider the nature and incidents of a simple mortgage. A simple mortgage cannot be better defined than in [244] the terms adopted by Mr. Justice Macpherson in his work on mortgages. It is an arrangement by which the borrower, binding himself personally for the repayment of a loan, pledges his land as a collateral security. It comprises then two contracts, a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a civil Court directing a sale. The mortgagee, in the case of a simple mortgage, has, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation.

He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only he obtains what is known as a money-decree; if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.

Notwithstanding the pledge the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may aliene his property in part or wholly.

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Such being the nature and incidents of a simple mortgage, I proceed to consider whether there is any, and if any what distinction between the interest which passes to a purchaser of the mortgaged property if it be sold under a decree pronounced in a suit brought to enforce the charge and ordering the sale, and the interest which passes to a purchaser if the mortgaged property be sold under a money-decree obtained on the personal obligation.

It appears to me there is a great difference in the two suits and a great difference in the operation of the decrees which can be obtained in the two suits. If the holder of a simple mortgage elects to enforce his pledge and that pledge be, as it usually is, a pledge of immoveable property, he must bring the suit in the district in which the property is situated, and if he sues solely on the contract of hypothecation, he can obtain only a decree ordering the sale of [245] the pledge; he cannot have recourse to the other property of the judgment-debtor. But the sale will pass not merely the rights of the judgment-debtor existing at the time of the sale, but the rights of the judgment-debtor existing at the date of the pledge and will be binding on all persons who are parties to the suit. To a suit then to enforce the hypothecation it is advisable for the creditor, though it is not incumbent on him, to make all subsequent encumbrancers parties, and if such encumbrancers apply to be made parties, the Court should admit them under s. 73, Act VIII of 1859, and I may add, although it is not the custom in these provinces, that in passing a decree in such a suit to which subsequent encumbrancers are made parties, the Court ought to give subsequent encumbrancers an opportunity to come in and redeem the prior encumbrance.

Of course such subsequent encumbrancers, if they are not made parties, might at any time before sale come in and redeem and they will not be bound by the decree, but if they do not redeem and a sale takes place, their liens will be defeated unless they can show something more than the existence of the subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it postponed to their own.

It appears to me doubtful whether it is necessary for the holder of a decree ordering a sale for the enforcement of a lien to proceed in execution by attachment and order for sale. If the decree is properly drawn up he has already obtained an order for sale. The Procedure Code is, I think, defective in that it contains no special provision for the execution of such decrees. They do not fall under ss. 199, 200, 201, or 202, and the provisions of s. 232 appear to apply to such decrees as are mentioned in s. 201. In practice no doubt such decrees have been in default of special provisions executed in the same manner as money-decrees.

On the other hand, if the holder of a simple mortgage puts in suit merely the personal obligation of the mortgagor, he need not necessarily sue in the district in which the property which is the subject of collateral security may be situated. To such a suit subsequent encumbrancers would not properly be made parties: the decree would be a mere money-decree conferring on the decree [246] holder the right to obtain its satisfaction by levying the amount for any property of the judgment-debtor. He is not confined to the estate under mortgage. He must proceed by attachment and sale, and what he attaches and sells is the property of the judgment-debtor, that is to say, the rights and interests of the judgment-debtor subsisting at the time of the sale—*Mahomed Buksh* v. *Mahomed*

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Hossein (1). Such property passes by the sale as the judgment-debtor could convey by private sale.

In *Syud Nadir Hossein* v. *Pearoo Thovildarinee* (2) Mr. Justice Pontifex has ruled that sale of the mortgaged property under a money-decree passes with it the lien; and in *Momtazooddeen Mahomed* v. *Rajcoomar Dass* (3), the majority of the Court declared that, where a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property it becomes absolutely vested in the purchaser. The reasons on which these rulings proceed I understand to be the following—the mere taking of a money-decree does not destroy the lien, and it continues an incident to the debt when it passes from a contract-debt into a judgment-debt—as the creditor cannot sell the property and retain the lien, it must continue in existence so far as is necessary for the protection of the purchaser. It cannot be doubted that the mere taking of a money-decree does not destroy the lien, and that it continues a collateral security for the debt when it has merged in a judgment-debt, but I fail to see on what ground it can be held that the collateral security has passed by the sale or continues in existence to protect the purchaser. The mortgagee has not in the case supposed elected to avail himself of the collateral security. The lien subsists nevertheless until the debt is discharged, when the object for which it was created fails, and it ceases.

We have not now to consider whether the holder of a simple mortgage, if he proceeds on the personal undertaking, and obtaining a money-decree, brings to sale the mortgaged property, can after-[247]wards sue the auction-purchaser to enforce his lien for any sum that may not have been satisfied by the sale in execution of the money-decree. In such a case it may be that, unless he gives notice at the sale of his intention to retain the lien, it would be held he had waived it. We have to consider whether the interests of third parties and the liens of intermediate encumbrancers can be defeated by a sale of the mortgaged property under a mere money-decree. In *Ramu Naikan* v. *Subbaraya Mudali* (4), it was held that the purchaser under a money-decree could avail himself of the lien of the original encumbrancer, as a shield and so defeat subsequent encumbrancers, and doubtless this ruling is supported by the dicta of the High Court of Calcutta to which I have referred, namely, that the collateral security passes to the auction-purchaser. The Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then if the mortgagee sues on the personal undertaking only he must sue the original mortgagor, he cannot implead the purchaser, and if he obtains a decree he can enforce it only against the property of the mortgagor who *ex hypothesi* has no interest left in the mortgaged property, and if, instead of selling the mortgaged property he sells the property of the mortgagor, no interest in the collateral security can pass by such a sale to the purchaser.

In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property pledged, aliened it in part by the creation of a subsequent encumbrance in the nature of a con-

(1) H. C. R. N.W. P. (1868), p. 171.
(2) 14 B. L. R. 425, note.
(3) 14 B.L.R. 408=23 W.R. 187.
(4) 7 M.H. C. R. 229.

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ditional mortgage. He thereby conferred on the conditional mortgagee the right to redeem the first mortgage at whatever time it could have been redeemed by the mortgagor, and the right in the event of default being made in payment of the debt due to him to foreclose and hold the property subject to the first encumbrance. The estate of the second encumbrancer having been created before the attachment and sale in execution of the money-decree cannot be destroyed by the sale, for in my judgment the original [248] mortgagor did not take the steps necessary to entitle him to enforce his collateral security, and the sale in execution of his decree on the personal obligation passed only the rights and interests of the mortgagor subsisting at the time of the sale, and those rights in the mortgaged property were then burdened with the charge created in favour of the conditional mortgagee.

It remains to be considered whether an auction-purchaser in execution of a money-decree can avail himself of a condition in the mortgage-deed prohibiting alienation. I was a party to the decision of this Court in the case of *Rajah Ram* v. *Bainee Madho* (1), in which it was held that the existence of such a condition enabled the auction-purchaser to resist the claim of a second encumbrancer. On fuller consideration I am not prepared to support that ruling. The condition is attached to the charge and not to the personal obligation of the mortgagor, and if the first mortgagee, who can only enforce the charge by suit, elects to abstain from pursuing that remedy and sues on the personal obligation only, I am of opinion that the auction-purchaser cannot plead the condition attached to the lien any more than he can plead the lien. I would reply that Khub Chand having purchased under a mere money-decree the interest at the time of sale remaining in the judgment-debtor, stands in the place of the judgment-debtor in respect of the interest he acquired by the purchase, and that he cannot resist the claim of the plaintiff to obtain possession of the property.

SPANKIE, J.—On the case stated to us I should say that Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, and that he has not, in consideration of his bond, a further right, and cannot successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865. It seems to me that we have decided a very similar point in Full Bench in the case of *Akhe Ram* v. *Nand Kishore* (2).

OLDFIELD, J.—Looking to the course of rulings by this Court on the question raised in this reference and the rule *stare decisis*, [249] I would reply to this reference that the auction-purchaser at a sale in execution of a mere money-decree acquires only the rights remaining in his judgment-debtor at the time of sale.

(1) H. C. R. N. W. P. (1872) p. 81. (2) Preceding case.

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APPELLATE CIVIL.

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1 A. 249.

APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Oldfield.

KARIM BAKSH AND ANOTHER (*Plaintiffs*) *v.* BUDHA (*Defendant*).*
[9th June, 1876.]

Public thoroughfare—Obstruction—Jurisdiction—Act X of 1872, *s.* 521.

No suit for obstructing a public thoroughfare can be maintained in a Civil Court without proof of special injury.

[F., 10 A. 162 ; 10 A. 498 ; Ap., 9 M. 463 ; R., 10 A. 543 ; D., 9 A. 434.]

THIS was a suit for the removal of a portion of a "chabutra," as an encroachment on a certain road, the plaintiffs alleging that the encroachment was such that carts and other wheeled conveyances were unable to pass along the road.

The Court of first instance found that the road was not a public thoroughfare, but the private property of the parties to the suit and other persons. Holding that the defendants were not entitled to encroach upon it without the consent of the plaintiffs, it gave the plaintiffs a decree.

The lower appellate Court held, on the assumption that the road was a public thoroughfare, that, as the plaintiffs alleged no special damage, the suit was not maintainable.

On special appeal by the plaintiffs to the High Court it was urged that the road was not a public thoroughfare, and that, even if it were, the lower appellate Court was wrong in holding that the suit was not maintainable.

Pandit *Bishambar Nath*, Pandit *Ajudhia Nath*, and Babu *Oprokhash Chandar*, for the appellants.

Munshi *Hanuman Parsad* and Lala *Ram Parshad*, for the respondent.

JUDGMENT.

[250] The judgment of the Court, so far as it is material to the above contention, was as folllows :—

If the road is a public thoroughfare, then, inasmuch as the plaintiffs alleged no special injury, the suit for the removal of the encroachment cannot be maintained—*Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (1) ; *Pyari Lal* v. *Rooke* (2) ; *Hira Chand Bannerjee* v. *Shama Charan Chatterjee* (3). There is, it is true, a decision to the contrary—*Jina Ranchod* v. *Jodha Ghella* (4), but the weight of authority supports the view taken by the Judge, which accords with the English law on the subject and is based on principles well understood. But it must be determined whether the road in suit is a public thoroughfare

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* Special Appeal, No. 172 of 1876, from a decree of the Judge of Allahabad, dated the 12th February 1876, reversing a decree of the Munsif, dated the 31st July, 1875.

(1) 3 B L.R. A. C. 295=12 W. R. 160, followed in *Raj Lukhee Debia* v. *Chunder Kant Chowdry*, 14 W. R. 173 ; *Bhageeruth Rishee* v. *Gokool Chunder Mandal*, 18 W.R. 58 ; *Bhageeruth Doss* v. *Chundee Churn*, 22 W. R. 462 ; *Ramtaruk Karati* v. *Dinanath Mandal*, 7 B. L. R. 184=24 W. R. 414 ; and *Parbati Charan* v. *Kali Nath*, 6 B. L. R. App. 73.

(2) 3 B. L. R. A. C. 305=3 B. L. R. App. 43=11 W. R. 434.

(3) 3 B. L. R. A. C. 351.

(4) 1 B. H. C. R. 1.

1 A. 250.

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APPELLATE CIVIL.

1 A. 250.

APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Oldfield.

ZAIBULNISSA BIBI (*Defendant*) v. KULSUM BIBI (*Plaintiff*).*
[16th June, 1876.]

Act IX of 1871, *s.* 5-*b.—Appeal—Limitation—Sufficient cause.*

A certain suit was dismissed on the 26th July 1875, on which day the plaintiff applied for a copy of the Court's decree. She obtained the copy on the 31st July, and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The appellate Court recorded that it should excuse the delay, and admitted the appeal.

[251] *Held*, that there was, under the circumstances, no sufficient cause for the delay. (1)

An appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period.

[R., 6 B. 304.]

THIS suit was dismissed by the Court of first instance on the 26th July 1875. On that day the plaintiff applied for a copy of the Court's decree, which was furnished on the 31st July. On the 31st August she presented an appeal to the lower appellate Court. but did not assign in her petition any cause for not presenting it within the period of limitation prescribed therefor by art. 151, sch. ii, Act IX of 1871. It was alleged, however, in special appeal, that her excuse was that she had miscalculated the period. The lower appellate Court recorded simply that it should excuse the delay and admitted the appeal, and eventually gave the plaintiff a decree.

On special appeal by the defendant to the High Court it was objected that the lower appellate Court was not competent to admit the appeal after the period of limitation ordinarily allowed by law without finding that the plaintiff had sufficient cause for not presenting it within such period, and that the cause alleged was not sufficient.

The Senior Government Pleader, (*Lala Juala Parshad*) and Munshi *Hanuman Parshad*, for the appellant.

Babu *Oprokash Chandar* and Shah *Assad Ali*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it related to the above objections was as follows :—

We admit the validity of these objections. Assuming the Judge considered the excuse now alleged for the delay in the presentation of the

* Special Appeal No. 478 of 1876, against a decree of the Judge of Allahabad, dated the 17th March 1876, reversing a decree of the Subordinate Judge, dated the 26th July 1875.

(1) For circumstances under which there was sufficient cause for delay in filing an appeal, see *The Secretary of State for India* v. *Mutu Sawmy*, 4 B L.R. App. 84=13 W.R. 245; and *Surbhai Dayalji* v. *Raghunathji Vasanji*, 10 B.H.C.R. 397, where, on appeal to the High Court against an order rejecting an appeal as being presented after the period of limitation prescribed therefor, sickness was pleaded as a cause for the delay, the Court refused to direct the lower Court to take evidence in the matter—*Petition of Mazoom Ali Khan*, 1 W.R. Mis. 23.

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appeal in the Court below (of which there is no proof), [252] we cannot hold that an error in the calculation of the time allowed was, under the circumstances, sufficient cause for the delay. We decree the appeal, and, reversing the order of the lower appellate Court, reject the appeal presented to the Judge on the gronnd that it was barred by limitation. The appellant will recover costs in this and the lower appellate Court from the respondent

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1 A. 252.

APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

TULSI RAM AND OTHERS (*Defendant*) *v.* GANGARAM (*Plaintiff*).*
[26th June, 1876.]

Act VIII of 1859, *s.* 7.

The fact that, at the time when the purchaser of certain lands sued, with a view of confirming his title to the lands under his purchaser, for a decree declaring such title, he was in a position to have sued for possession of the lands, was no bar under the provisions of s. 7, Act VIII of 1859, to his subsequently suing for possession of the same.

[**Diss.**, 8 Ind. Cas. 9 (14); **Ap.**, 8 C. 483 (**F.B.**); **R.**, 34 A. 172 (179) = 9 A.L.J. 111 = 13 Ind. Cas. 154.]

THIS was a suit for the possession of certain lands and for the mesne profits of the same for three years. The suit was based on a deed of sale executed in the plaintiff's favour by Baldeo, the father of the defendants, on the 23rd of December 1862. The plaintiff had sued Baldeo on the 2nd of June 1864 for a declaration of his rights under the sale, on the ground that Baldeo had failed to fulfil his promise of putting him into possession of the lands, and had obtained a decree on a confession of judgment.

The Court of first instance dismissed the present suit on the ground that it was barred by s. 7, Act VIII of 1859. The lower appellate Court was of a different opinion, and reversing the decree of the first Court, remanded the suit for a decision on the merits.

On special appeal by the defendants to the High Court it was again contended that the suit was barred by the provisions of that section.

Pandit *Bisambar Nath* and Munshi *Sukh Ram*, for the appellants.

The Senior Government Pleader (*Lala Juala Parshad*) and Pandit *Ajudhia Nath*, for the respondent.

JUDGMENT.

[253] The judgment of the Court was as follows:—

The plaintiff sued to obtain possession of 4 bighas, 12 biswas of land out of 92 bighas, 12 biswas, and one-fourth of 1 bigha, 11 biswas (jureebi), situate in Thoke Muhoor, Mauza Rahtori, together with mesne profits for three years.

It appears that, on December the 23rd, 1862, Baldeo, the father of the defendants, sold the lands in suit with other lands to the plaintiff, and with a view, it is said, of confirming his title, he in 1864 sued for and

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* Special Appeal, No. 572 of 1875, from a decree of the Subordinate Judge of Agra, dated the 20th May 1875, reversing a decree of the Munsif, dated the 20th March 1875.

obtained a decree declaring his rights under the sale. It is admitted that he had not at the time of the institution of the declaratory suit and that he has not up to the present time obtained possession.

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APPELLATE CIVIL.

1 A. 252.

The defendants pleaded *inter alia* that the suit was barred by the provisions of s. 7, Civil Procedure Code. The Munsif allowed the plea and dismissed the suit without trial on the merits. The lower appellate Court held that the suit was not barred and remanded it for trial under s. 351, Civil Procedure Code. The lower appellate Court considered that s. 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim, and not to cases in which, although he may be entitled to claim more than one kind of relief, he seeks for the time one remedy only.

In our judgment the lower appellate Court has properly interpreted the provisions of the section referred to. We have not now to consider whether the plaintiff ought to have obtained a declaratory decree, seeing that he might have obtained that relief in an ordinary suit for possession. We have to determine whether, in seeking a declaratory decree to establish his purchase-deed, and omitting to sue for possession, he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit. The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession. The plaintiff might have obtained a declaratory decree without entering on the question of possession. For these reasons we hold that s. 7 is inapplicable, and we consequently affirm the order of the lower appellate Court and dismiss the appeal with costs.

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1 A. 254.

[254] APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

TIMAL KUARI (*Plaintiff*) v. ABLAKH RAI AND OTHERS (*Defendants*).*
[26th June, 1876.]

Act XVIII of 1873—*Act IX of* 1871, *s.* 15—*Limitation.*

Semble, that the provisions of s. 15, Act IX of 1871, are not applicable to suits or applications under Act XVIII of 1873.

THIS was a case stated by an Assistant Collector of the first class for the opinion of the District Judge. The case was as follows:—

The plaintiff was illegally ejected from certain land in or before the year 1873, and in January 1876 made an application under s. 95, cl. (*n*), of Act XVIII of 1873 to recover possession of the same. The defendants raised the objection that, under cl. (*e*), s. 96, Act XVIII of 1873, applications under cl. (*n*), s. 95, could not be brought after six months from the date of wrongful dispossession, but as it appeared that the plaintiff had spent the time intervening between the date of his dispossession and the date of his application, prosecuting suits, for the recovery of the land, instituted by him in Courts which had no jurisdiction to try such suits, the Assistant Collector referred to the District Judge the question whether the provisions of s. 15, Act IX of 1871, apply to applications under Act XVIII of 1873 or not?

* Miscellaneous Regular Appeal, No. 26 of 1876, against a judgment of the Judge of Ghazipur, dated the 21st February, 1876.

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The District Judge decided that they did not apply either to suits or applications, relying on *Nona* v. *Dhoomun Dass* (1) and *Madhco Soodun Mojoomdar* v. *Brojonath Koond Chowdhry* (2).

The plaintiff appealed against this decision to the High Court, contending that the Assistant Collector was not competent to make a reference under s. 204, Act XVIII of 1873, and that the decision was erroneous.

Mr. *Conlan* and Babu *Baroda Parshad*, for the appellant.

Lala Lalta Parshad, for the respondent.

JUDGMENT.

[255] The judgment of the Court was as follows :—

The appellant rightly contends that the Assistant Collector had no power to make the reference, and that consequently the Judge's opinion cannot be regarded as authoritatively binding on the Assistant Collector and the parties to the proceeding. It is not necessary for us to go on to consider the validity of the second plea, but we may notice that the opinion recorded by the Judge appears to be in conformity with the ruling of the Privy Council in *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (3), in which it was held that the analogous provisions of s. 14, Act XIV of 1859, do not apply to suits instituted under Act X of 1859, because the latter is a special law. On similar grounds it was ruled in *Mahomed Bahadur Khan* v. *The Collector of Bareilly* (4) that the provisions of the Limitation Law relating to disability do not apply to enlarge the period of limitation prescribed by Act IX of 1859. We must, however, declare the reference to the Judge has no legal effect and his opinion cannot be held binding on the parties. We order the Judge to return the reference to the Assistant Collector, that it may be submitted through the proper channel should the Collector think fit to make a reference, and we shall direct each party to bear his own costs.

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1 A. 255 (F.B.) = 1 Ind. Jur. 198.

BEFORE A FULL BENCH.

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

SHAM KUAR AND OTHERS (*Defendants*) *v.* GAYA DIN AND ANOTHER (*Plaintiffs*).* [28th June, 1876].

Hindu Law—Adoption—Inheritance.

An adopted son under the Dattaka Mimansa and Mitakshara succeeds to property to which his adoptive mother succeeded as the heiress of her father (5).

[F., 6 C. 256 **(F.B.)**. ; **R.**, 33 B. 404 ; 11 Bom. L.R., 641.**]**

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* Special Appeal, No. 923 of 1875, against a decree of the Judge of Azamgarah, dated the 11th June 1875, reversing a decree of the Subordinate Judge, dated the 15th January 1875.

(1) H.C.R. N.W.P. 1873, p. 30. (2) 5 W.R. Act X, Rulings, 44.

(3) 15 B.L.R. 60 note = 19 W.R. 5 ; adopting the view taken by the Full Bench of the Bengal High Court in their decision in *Poulson* v. *Madhusudan Pal*, B.L.R., Sup. Vol. 101 = 2 W.R. Act X Rulings, 21.

(4) 1 I. A. 167 (P.C.) = 13 B.L.R. 292.

(5) See, however, besides the cases cited afterwards, *Chinnaramakrishna Ayyar* v. *Minatchi Ammal*, 7 M. H.C.R. 245.

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[256] THE plaintiffs in this suit were the sons of Sheodat Singh, the adopted son of Ramdat Singh, the deceased husband of Birja Kuar, deceased. They claimed a declaration of their right to, and possession of, certain share in certain villages which Birja Kuar had inherited from her father Lotan Singh, in virtue of a will which Birja Kuar had executed in their favour, with the consent of their father, and in virtue of their father's right of succession, under Hindu law, to the property of Birja Kuar, his adoptive mother. The defendants were descended from other daughters of Lotan Singh.

The Court of first instance dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree.

On special appeal by the defendants to the High Court, the Court (Turner and Spankie, JJ.) referred the following question to the Full Bench, *viz.*—

"Whether an adopted son is entitled to succeed to property which descended to the wife of the adopting father as the heiress of her father."

Lala Lalta Parshad and Munshi *Kashi Parshad*, for the appellants.

The Senior Government Pleader (Lala *Juala Parshad*) and Munshi *Hunuman Parshad*, for the respondents.

OPINION.

The opinion of the Full Bench was as follows :—

Looking to the object of the rite of adoption, we find it to be to ensure by providing a son the spiritual benefit of the adoptive father and the perpetuation of his family name (Dattaka Mimansa, ss. 1—9), rather than to obtain any benefit for the adoptive mother, whose happiness in a future state is not so dependent on having a son to perform the funeral obsequies and can be otherwise secured (Dattaka Mimansa, s. 1, v. 29), and it is also the fact that the wife has no power to adopt on her own account, the right being absolute in the husband. Such being the case, there is no doubt at first sight much force in the contention that the adoption of a son merely affiliates him in the family of the adoptive father, and not of the adoptive mother, and that he cannot in consequence succeed by inheritance to the property which descended to his adoptive mother [257] as heiress of her father. But on the other hand we find that the wife is associated in making the adoption with the husband; and its effect is declared to be to make the adopted child the son of the adoptive mother as well as of the adoptive father.—" By the husband's mere act of adoption the filiation of the adopted son, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband "—Dattaka Mimansa, s. 1, v. 22. Nowhere do we find it stated that there is any difference in the effect obtained by this filiation with reference to the son's position towards the adoptive father and mother or their families, while we know that in respect of the natural father and mother the effect is alike to completely sever the adopted son from the families of both.—" A given-son must never claim the family and estate of his natural father. The funeral cake follows the family and estate, but of him who has given away his son the obsequies fail "—Dattaka Mimansa, s. 6, v. 6. " The estate of the maternal grandfather also like that of the father lapses from the son given "—Dattaka Mimansa, s. 6, v. 51. When the separation is so complete from the natural father and mother's family in the absence of texts to the contrary, it may perhaps be not assuming too much to infer that the affiliation by adoption is into both families of adoptive father and mother. But we have what seems to be an express text to that effect. Dattaka

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Mimansa, s. 6, v. 50 declares—" The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest : for the rule regarding the paternal is equally applicable to the maternal grandsires of adopted sons." There is also another fact which affords the strongest argument in favour of the adopted son's right of succession, and this is that he has the right to perform funeral obsequies to his adoptive mother's father. In Dattaka Mimansa, s. 6, vv. 52,53,we find—"Accordingly Hemadri himself, from not being satisfied with that (just stated), has advanced the other position : 'In the same manner as for the secondary father, a funeral repast must be performed in honour of the secondary maternal grandfather and the rest.' And this even is proper. The adopted son as substitute for the real legitimate son being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honour of whom a legitimate son performs **[258]** such repast." This right of performing the obsequies indicates a right of heirship in the family of the adoptive mother. We have seen the rule laid down by Manu to be -"A given-son must never claim the family and estate of his natural father," and the reason assigned is because "the funeral cake follows the family and estate," and the same reason is assigned in v. 51, s. 6, Dattaka Mimansa, why the given-son cannot claim the estate of his natural maternal grandfather—' the funeral cake follows the family and estate;' "the family and estate are declared to be the cause of performing the funeral repast." So when we find that the adopted son performs by right the obsequies of his adoptive maternal grandfather, it will follow that he does so because he is amongst the heirs, or to quote the text, because "the family and estate are the cause of performing the funeral obsequies," and this doctrine of funeral cake has been held by a high authority (Sir W. Jones) to be the key to the whole Hindu law of inheritance.

Amongst decisions on the question, we find that in *Morun Moyee Debeah* v. *Bejoy Kishto Gossamee*(1),decided on the 23rd July 1863, the High Court of Bengal held that an adopted son cannot succeed to his adoptive maternal grandfather's estate when there are collateral male heirs.

There is the case of *Gunga Mya* v. *Kishen Kishore Chowdhry*(2), decided on the 17th December 1821, in which a *vyavastha* was delivered to the effect that a son adopted with the permission of her husband by a woman on whom her father's estate had devolved will not be entitled to such estate on his adoptive mother's death, but such estate will go to her father's brother's son in default of nearer heirs. This opinion was based on an interpretation given by the Dayabhaga to the text of Manu by which the adopted son's right of succession collaterally was confined to succession to property of persons belonging to the same family as the adopting father. But that dictum was accepted by one Judge only, and the majority of the Court expressed no opinion on it, as the point did not arise in the case. The dictum has, however, been accepted by Mr. Macnaghten—Hindu Law, vol. ii, 187.

[259] Then there is the case of *Gungapersad Roy* v. *Brijessuree Chowdhrain* (3), decided by the High Court of Bengal on the 30th July 1859, in which the learned Judges considered that the doctrine laid down in the case of *Gunga Mya* v. *Kishen Kishore Chowdhry* stood merely as the dictum of the Pandit who gave it, and had not been conclusively adopted

(1) W.R. F.B. 121. (2) 3 S.D.A. Rep. L.P. 128.
(3) 15 S.D.A. Rep. L. P. part ii, p. 1091.

by the Court and could not be said to have acquired all the authority of a recognised principle of Hindu Law to which the Sudder Court had intended to give effect, and the Court proceeded to decide the question before them, which was the converse of that before us, and held that the relations of the adoptive mother inherit the property of her adopted son just as they would inherit the property of her natural son.

In another case, *Teencowree Chatterjee* v. *Dinnonath Banerjee* (1) the right of inheritance by the adopted son was held to be limited to the adoptive mother's stridhan, and did not extend to the property she had inherited from her father and paternal ancestors, but this limitation of the succession proceeded on the ground that the adopted son cannot perform the shradh of the adoptive mother's father, in which view the Court appears to have been mistaken.

Referring again to the decision in *Morun Moyee Debeah* v. *Bejoy Kishto Gossamee*, it should be noticed that in that case the Pandits of Moorshedabad and the Sudder Court gave their opinion that a legally adopted son can inherit the property of the adopting mother's father. They thus differed from the dictum given in 1821, and it should be also noticed that this *vyavastha* of 1821, on which the Judges in *Morun Moyee Debeah* v. *Bejoy Kishto Gossamee* principally relied, has special reference to the Dayabhaga law, and will not have equal weight in deciding the question before us, which must be governed by the Dattaka Mimansa and Mitakshara.

On a full consideration of the question there seems no valid reason to doubt that the adopted son does succeed to property which descended to his adoptive mother as heiress of her father.

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1 A. 260.

[260] APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

JAGAN NATH (*Defendant*) v. LALMAN (*Plaintiff*).* [29th June, 1876.]

Act VIII of 1859, *s.* 336—*Appeal when instituted—Memorandum of appeal—Limitation.*

Where, under the provisions of s. 336, Act VIII of 1859, a memorandum of appeal is returned for the purpose of being corrected, the appellate Court should specify a time for such correction.

Where an appellant presented an appeal within the period of limitation prescribed therefor, and the appellate Court returned the memorandum of appeal for correction without specifying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was presented.

THE period for presenting an appeal in the suit against the decree of the Court of first instance expired on the 18th December 1875. The defendant presented an appeal on the 16th December. The lower appellate Court returned the memorandum of appeal for the purpose of being corrected without specifying any time within which the appeal should be again presented. It was again presented on the 22nd December and admitted. At the hearing the plaintiff objected that it was

* Special Appeal, No. 561 of 1876, from a decree of the Judge of Farukhabad, dated the 29th February 1876, rejecting an appeal against a decree of the Subordinate Judge, dated the 15th November 1875.

(1) 3 W. R. 49.

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presented after time. The lower appellate Court admitted the validity of the objection, deciding that the date on which it was presented the second time must be taken to be the date of its presentation, for the purpose of computing the period of limitation, and holding that the defendant had shown no sufficient cause for not presenting it within time, dismissed it as barred by limitation.

Against this decision the defendant appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellant.

Pandit *Bishambar Nath* and *Lala Harkishen Das*, for the respondent.

JUDGMENT.

The judgment of the Court was as follows :—

We are unable to hold that the appeal was presented after the proper time, for the date of its presentation is the date on which it is first presented to the officer. In returning the application that [261] the grounds of appeal might be amended, the Judge should have prescribed a time within which it should have been again presented in an amended form. The case of *Ismail Sahib* v. *Arumuga Chetti* (1) appears to be in point. The decree of the lower appellate Court is set aside and the case remanded under s. 351 for trial by the lower appellate Court.

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1 A. 261=1 Ind. Jur. 171.

APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

TOTARAM (*Defendant*) *v.* SHER SINGH AND OTHERS (*Plaintiffs*).*
[29th June, 1876.]

Act XVIII of 1873, s, 93, cl. (h)—Suit for profits—Interest.

A Court of Revenue is competent, in a suit for profits, under s. 93, cl. (*h*) of Act XVIII of 1873, to award the interest claimed on such profits.

[R., 6 O.C. 89.]

THIS was a suit under cl. (*h*), s. 93, Act XVIII of 1873, by five co-sharers to recover from the remaining co-sharer five-sixths of the profits, together with interest, of a certain mahal for 1280 Fasli. The Court of first instance gave them a decree for the whole sum claimed. The lower appellate Court affirmed that decree.

On special appeal by the defendant to the High Court it was contended that the Court of first instance was not competent to give a decree for the interest claimed, the defendant not being liable under any provisions of Act XVIII of 1873 to pay interest.

Munshi *Hanuman Parshad* and Pandit *Bishambar Nath*, for the appellant.

Babu *Jogendro Nath*, for the respondents.

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* Special Appeal, No. 559 of 1876, against a decree of the Judge of Meerut, dated the 29th February 1876, affirming a decree of the Assistant Collector, dated the 27th August 1875.

(1) 1 M.H.C.R. 427; see also *Hidayut Ali* v. *Maeraj Begum*, H.C.R.N.W.P. 1871, p. 202; *Begee Begum* v *Yusuf Ali*. H. C. R. N. W. P. 1874, p. 139; *Sham Chand Koondo* v. *Kally Kanth Roy*, Marsh 336; *Ram Coomar Shaha* v. *Dwarkanath Hazra*, 5 W R 207; *Husrutoolah* v. *Abdool Kadir*. 6 W. R. 39; *Greesh Chunder Singh* v. *Ram Kishen Bhuttacharjee*, 7 W. R. 157; *Mengur Munder* v. *Huree Mohun*, 23 W. R. 447; and see also the Indian Limitation Act, s. 4, Explanation.

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1 A. 261= 1 Ind. Jur. 171.

JUDGMENT.

[262] The judgment of the Court, so far as it is material to the above contention, was as follows :—

It is true that the Rent Act does not expressly declare that interest will accrue on other sums which may be recovered in the Revenue Court except sums due in respect of rent, but neither does it declare the Revenue Courts incompetent to award interest, and it would be contrary to the policy of the Act to compel a plaintiff to resort to the Civil Court to obtain compensation in the way of interest for the default in payment of sums which are only recoverable in the Revenue Courts. As it has been the practice in the Revenue Courts to decree interest on arrears of profits, we shall not interfere with the decree of the Court below in this respect.

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1 A. 262.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spankie*).

GAURI (*Plaintiff*) v. CHANDRAMANI (*Defendant*).* [29th June, 1876.]

Hindu Law -Hindu Widow—Family Dwelling-house—Right of Residence.

A Hindu widow, who resides with her husband and the members of his family in the family dwelling-house while he is alive, is entitled to reside therein after his death, and cannot be ousted by the auction-purchaser of the rights and interests in the house of her husband's nephew.

Mangala Devi v. *Dinanath Bose* (1) followed (2).

[F., 3 A. 353 ; 2 B. 494 ; 13 B. 101 ; R., 12 M. 260 (F.B.) ; A.W.N. (1887) 279 ; D., 2 A. 141.]

THE plaintiff in this suit was the auction-purchaser of the rights and interests in a certain dwelling-house of his judgment-debtor, Bindesri Parshad.

Bindesri Parshad was the son of Lachman Parshad, deceased, and nephew of Beni Parshad, also deceased.

When the plaintiff endeavoured to obtain possession of the house he was resisted by the defendant, the childless widow of [263] Beni Parshad, who was residing in the house, and claimed the right to reside in a moiety thereof as her husband's widow. He therefore brought the present suit to eject her.

The Court of first instance gave him a decree. The lower appellate Court held, on the ground that a moiety of the house was admittedly the separate property of Beni Parshad, that the defendant was entitled to the right of residence claimed by her, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Lala *Lalta Parshad*, for the appellant.

The respondent did not appear.

JUDGMENT.

The judgment of the Court was as follows :—

It does not appear to have been admitted that the property was held by Lachman Parshad and Beni Madho in equal shares, but assuming it

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* Special Appeal No. 469 of 1879, against a decree of the Subordinate Judge of Gorakhpur, dated the 17th February 1876, reversing a decree of the Munsif, dated the 30th November 1875.

(1) 4 B.L.R.O.J. 72=12 W.R.O.J. 35.

(2) See, however, *Mohun Geer* v. *Tota*, H.C.R.N.W.P. 1872, p. 153.

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was the joint property of the two brothers, the widow of Beni Madho is entitled to live in it, it being the house in which she resided with her husband. She cannot be ousted by a purchaser of her nephew's right. *Mangala Debi* v. *Dinanath Bose* (1). The house is a small one, and it is not shown that one moiety is more than sufficient as a residence for the Mussammat. We shall not therefore disturb the decree of the lower appellate Court, but dismiss the appeal with costs.

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1 A. 263.

APPELLATE CIVIL,

BISHAN CHAND (*Defendant*) *v.* AHMAD KHAN AND OTHERS (*Plaintiffs*).*
[30th June, 1876.]

Act IX of 1871, s. 5 a.—Institution of Suit—Limitation.

Held, that where the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of re-opening after the vacation on the day that it should have re-opened, re-opened on a later day, and the suit was instituted when it did re-open, it was instituted within time.

[264] THIS suit was instituted in the Court of the Subordinate Judge of Ghazipur on Monday, the 16th November 1874. The cause of action was stated in the plaint to have arisen on the 2nd November 1871.

The Subordinate Judge dismissed the suit, holding that the period of limitation applicable to it was two years. On appeal by the plaintiffs the District Judge held that the period applicable was three years, and that, as that period expired when the Court of the Subordinate Judge was closed, and the plaintiffs had instituted the suit on the day the Court re-opened, it was instituted within time.

The Court of the Subordinate Judge was closed from the 12th October 1874 to the 13th November 1874, in accordance with a list of days to be observed as close holidays in 1874 by the Courts subordinate to the High Court, such list being prepared by the High Court and published in the local *Gazette*, under the provisions of s. 17, Act VI of 1871. It should have reopened on Saturday the 14th November 1874, but did not do so until Monday the 16th November 1874, under an order issued by the District Judge.

On special appeal by the defendant to the High Court it was contended that the suit was barred by limitation, not having been instituted on the 14th November 1874.

Munshi *Hanuman Parshad* and Pandit *Ajudhia Nath*, for the appellant.
Pandit *Bishambar Nath* and Shah *Assad Ali*, for the respondents.

JUDGMENT.

The judgment of the Court, so far as it is material to the above contention, was as follows:—

It appears that the Court should have sat on the 14th November 1874, and if it had done so, the suit, according to the Judge's [265] view of the limitation that applies, would have been within time. The Judge does not

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* Special Appeal, No. 534 of 1876, from a decree of the Judge of Ghazipur, dated the 19th April 1876, reversing a decree of the Subordinate Judge, dated the 12th June 1875.

(1) 4 B. L. R. O. J. 72=12 W. R. O. J. 35.

notice the fact that the Court did not sit on the 14th, but confines his remarks to the point that, when the Court opened, the petition was filed, and the limitation being three years, not two years as found by the first Court, the suit was within time. It was contended that the Courts did not sit because the Judge had issued an unauthorized order that they were not to open until the Monday following Saturday the 14th, on which day they should have been opened after the close of the vacation. The Judge's unauthorized order cannot, it is urged, override the law of limitation, which must be applied strictly. It does not appear why this order was issued; probably it was to suit the convenience of the Judges on their return to their Courts after the vacation, because Sunday caused another break between Saturday and Monday. There was considerable difference of opinion before the passing of the present Limitation Law, as to whether Act XIV of 1859 was to be strictly applied in a case of this nature when a Court happened to be unexpectedly closed (1). In the present case the plaintiff appears to have brought his claim to the Munsif and to have been ready to present it on the 14th. It is dated the 14th, so is the vakalat-nama and the plaint was presented on Monday the 16th. In such a case we should not be disposed to apply the strictest interpertation, and looking at the terms of s. 5, cl. (*a*), Act IX of 1871, we do not think that we are called upon to do so. The section provides, that, if the period of limitation prescribed for any suit, appeal, or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, presented, or made on the day that the Court re-opens. This was the course followed in the case before us, and the section appears to us wide enough, since it does not refer to vacations or holidays, to admit of the entertainment of the suit.

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1 A. 263.

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1 A. 266.

[266] APPELLATE CIVIL.

(Mr. Justice Turner and Mr. Justice Spankie).

RAM GOLAM AND OTHERS (*Defendants*) *v.* SHEO TAHAL AND OTHERS (*Plaintiffs*).* [7th July, 1876.]

Decree—Judgment—Appeal.

The plaintiffs in this suit claimed, as the heirs of *G*, possession from the defendants of certain lands which *G* had mortgaged to the defendant, alleging that the mortgage-debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, asserting also that the mortgage-debt had not been satisfied. The Court of first instance held that the plaintiffs were

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* Special Appeal, No. 554 of 1876, against a decree of the Judge of Ghazipur, dated the 17th February 1876, affirming a decree of the Additional Subordinate Judge, dated the 8th April 1875.

(1) In the following cases it was held that a plaintiff was not entitled to deduct the time the Court was closed from the period of limitation applicable to his suit under Act XIV of 1859, that Act giving no discretion to the Court to extend such period—*Rajkristo Roy* v. *Dinobundho Surma*, B.L.R., Sup. Vol., 360=3 W.R.,S.C.C. R., 5; *McKilligan* v. *Tarinee Churn Singh*, 3 W.R., 209; *Kudomessuree Dossee* v. *Enam Ali*, 20 W.R. 167; *Ramasamy Chetty* v. *Venkatachellapatty Chetty*, 2 Mad. H.C R. 408. In *Manirun* v. *Luteefun*, 3 W.R., 46, it was held otherwise.

Where the time fixed by the decree in a suit for pre-emption for the deposit of the purchase-money expired when the Court was closed, its deposit when the Court re-opened was held to have been made within time—*Muchul Kooer* v. *Laljee*, H.C.R., N.W.P. 1870, p. 112.

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entitled to redeem, but dismissed the suit on the ground that the mortgage-debt had not been satisfied.

Held, that the defendants were entitled to appeal, the case of *Pan Kooer* v. *Bhugwunt Kooer* (1) not being applicable to this case.

[Ap., 2 A. 497 (F.B.); 17 A. 174; 9 C.W.N. 584.]

THE plaintiffs in this suit claimed, as the heirs of Gunnu Dubay, to recover possession from the defendants of certain lands which Gunnu Dubay had mortgaged to their ancestor in 1835 for Rs. 25, alleging that the mortgage-debt had been satisfied from the usufruct. They also claimed mesne profits.

The defendants denied that the plaintiffs were the heirs of Gunnu Dubay, asserting that they themselves were his heirs, and that they held possession of the lands in suit as such, having originally held possession of them under the mortgage. They also denied that the mortgage-debt had been satisfied from the usufruct.

The Court of first instance found that the plaintiffs were the heirs of Gunnu Dubay, but dismissed the suit on the ground that the mortgage-debt had not been satisfied. Its decree was in these terms:—"It is ordered that the plaintiffs' claim be dismissed in its present form."

The defendants appealed impugning the decision of the Court of first instance that the plaintiffs were the heirs of Gunnu Dubay. The lower appellate Court dismissed the appeal on the ground that [267] it was an appeal against the decision of the Court of first instance and not the decree, referring to *Pan Kooer* v. *Bhugwant Kooer* (1). On special appeal by the defendant to the High Court it was contended that the lower appellate Court had misapplied that case.

Mir *Akbar Hussain*, for the appellants.

The *Senior Government Pleader* (Lala Juala Parshad), for the respondents.

JUDGMENT.

The judgment of the Court was as follows;—

We are of opinion that the ruling of the Full Bench does not apply in this case. The appellant is dissatisfied with the decree of the Court of first instance. He contends that the respondents have, under no circumstances, a right to redeem, and that their suit should have been dismissed absolutely and not in such a manner that they are at liberty to come into Court again. We admit the force of the objection, and decreeing the appeal, remand the case to the lower appellate Court for decision on the merits.

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(1) H. C. R. N. W. P. 1874, p. 19.

1 A. 267 (F.B.).

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FULL BENCH.

1 A. 267 (F.B.).

BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

ANANT DAS (*Defendant*) v. ASHBURNER AND CO. (*Plaintiffs.*)*
[27th July, 1876.]

Act IX of 1872 *(Contract Act)*, s. 28—*Agreement not to appeal—Void Agreement.*

Where, in consideration of *A* giving *B* time to satisfy a decree against him held by *A*, B agreed not to appeal against the decree and did appeal, *held* that the agreement was not prohibited by s. 28 of Act IX of 1872, and that the appellate Court was bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow B to proceed with the appeal which he had instituted in contravention of it.

[F., 8 C. 455 ; D., 3 A. 152 ; 5 O.C. 49.]

ASHBURNER AND CO., the respondents in this appeal, had obtained a decree against Anant Das, the appellant. On the 24th July, 1875, while certain proceedings in execution of that decree were pending, Anant Das entered into an agreement with Ashburner and Co. by which he bound himself not to appeal from the decree if they would give him until the 20th September, 1875, to satisfy it. The agree-[268]ment and consent having been notified by the parties to the Court executing the decree, it directed execution to be stayed.

Anant Das contrary to the agreement above-stated preferred the present appeal to the High Court. The respondents urged, when it came on for hearing, that it ought not to be entertained. The appellant contended that the agreement was void under the provisions of s. 28, Act IX of 1872.

The Court (Turner and Oldfield, JJ.), being doubtful whether the terms of that section applied, referred to the Full Bench the question whether, under the circumstances stated, the appellant ought to be allowed to proceed with the appeal.

The *Senior Government Pleader* (Lala Juala Parshad), for the appellant, contended that the agreement was void under s. 28, Act IX of 1872.

Mr. *Howard* (with him the *Junior Government Pleader*, Babu Dwarka Nath Banarji), for the respondents, contended that the section was not applicable. The agreement is a valid agreement, and the consideration *viz.*, the granting of time, good and sufficient. He referred to *Munshi Ali* v. *Maharani Inderjit Koer* (1).

OPINIONS.

STUART, C.J.—I would answer this reference in the negative. It is perfectly clear that s. 28 of the Contract Act does not apply to such a case, while in my judgment the agreement of the 24th July, 1875, was a valid and reasonable arrangement which can be enforced. The appellant therefore ought not to be allowed to proceed with his appeal.

TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion :—

Section 28, Act IX of 1872, declares that every agreement by which any party thereto is restricted absolutely from enforcing his rights under or

* Regular Appeal, No. 109 of 1875, against a decree of the Subordinate Judge of Gorakhpur, dated the 10th July, 1875.

(1) 9 B. L. R. 460.

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in respect of any contract by the usual legal proceedings in the ordinary tribunals is void to that extent. These provisions appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the Courts; but notwithstanding this rule it was long since determined that, if a person after mature delibera- [269] tion enters into an agreement for the purpose of compromising a claim *bona fide* made to which he believes himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and the agreement is valid. This principle has been recognised in the Indian law in the provisions of the Procedure Code, which enable the parties to a suit to go before the Court and obtain a decree in the terms of a compromise. Furthermore, that the parties to a suit may before a decision is passed in the Court of first instance agree to abide by the decision of that Court and forego their right of appeal is shown by the decision of the Privy Council in *Munshi Amir Ali* v. *Maharani Inderjit Koer* (1). That case was, it is true, decided before the Indian Contract Act was passed, but if, as we are of opinion, the provisions on which the appellant relies only declare what was before a recognised rule of law, it is an authority in favour of the conclusion at which we have arrived, that those provisions are not applicable to the circumstances of the present case. By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is, in our judgment, prohibited neither by the language nor the spirit of the Contract Act, and an appellate Court is bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with an appeal.

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1 A. 269.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Oldfield*).

THE MUNICIPAL COMMITTEE OF MORADABAD (*Defendants*) v. CHATRI SINGH (*Plaintiff*).* [27th July, 1876.]

Act XV of 1873 (*North-Western Provinces and Oudh Municipalities Act*), ss. 28, 43—*Local Government—Notice of suit—Special Appeal.*

Where, in a suit against a Municipal Committee, the Magistrate of the District was impleaded as representing the Local Government, the Court [270] refused to allow the plea that the Local Government had not been made a party to the suit in accordance with the provisions of s. 28, Act XV of 1873.

The notice previous to suing a Municipal Committee for a thing done by them under that Act required by s. 43 of the Act is only necessary where compensation is claimed for the thing done.

The plea that no notice was given as requried by s. 43 cannot be taken for the first time in special appeal.

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* Special Appeal, No. 341 of 1876, against a decree of the Subordinate Judge of Moradabad, dated the 7th January, 1876, reversing a decree of the Munsif, dated the 30th September, 1874.

(1) 9 B. L. R. 460.

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APPELLATE CIVIL.

1 A. 269.

Quære.—Whether a plea that the Local Government has not been made a party to a suit against a Municipal Committee in accordance with s. 28 can be taken for the the first time in special appeal.

[F., 16 M. 296; Ap., 4 A. 102; R., 4 A. 339=A.W.N. (1882) 63; 22 B. 289 (F.B.); 25 B. 142; D., 28 A. 600=3 A.L.J. 341=A.W.N. (1906) 107.]

ONE Dhokal Singh complained to the Magistrate that the plaintiff was encroaching on a certain public highway in the Municipality of Moradabad. The Municipal Committee took the matter up, and in the carrying out of a resolution by them the line of the highway was marked out so as to admit of the passage of carts. The plaintiff instituted the present suit against Dhokal Singh and against the Magistrate of the District or President of the Municipal Committee and as representing the Local Government, in which he claimed to be maintained in possession of the piece of land which he alleged would be cut off his property if the highway were carried along the line marked out. The Court of first instance dismissed the suit, holding that the plaintiff had failed to prove his title to the land. The lower appellate Court, holding that the land was the plaintiff's property, gave him a decree.

On special appeal to the High Court by the Magistrate as President of the Municipal Committee, it was urged that the suit should be dismissed as the Local Government had not been made a party thereto in accordance with the provisions of s. 28, Act XV of 1873, and that the suit was not maintainable because notice of action was not given in accordance with s. 43 of that Act.

The *Senior Government Pleader* (Lala Juala Parshad), for the appellant.

Pandit *Bishambar Nath* and *Mir Zahur Hussain*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it is material to the above contention, was as follows :—

A plea was, however, urged which is not entered in the memorandum of grounds of appeal that the suit ought to be dismissed on [271] the ground that the Local Government had not been made a party in accordance with the provisions of s. 28, Act XV of 1873. Inasmuch as in a former case (1) this objection had been allowed in special appeal and the suit remanded to the Court of first instance for retrial after adding the Local Government as defendant, we permitted the plea to be argued although it was not entered in the memorandum. In the present instance it appears to us that the plea should not be allowed. It is the practice to implead the Collector as representing the Local Government. The Collector and the Magistrate are one and the same person, and in this suit the Magistrate was impleaded not only as President of the Municipal Committee, but as representing the Local Government.

At the most it appears to us in this case there was a misdescription of the officer representing Government, a misdescription which that officer might have applied to have corrected. Consequently, assuming that it would be a valid plea in special appeal that the Government must necessarily have been impleaded, and on this point we must not be taken to express an opinion, we hold that the plea cannot arise in this suit because the Government was impleaded.

(1) Unreported.

1876 JULY 27. — APPELLATE CIVIL. — 1 A. 269.

The question which next calls for decision is whether or not the suit should be dismissed because notice of action was not given in pursuance of s. 43 of the Act. This plea was not, it appears, raised in either of the Courts below, and it is not a plea affecting the decision on the merits. It therefore can hardly be held to be a good plea in special appeal. We may, however, observe, that a plea based on similar provisions in a former Act was considered by the Court in an unreported case. It was then pointed out that, on the construction of analogous provisions in English Statutes, it had been held that notice of action is only necessary where the suit is brought for a tort or a quasi tort—Addison on Torts (1)—and that in *Poorno Chunder Roy* v. *Balfour* (2) Mr. Justice Phear expressed his opinion that similar provisions in Act III of 1864 (B. C.) "were directed solely to the cases of suits brought against Commissioners for damages consequential on the act done by them;" and seeing [272] that the suit then before the Court was not brought for damages, the Court held that the provisions of s. 31, Act VI of 1868, respecting notice of action were inapplicable to it. We agree with that ruling. The object of requiring such notice appears to be to enable the Committee or those acting under then to tender compensation and so prevent the necessity for a suit. In the suit now before the Court no damages are claimed. For the reasons we have stated we disallow the plea.

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1 A. 272.

APPELLATE CIVIL.

(*Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield*).

FARZAND ALI (*Defendant*) *v.* ALIMULLAH (*Plaintiff*).*
[3rd August, 1876.]

Act XXIII of 1861, *s.* 14—*Pre-emption—Pattidari Estate—Co-sharer—Stranger—Auction-purchaser*.

A share-holder in one patti of a pattidari estate is not a "stranger" with reference to a share-holder in another patti of the estate, within the meaning of that term in s. 14, Act XXIII of 1861.

The auction-purchaser at a sale in execution of a decree of a share in a pattidari estate seeking to establish his right as against a person whose claim to the right of pre-emption under the provisions of s. 14, Act XXIII of 1861, has been allowed and in whose favour the sale has been confirmed, cannot maintain a suit for possession of the share, but should sue for declaration that the person claiming the right of pre-emption has no such right and to set aside the sale (3).

[D., 14 C. 761.]

THIS was a suit for a declaration of the plaintiff's right to, and to obtain possession of, a certain share in a pattidari estate. The share had been knocked down at a sale in execution of decree to the plaintiff, who was a co-sharer in the estate, but not a co-sharer in the patti in which the share in suit was situated. The defendant, who was a co-sharer in

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*Special Appeal No. 318 of 1876, from a decree of the Judge of Ghazipur, dated the 21st January 1876, reversing a decree of the Munsif, dated the 16th September, 1875.

(1) 4th ed., 764.

(2) 9 W.R. 535; see also *Price* v. *Khilat Chandra Ghose*, 5 B.L.R. App. 50.

(3) See *Tasuduk Ali* v. *Muksud Ali*, H.C.R. N.W.P. 1874 p. 272; *Dabee Pershad* v. *Bisheshar Pershad Singh*, H.C.R.N.W.P. 1874, p. 289; and *Shib Sahai* v. *Thika Ram*, H.C.R. N.W.P., 1875, p. 97.

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that patti, had claimed to take the share sold, under the provisions of s. 14, Act XXIII of 1861. The officer conducting the sale had allowed the defendant's claim, and the Court executing the decree had confirmed the sale in his favour.

[273] The Court of first instance held that the plaintiff was a "stranger" within the meaning of s. 14, Act XXIII of 1861, and that the defendant was therefore entitled to take the share, and dismissed the suit. The lower appellate Court held that the plaintiff was not a "stranger" within the meaning of that section and gave him a decree.

On special appeal by the defendant to the High Court it was contended that the suit was not maintainable, and that the lower appellate Court had placed a wrong construction on the provisions of s. 14, Act XXIII of 1861.

Munshi *Hanuman Parshad*, for the appellant.

Pundit *Bishambar Nath*, Lala *Lalta Parshad*, and Shah *Asad Ali*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court :—

STUART, C. J.—The judgment of the Judge is substantially right. This is really not a case where the defendant shows any exclusive right of pre-emption and where the plaintiff is a "stranger," but of competitive pre-emption, if I may be allowed the expression, the plaintiff's claim in respect of title being quite as good as that of the defendant, while he has priority by purchase. As pointed out by the Judge, although the plaintiff did not live in the same patti as the vendor, but in another patti, he was a member of the co-parcenary, and therefore his claim under s. 14 of Act XXIII of 1861 must be allowed, and the sale to the defendant declared invalid. But the plaintiff cannot benefit by this judgment, and obtain possession, until the sale to him has been confirmed. I am therefore of opinion that, with this slight modification, the appeal should be dismissed, and with costs, the plaintiff, respondent, having substantially succeeded, and defendant treating him as a stranger and denying his right as a member of the co-parcenary.

OLDFIELD, J.—The plaintiff is himself a member of the co-parcenary, being a sharer in another patti of the estate. The right of pre-emption can only be asserted against a stranger, *i.e.*, one who is not a co-sharer or member of the co-parcenary. A sharer in one of pattis in a pattidari estate cannot be said to be a stranger with reference to the co-sharers in another patti, and the section gives no preferential rights of pre-emption among themselves between co-sharers in the same patti and sharers in other pattis, [274] who come under the denomination of members of the co-parcenary. But the plaintiff can, however, only obtain a declaration that the defendant has no right of pre-emption as against him, and that the sale to the defendant is invalid, but he cannot obtain possession until the sale has been confirmed in his favour and made absolute. He has taken no steps to effect this by moving the Court which ordered the sale to confirm it in his favour, which is the proper remedy open to him. I would modify the decree of the lower appellate Court by declaring that the defendant has no right of pre-emption as against plaintiff, and that the sale to the defendant is invalid.

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APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

DARSHAN SING AND OTHERS (*Defendants*) *v.* HANWANTA (*Plaintiff*).*
[11th August, 1876.]

Act VIII of 1871 (*Registration Act*), *s.* 17, *cl.* (*2*)—*Registration—Mortgage.*

A bond which charged immoveable property with the payment on a day specified therein of Rs 99, the principal amount, and Rs. 6, interest thereon, should have been registered under the provisions of cl. (2), s. 17, Act VIII of 1871 (1).

[**F.**, 2 A. 40 ; 2 A. 688 ; **Cons.**, 3 A. 1 ; **D.**, 2 B. 353 ; 4 C. 61 ; 5 M. 214.]

THE plaintiff in this suit claimed to recover the amount of a bond dated the 21st March, 1871, from the defendants personally and by the sale of their property, situated in mauza Gutla, which he alleged was charged in the bond with the payment of the amount. The defendants described in the bond which was unregistered, as residents of mauza Gutla, bound themselves to pay the plaintiff, described as a resident of the same mauza, on the 5th June, 1871, the sum of Rs. 99, together with interest thereon at 2 per cent per mensem, and with such payment they charged "their house and landed property." The suit was instituted on the 15th September, 1875.

The Court of first instance held that the plaintiff's claim against the defendants personally was barred by limitation, and that his claim against their property situated in mauza Gutla was not **[275]** maintainable, as the bond created no charge thereon. The lower appellate Court held that the bond created a charge on that property, referring to *Martin* v. *Pursram* (2).

On special appeal by the defendants to the High Court it was contended that the bond created no charge upon immoveable property, the case cited by the lower appellate Court being inapplicable, and that the claim against them personally was barred by limitation.

The Senior Government Pleader (Lala *Juala Parshad*) and Munshi *Kashi Parshad*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondent.

JUDGMENT.

The following judgment was delivered by the Court :—

Assuming that the instrument creates a charge on immoveable property, which may be doubted (3), it purports to create an interest over Rs. 100 in value, for it secured the repayment of Rs. 99 *plus* Rs. 6, the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered we cannot act upon it. Nor can we decree the debt apart from the lien, for the agreement should have been but was not registered, and more than four years had elapsed prior to suit from the date on which the

* Special Appeal, No. 674 of 1876, from a decree of the Judge of Agra, dated the 18th March, 1876, reversing a decree of the Munsif, dated the 27th November, 1875.

(1) So held in *Dhurmdeo Narain Singh* v. *Nund Lall Singh*, H. C. R. N.W. P. (1874) p. 257, with reference to the corresponding provisions of s. 17, Act XX of 1866.

(2) H.C.R. N.W.P. (1867), p. 124. (3) See next case.

agreement to repay the money was broken. This claim was therefore barred by limitation. The appeal is decreed, and, the decree of the lower appellate Court being reversed, the decree of the Court of first instance is restored with costs.

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1 A. 274.

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1 A. 275.

APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

DEOJIT (*Plaintiff*) v. PITAMBAR AND OTHERS (*Defendants*).*
[11th August, 1876.]

Mortgage—Uncertain agreement—ambiguous or defective document—Act IX of 1872 (*Contract Act*), *s.* 29—*Act I of* 1872 (*Evidence Act*), *s.* 93.

Semble, that where certain persons, describing themselves as residents of *J*, give a bond for the payment of money in which, as collateral security, [276] they charge "their property" with such payment, they do not thereby create a charge on their immoveable property situated in *J*.

Martin v. *Pursram* (1) distinguished.

[**Diss.**, 12 A. 175=A.W.N. (1890) 60; **R.**, 3 M. 35; **D.**, 5 A. 11.]

THE plaintiff in this suit claimed to recover certain money which he alleged was charged upon the immoveable property of the defendants situated in mauza Jarao Bas Mohan by a certain bond. This bond purported to be executed by the defendants, described therein as residents of Jarao Bas Mohan, in favour of the plaintiff, described as resident of Jarao Bas Kesri. The portion of the bond on which the plaintiff relied as creating a charge was as follows:—"and we hypothecate as security for the amount our property with all the rights and interests" (2).

The Court of first instance and the lower appellate Court concurred in holding that the plaintiff had failed to prove the bond. The lower appellate Court further held that the hypothecation in the bond was of too general a nature to admit of a decree being given against any particular property of the defendants.

On special appeal by the plaintiff to the High Court it was contended that the bond created a charge in his favour on the property of the defendants situated in Jarao Bas Mohan.

Munshi *Hanuman Parshad*, for the appellant.

The Senior Government Pleader (Lala *Juala Parshad*) and Lala *Lalta Parshad*, for the respondents.

JUDGMENT.

The following judgment was delivered by the Court:—

This case differs widely from the one to which reference has been made (3). If the debtors had described themselves as the owners of certain property and then gone on to pledge their rights and interests, it would have been reasonable to refer the indefinite expression to the

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* Special Appeal, No. 675 of 1876, against a decree of the Judge of Agra, dated the 28th March, 1876, affirming a decree of the Munsif of Jalesar, dated the 4th January, 1876.

(1) H.C.R. N.W.P. (1867), p. 124.

(2) The original words are "*hakiyat apne kal haq haquk.*"

(3) *Martin* v. *Pursram*, H.C.R. N.W.P. (1867), p. 124.

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description. In this case the debtors simply describe themselves as residents in a place and pledge "*kul haq haquk.*" This case falls within the principle of the decision (1) that a general hypothecation is too indefinite to be acted upon. Under [277] the Contract Act, s. 29, an agreement is void if its meaning is not certain or capable of being made certain, and under s. 93 of the Evidence Act, where the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. The Courts below have, however, found that the deed was not proved, and by this finding we are bound. Our observations on the other issue are intended to impress upon money-lenders that distinctness in the description of property mortgaged is essential. The appeal fails and is dismissed with costs.

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1 A. 277=1 Ind. Jur. 269.

APPELLATE CIVIL.

Mr. Justice Spankie and Mr Justice Oldfield.

NARAIN SINGH (*Defendant*) *v.* MUHAMMAD FARUK (*Plaintiff*).*
[16th August, 1876.]

Act XXIII of 1861, *s.* 14—*Pattidari Estate—Pre-emption—Act XVIII of* 1873, *s.* 177—*Act XIX of* 1873, *s.* 188.

The provisions of s. 14, Act XXIII of 1861, are not applicable, where the land is sold in execution of a decree of a Revenue Court.

Held, on the assumption that, where land is sold in execution of such a decree, a claim to the right of pre-emption can be preferred under the provisions of s. 177 of Act XVIII of 1873, and s. 188, Act XIX of 1873, that such claim can only be preferred where the land is a patti of a mahal, not where it is party only of a patti of a mahal.

Semble that, where land which is a patti of a mahal is sold in execution of such a decree, a claim to the right of pre-emption can be preferred under the provisions of s. 177, Act XVIII of 1873, and s. 188, Act XIX of 1873.

THIS was a suit to establish the plaintiff's right to certain land forming portion of a patti of a pattidari mahal. The suit was based upon the provisions of s. 14, Act XXIII of 1861. The land was sold to the defendant on the 20th August, 1874, in execution of decree of a Revenue Court made in a suit under cl. 2, s. 1, Act XIV of 1863. The plaintiff preferred a claim to take the land at the price it was knocked down to the defendant, [278] under the provisions of s. 14, Act XIII of 1861, but his claim was disallowed. The Court of first instance held that the suit was not maintainable, being of opinion that s. 14, Act XXIII of 1861, applied only to sales in execution of decrees made by Civil Courts, and that Act XVIII of 1873 did not provide for the preferring of pre-emptive rights on the occasion of sales in execution of decrees made by the Revenue Courts under that Act. The lower appellate Court held that the suit was maintainable, having regard to s. 177, Act XVIII of 1873, and s. 188, Act XIX of 1873.

Against this decision the defendant appealed to the High Court.

Pandit *Bishambar Nath* and Pandit *Ajudhia Nath*, for the appellant.

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* Special Appeal, No. 666 of 1876, from a decree of the Judge of Azamgarh, dated the 16th March, 1876, reversing a decree of the Munsif of Nagra, dated the 6th December, 1875.

(1) See, *e.g.*, *Ram Ba ksh* v. *Sookk Deo*, H. C. R. N. W. P. (1869) p. 65.

Mr. *Mahmood*, Munshi *Hanuman Prashad*, and Shah *Assad Ali*, for the respondent.

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APPELLATE CIVIL.

1 A. 277= 1 Ind. Jur. 269.

JUDGMENT.

The judgment of the Court, so far as it is material for the purposes of this report, was as follows :—

The suit was instituted under s. 14, Act XXIII of 1861, but that section cannot apply to sales in execution of decrees by Revenue officers. The Act is supplementary to and amends Act VIII of 1859, which is purely a Code of Civil Procedure. The Rent Act X of 1859 provided for the execution of decrees under the Act by Courts presided over by Revenue officers, and Act XIV of 1863, under which the suit was brought and decreed, and the property now in suit was sold in execution on the 20th August, 1874, is by s. 18 declared to be a part of Act X of 1859. Hence it is quite clear that s. 14, Act XXIII of 1861, would not apply to the present suit, and no claim to pre-emption would be asserted under it. Since the decree under Act XIV of 1863, Act X of 1859 has been repealed, and if the present Rent Act admits of the assertion of a pre-emptive title in cases of sale in execution of decrees, the suit should have been founded on some section in that Act. The Munsif possibly might have thrown out the suit as based on s. 14, Act XXIII of 1861, which did not apply ; but the plaint distinctly stated that the sale took place in the execution of a decree of a Revenue Court, and the Munsif made it an issue whether the plaintiff had any right of pre-emption in such a case. In making this issue we think that the [279] first Court was right, as the nature of the claim was apparent, and the defendant would not be prejudiced on the merits of the case, if it would be successfully urged; and on the other hand if the Rent Act provided no means of asserting a pre-emptive title in sales in execution of decrees the defendant had a complete answer to the suit. The lower appellate Court's judgment opens with the remark that the plaintiff brought his suit under the Muhammadan law in respect of pre-emption. But this is not so ; no such claim was asserted. The suit rests upon some assumed right as a co-sharer to claim at a sale in execution of a decree by a Revenue Court to purchase the property sold at the price it was knocked down to the last bidder, and the plaintiff asserts that he made the claim at the time of sale, and fulfilled all the conditions of the sale, but his claim was disallowed. It was contended that s. 177, Act XVIII of 1873, and s. 188, Act XIX of 1873, applied to the case. Section 177 of the former Act gives power to the Board of Revenue to order the sale of immoveable property under certain conditions, and if the property be sold, the sale shall be made under the rules in force for the sale of land for arrears of land revenue. The only reference to pre-emption in Act XIX of 1873 is to be found in s. 188. It is contended that, as the sale is concluded before the claim to pre-emption can be made, the claim itself is not made under any rules for the conduct of sales. We should, however, be disposed to disallow this contention. It is not, however, necessary on the present occasion to determine the point. Section 188 provides that, when any land sold under s. 166 is a patti of a mehal, any recorded co-sharer, not being himself in arrear with regard to such land, may if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid. From this section, and s. 166, it is clear that the land must be a patti of a mehal and not a portion of a patti ; and this contention of the appellant's pleaders appears to us to dispose of the suit in which the land claimed is only a portion

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of a patti. We, therefore, think that this suit founded on the alleged right to claim as a pre-emptor in a sale in execution of a decree of a Revenue Court, under rules for the conduct of such sales, fails, and was properly dismissed by the first Court. We, therefore, decree the appeal, and reverse the decision of the lower appellate Court, restoring the decree of the Munsif with costs.

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1 A. 280.

[280] APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

MEGHRAJ (*Plaintiff*) *v.* ZAKIR HUSSAIN (*Defendant*).*
[21st August, 1879.]

Act XVIII of 1850, *s.* 1—*Jurisdiction—Good faith.*

Under the provisions of s. 1, Act XVIII of 1850, no person acting judicially is liable for an act done or ordered to be done by him in the discharge of his judicial duty within the limits of his jurisdiction. In such a case the question whether he acted in good faith does not arise (1).

[Appl., 12 A. 115.]

THIS was a suit in which the plaintiff claimed to recover damages from the Munsif of Meerut on the ground that he had acted contrary to law, and had postponed the sale in execution of a decree held by the plaintiff. The cause of action was stated in the plaint to have arisen on the 2nd August. In his written statement the plaintiff made allegations imputing that the defendant had not acted in good faith.

The Court of first instance dismissed the suit on the ground that the plaint disclosed no cause of action.

The plaintiff appealed to the High Court, contending that the Court of first instance should have tried and determined the question whether the defendant had acted in good faith.

Mr. *Howard* and Babu *Jogendra Nath*, for the appellant.

Mr. *Mahmood*, Mr. *Conlon*, Pandit *Bishambar Nath*, and Munshi *Hanuman Parshad*, for the respondent.

JUDGMENT.

The judgment of the Court was as follows :—

The appellant obtained a decree in the Small Cause Court of Meerut for a sum of Rs. 61. The judgment-debtor having no [281] moveable property, the appellant obtained a certificate from the Small Cause Court and applied to the Munsif to execute the decree by attachment and sale of the judgment-debtor's rights and interests in a house. Orders were accordingly issued, but with the consent of the appellant or his pleader the sale was from time to time postponed. Eventually it was ordered the sale should take place on the 3rd August; but on the 2nd August the judgment-debtor again applied for a postponement, stating that negotiations were in progress for the sale of the house by private sale.

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* Regular Appeal, No. 34 of 1876, against a decree of the Judge of Meerut, dated the 10th April, 1876.

(1) See *The Collector of Hooghly* v. *Tarak Nath Mukhopadhya*, 7 B.L.R. 449 = 16 W.R. 63 ; and *Parlhad Muharudra* v. *Watt*, 10 Bom. H.C.R. 346 ; in which cases, however, the protection to a judicial officer acting within his jurisdiction was rested not on Act XVIII of 1850, but on general principles of law.

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The Munsif inquired of the decree-holder's pleader if it was probable the money to satisfy the decree would be raised, and on the pleader's stating that he thought it was probable, and apparently offering no opposition to the postponement, the sale was again put off to the 16th September. On that day the judgment-debtor brought into Court Rs. 50, and prayed for further delay. The decree-holder's pleader complained that the amount paid in was too small, but consented to the payment of the money, and did not press any objection to the postponement of the sale. Subsequently the sale took place, but it was set aside on the ground that it was held after the proper time of the day, and therefore no adequate price was offered for the property. These are the facts on which the appellant relies to establish his case.

Now it is enacted by Act XVIII of 1850 that no judge or other officer therein mentioned shall be liable for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he at the time in good faith believed himself to have jurisdiction to do or order the thing complained of.

It is clear the Munsif had jurisdiction, and therefore the question of good faith does not arise. He is protected from suit by the provisions of the Act, and although it is unnecessary to express any opinion on the point, we feel bound to say that, whether or not the Munsif was right in setting aside the sale on the ground urged before him, and whether or not he should have declined to grant the postponement of the sale on the 16th September, we have heard nothing which would support the suggestion (which was not made in the plaint) that he has not acted in good faith. We dismiss the appeal with costs.

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1 A. 282.

[282] APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

NAND KUMAR AND OTHERS (*Defendants*) v. RADHA KUARI (*Plaintiff*).*
[21st August, 1876.]

Res judicata—*Hindu widow—Reversioner.*

On her husband's death a Hindu widow obtained possession of his estate as his heir, and, in a suit against her for possession thereof by certain persons claiming to succeed to the estate as rightful heirs, a decree was obtained by them. *Held* that such decree was a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow, the decree having been fairly and properly obtained against the widow (1).

[Ap., A.W.N. (1881) 106; R., 8 A. 365=6 A.W.N. (1886) 129; 29 P.R. 1895; 107 P.R. 1906.]

THIS was a suit in which the plaintiff claimed possession of certain shares in certain villages as heir, in succession to her mother, to the estate of her deceased father, Lachmi Narain, under Hindu law. The plaintiff's father died leaving a widow named Ananda, the plaintiff's mother; who at his death obtained possession of his estate as his heir.

* Regular Appeal, No. 26 of 1876, against a decree of the Subordinate Judge of Gorakhpur, dated the 1st February, 1875.

(1) Adverse possession against a Hindu female heir, which would bar her right of suit if she were alive, will equally bar that of the reversioner—*Nobin Chunder Chukerbutty* v. *Guru Persad Doss*, B.L.R. Sup. Vol. 1008=9 W.R. 505.

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The defendants in this suit sued her, as the rightful heirs of Lachmi Narain, for possession thereof. She pleaded that the property was the separate and self-acquired property of her husband, and that she was therefore entitled to succeed to it. It was held proved in that suit that the property was the joint and undivided property of the defendants in this suit and Luchmi Narain, and the defendants in this suit obtained a decree establishing their right and title to the property.

In the present suit the plaintiff averred that the property was the separate property of Lachmi Narain, and the decree in the former suit was obtained by collusion and fraud on the part of her mother and the defendants. The defendants urged that the decree in the former suit against her mother was a bar to the present suit by the plaintiff. The Court of first instance overruled this plea, and gave the plaintiff a decree.

On appeal by the defendants to the High Court it was again contended that the plaintiff was bound by the decree in the former suit.

Lala *Lalta Prashad*, for the appellants.

[283] The Senior Government Pleader (Lala *Juala Parshad*) and Munshi *Sukh Ram*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows :—

We are of opinion that the objection is a valid one and disposes of the plaintiff's claim. A Hindu widow succeeding to her husband's estate as heir represents the estate fully, and reversioners claiming to succeed after her are bound by decrees relating to her husband's estate obtained against her without fraud or collusion,—*Katama Natchiar* v. *The Raja of Shivangunga*(1) ; *Ganga Jali* v. *Ram Sukal* (2) ; *Bansi Kuari* v. *Sunjhari Kuari*(3); *Suga Kunari* v. *Ramugrah Dubay* (4) ; *Nobin Chunder Chuckerbutty* v. *Gura Pershad Doss* (5) ; *Amirtolal Bose* v. *Rajoneekant Mitter* (6).

There is no reason to believe that the decree against Musammat Ananda was obtained by collusion or fraud and we must therefore consider that it has finally disposed of the plaintiff's claim. We allow the appeal and dismiss the suit with costs.

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1 A. 283.

APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

ALI MUHAMMAD (*Defendant*) *v.* TAJ MUHAMMAD (*Plaintiff*).*
[22nd August, 1876.]

Muhammadan Law—Pre-emption—Act VI of 1871, *s.* 24.

The right of pre-emption being a right, weak in its nature, where such right is claimed under Muhammadan law, it should not be enforced except upon strict compliance with all the formalities which are prescribed by that law (7).

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* Special Appeal, No. 661 of 1876, against a decree of the Judge of Allahabad, dated the 5th April, 1876, reversing a decree of the Munsif, dated the 8th September 1875.

(1) 9 M.I.A. 604.

(2) S.A. No. 335 of 1875 decided the 26th August 1875.

(3) R.A. No. 16 of 1875, decided the 19th August 1875.

(4) R.A. No 72 of 1875, decided the 21st April 1876.

(5) B.L.R. Sup. Vol. 1008=9 W.R. 505.

(6) 15 B.L.R. 10.

(7) See the following cases:—*Kareemoodin* v. *Moiezooddeen Khan*, H.C.R.N. W. P. (1866), p. 184; *Gholam Hoossein* v. *Abdol Kadir*, H.C.R. N. W. P. (1873), p. 11; *Bhowanee.*

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[284] Under Muhammadan law the "*talab-i-mawasabat*," or immediate claim to the right of pre-emption, should be made as soon as the fact of the sale is known to the claimant, otherwise the right is lost, and it was consequently held that the plaintiff, having failed to make the "*talab-i-mawasbat*" until twelve hours after the fact of the sale became known to him, had lost his right of pre-emption(1).

[R., 35 C. 575.]

THIS was a suit for pre-emption founded on Muhammadan law, the parties to the suit being Muhammadans. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Maulvi *Obeidulrahman* and Maulvi *Mehdi Hassan*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Ram Pershad*, for the respondent.

JUDGMENT.

The judgment of the Court was as follows :—

The "*talab-i-mawasabat*," or immediate demand, should be made when a person entitled to pre-emption has heard of a sale, on the instant, whether there is any one by him or not, and when he remains silent without claiming the right it is lost,—Baillie's Digest of Muhammadan Law, Bk. vii, ch. iii. The "*talab-i-ishad*," or demand with invocation of witnesses is a calling on witnesses to attest the immediate demand and must take place in the presence of the purchaser or seller or of the premises which are the subject of sale,—Baillie's Digest of Muhammadan Law, Bk. vii, ch. iii.

The Munsif dismissed the claim because it was obvious from the examination of the plaintiff that he did not, on hearing of the sale, immediately, on the instant, claim his right of pre-emption. He heard of the sale in the morning but did not assert his right [285] until 7-30 or 8 in the evening. The plaintiff appealed and contended that the delay in making affirmation of his demand did not destroy his right of pre-emtion. The Judge, citing a decision of the Calcutta High Court noted in the margin and based upon a decision of the Sudder Dewanny Adawlut in 1857,* held that the delay in this case was not such that it interfered with the plaintiff's right of pre-emption. He therefore remanded the case under s. 351 for re-trial on the merits.

Mahomed Waris v. Hazee Emam-ood-deen (2).

Dutt v. *Lakhoo Singh*, W.R. 1864, p. 61 ; *Hosseinee Khanum* v. *Lallun*, W. R. 1864, p. 117; *Issur Chunder Shaha* v. *Mirza Misar Hoossein*, W.R. 1864, p. 351 ; *Mono Singh* v. *Morsad Singh*, 5 W.R. 203; *Razeeooddeen* v. *Zenut Bibee*, 8 W.R. 463; *Jholee Singh* v. *Komul Roy*, 10 W.R. 119 ; *Narbhase Singh* v. *Luchmee Narain*, 11 W.R. 307 ; *Prokas Singh* v. *Jogeswar Singh*, 2 B. L. R. A. C. 12; *Jadu Singh* v. *Rajkumar*, B. L.R.A.C. 171=W.R. 177 ; *Chamroo Pasban* v. *Puhlwan Roy*, 16 W.R. 3; *Nubee Buksh* v. *Kaloo Lushker*, 22 W.R. 4 ; *Elahee Buksh* v. *Bibee Mohan*, 25 W.R. 9.

* 1 S.D. A. (1857), 454.—*Ed.*

(1) In *Karimooddeen* v. *Moiezooddeen Khan*, H. C. R. N. W. P. 1866, p. 184, it was held that the performance of the "*talab-i-mawasbat*" before the registrar, on the registration of the sale-deed, was not a sufficient compliance with Muhammadan law. In *Ram Charan* v. *Narbhir Mahton*, 4 B.L.R.A.C. 216=13 W. R. 259, it was held, where the pre-emptor, on hearing of the sale, went to the property in dispute and performed that formality, that the delay was fatal. Where the pre-emptor went into his house to get the money before performing that formality it was held that he had not complied with the law,—*Mona Singh* v. *Morsad Singh*, 5 W. R. 203. Where the pre-emptor was sitting when he heard of the sale, and stood up and performed the formality, it was held that there was no delay sufficient to work a forfeiture of his right,—*Maharaj Singh* v. *Buchook Lall*, W.R. 1864, p. 294, approved of in *Ram Charan* v. *Narbhir Mahton*, *supra*. In *Amjad Hossein* v. *Kharag Sen Sahu*, 4 B. L. R. A. C. 203=13 W. R. 299, it was held that the mere fact of the pre-emptor taking a short time before the performance for ascertaining whether the information conveyed to him was correct or not, did not invalidate his right, and that the law allows a short time for reflection.

(2) 6 W.R. 173.

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1 A. 283.

It is contended here by the special appellant that the delay was fatal. Moreover, the plaintiff had opportunities of asserting his right on the premises and before some labourers at work on the roof, and he neglected to do so, and so, lost his right.

It is to be observed that the Munsif laid down as an issue whether or not the plaintiff had fulfilled the conditions of immediate demand, and demand with invocation of witnesses, and his judgment would seem to imply that he did not fulfil the condition of immediate demand, as he heard of the sale in the morning and did not assert his right until 7-30 or 8 P.M. in the evening. On the other hand the Judge seems to have lost sight of this finding, and to have addressed himself solely to the plea that the affirmation of purchase (before witnesses) in the evening was not such a delay as to vitiate the right of pre-emption. This clearly appears from his citing a judgment in which the question was whether the demand by invocation of witnesses had been made too late.

In special appeal the contention appears to be that neither of the conditions of immediate demand, or demand with the invocation of witnesses, has heen made. At the same time the third plea seems to confuse both conditions, for it is not necessary that the immediate demand should be made on the premises, though it ought to have been made before the labourers. As the Munsif only received the evidence of one person, who was the plaintiff himself, for it does not appear that any evidence was offered by the defendant, and as the two judgments seem to relate to different demands, we think that we ought to consider what it was that the plaintiff really said, and what was the effect of his admissions.

[286] The plaintiff at the outset of his examination stated that he heard of the sale for the first time on the 16th June in the evening at 5 P.M., when he returned from Court, and saw several men repairing the house in dispute. He asked them on whose part they were making repairs, and they said on the part of Ali Muhammad. "I sent my brother," the plaintiff continued, "in search of Ali Muhammad to his house, but he was not found; at 7-30 or 8 o'clock Ali Muhammad came to my house." But in the after part of his deposition the plaintiff very distinctly stated that he heard at 7-30 A.M. from the labourers that "they were repairing the house on the part of Ali Muhammad, who had purchased the house; after hearing this, I did not say a single word more to the labourers, but I at once sent my brother to Ali Muhammad to call him. I went to Court * * * I told my brother only this much, go and call Ali Muhammad, I did not tell him anything more. I made mention about pre-emption for the first time at 7-30 in the evening when Ali Muhammad came.

This evidence justifies the decision at which the Munsif arrived, inasmuch as it shows that the plaintiff did not make the immediate demand on the instant when he first heard of the sale. He should have done so before the labourers. He said that two minutes after leaving the labourers he sent his brother to call Ali Muhammad, but he admits that he did not even before his brother claim the right. Although the plaintiff's intention doubtless was to make the demand to Ali Muhammad had he been found and had come to him in the morning, still the delay in making the immediate demand is such that cannot be remedied. The meaning of the word "*mawasabat*" is literally jumping up (1), and though it has been said that the demand may be made at any time during the meeting at which the information has been received, still even if this were so, in this

(1) Baillie's Digest, Bk. vii, ch. iii.

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case it is clear that no demand was made until twelve hours after the plaintiff became aware of the sale, and then it was made at the same time with the demand with invocation of witnesses.

We are not called upon to say whether the Judge has rightly ruled (if he has so ruled) that the delay in making the demand with invocation of witnesses was not too late. The making of this [287] demand is measured by the ability to do so, and the Judge considers apparently that it was made with the least practicable delay. But if the Judge is to be understood as applying this test to the immediate demand, then we think that he is wrong, and that delay in making the immediate demand is fatal, because it must be made at once when the fact of the sale becomes known.

Chundo v. *Hakeem Alimooddeen* (1).

The Full Bench decision of this Court cited marginally ruled that, under s. 24, Act VI of 1871, Muhammadan law is not strictly applicable in suits for pre-emption between Muhammadans not based on local custom or contract, but it is equitable in such cases to apply that law. So in cases relating to gifts it was held in another Full Bench decision (2) that it was equitable as between Muhammadans to apply Act VI of 1871 to such questions. The right of pre-emption is not a strong right, and it appears to us that any one claiming it should be held bound by the conditions of the Muhammadan law, and should promptly assert his right of pre-emption by the immediate demand. It is not surely the duty of the Courts to enlarge the conditions under which so inconvenient and sometimes oppressive a right can be asserted. Following the principle laid down in the Full Bench decisions of this Court already referred to, we think that the judgment of the lower appellate Court is wrong, and that of the first Court should be restored. We, therefore, decree the appeal and reverse the judgment of the lower appellate Court, and restore that of the first Court with costs.

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1 A. 287.

APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

IN THE MATTER OF THE PETITION OF RUKMIN AND ANOTHER.*

[22nd August, 1876.]

Act XXVII of 1860 ss. 5, 6—*Certificate for collection of debts—Security—Appeal.*

No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate, under Act XXVII of [288] 1860, lies under that Act to the High Court. *Sonea* v. *Ram Suha* (3) and *Monmohinee Dassee* v. *Khetter Gopal Dey*(4) followed.

Semble, that, in proceedings under Act XXVII of 1860, a review of judgment is admissible (5).

[F., 3 A. 304 (305).]

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* Miscellaneous Regular Appeal, No. 42 of 1876, from an order of the Judge of Cawnpore, dated the 19th May, 1876.

(1) H. C. R. N. W. P. 1874, p. 28.

(2) *Shumshoolnissa* v. *Zohra Beebe*, H. C. R. N. W. P. 1874, p. 2.

(3) H.C.R. N. W. P. 1870, p. 146.

(4) 1 C. 127 = 24 W. R. 362; see also *Raj Mohinee Chowdrain* v. *Dino Bundhoo Chowdhry*, 1 C. 128, note = 17 W.R. 566.

(5) See *Petition of Poona Koer*, 1 C. 101; but see also *Situ* v. *Chenamma*, 6 M.H.C.R. 417.

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THIS was an application to the District Court for a certificate under Act XXVII of 1860. It was made on the ground that the applicants were the widows and sole heirs of the deceased. The debts due to the estate of the deceased were stated in the application to amount to Rs. 3,000. Notice was issued in accordance with the provisions of s. 6 of the Act, but no claimants appeared. The District Court granted the certificate, but required the applicants to furnish security under the provisions of s. 5 to the amount of Rs. 3,000.

The applicants appealed to the High Court against the District Court's order requiring security, urging that that order was unreasonable and unjust, inasmuch as they had no separate property of their own, and there were no debts due by the estate.

Mr. *Leach*, for the appellants.

JUDGMENT.

The judgment of the Court was as follows:—

We must follow the ruling of this Court in *Soonea* v. *Ram Suha* (1) which is in accordance with a recent ruling of the Calcutta High Court in *Monmohinee Dassee* v. *Khetter Gopaul Dey* (2). The appeal then fails; but if the facts are such as the petitioners assert, we consider that the appellants should apply to the Judge to reconsider the order relating to security, and that the Judge might well comply with their prayer and reduce the amount demanded.

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1 A. 288.

APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

HASSAN ALI (*Defendant*) *v.* NAGAMAL (*Plaintiff*).*
[22nd August, 1876.]

Adoption—Hindu law—Jain law.

The question of the validity of an adoption, the parties between whom the [289] question arose being Jains, was decided in accordance with the law of that sect, and not in accordance with Hindu law. *Sheo Singh Rai* v. *Dakho* (3) followed.

Under Jain law the adoption of a sister's son is valid.

THIS was a suit in which the plaintiff claimed to be maintained in possession of a moiety of certain buildings, by partition. He sued as the adopted son of one Chunna Singh deceased. The parties to the suit were Saraogis. The defendants pleaded that the adoption of the plaintiff by Chunna Singh was invalid under Hindu law, the plaintiff being the only son of his natural father and son of Chunna Singh's sister. Both the lower Courts found that, by the custom of the sect to which the parties belonged, the adoption was valid, and held that such custom was applicable and not Hindu law.

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* Special Appeal, No. 1035 of 1874, against a decree of the Judge of Saharanpur, dated the 21st May, 1874, affirming a decree of the Munsif of Muzaffarnagar, dated the 25th March, 1874.

(1) H.C.R. N.W.P. 1870, p. 146. (2) 1 C. 127=24 W. R. 362.
(3) H.C.R.N.W.P. 1894, p. 382.

1876 AUG. 22. — APPELLATE CIVIL. — 1 A. 288.

On special appeal by one of the defendants to the High Court it was contended that the validity of the plaintiff's adoption should be decided under Hindu law.

The Senior Government Pleader (Lala *Juala Parshad*) and Munshi *Hanuman Parshad*, for the appellant.

Pandit *Bishamber Nath*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows:—

The plaintiff is the adopted son of one Chunna, and is at the same time Chunna's sister's son, and the material question raised in special appeal is whether, under the Jain law (the parties being Saraogis), an adoption of a sister's son is valid. Evidence on the point was given in the Court of first instance, and the lower appellate Court gave the parties opportunity of producing further evidence, which was produced, and which supports the view taken by both the lower Courts, that such an adoption is valid under Jain law. We find no reason to doubt the correctness of this decision, and find that it is quite consistent with a ruling of this Court,—*Sheo Singh Rai* v. *Dakho* (1), where all the authorities have been reviewed. In that case it was held that, in questions arising between parties of the Jain sect, the custom of the sect should be enquired into and given effect to, although it may be at variance with Hindu law, and it was further held that, among followers of the Jain sect, a daughter's son might be adopted. In the case before us the adoption is of a sister's son, but the principle involved in both cases is **[290]** the same, and, indeed, looking to the grounds upon which the objection to such adoption is based under the Hindu law, it would have more force in the case of the adoption of a daughter's son than of a sister's son.

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1 A. 290.

APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

JAN MUHAMMAD (*Defendant*) *v.* ILAHI BAKSH (*Plaintiff*).*
[25th August, 1876.]

Act VIII of 1859, *s.* 260—*Certified purchaser.*

The certified purchaser of certain property at a sale in execution of decree sued to establish his right to the property and for possession thereof.

Held that the defendant in the suit was not precluded by s. 260, Act VIII of 1859, from resisting the suit on the ground that he was the actual purchaser of the property.

[R., 3 O.C. 229.]

THIS was a suit to establish the plaintiff's right to a moiety of a house and garden, and for possession, by partition, of the same, the plaintiff claiming as certified purchaser of the property at a sale in execution

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* Special Appeal, No. 1133 of 1875, from a decree of the Subordinate Judge of Moradabad, dated the 20th July 1875, affirming a decree of the Munsif of Nagina, dated the 16th January, 1875.

(1) H. C. R. N. W. P. 1894, p. 382.

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of decree. The defendant urged that he was the actual purchaser of the property, relying on a petition presented by the plaintiff to the Court executing the decree in which he had stated that the defendant was the actual purchaser and had paid the purchase-money, and that he had made the purchase on behalf of the defendants, to whom he prayed the sale-certificate might be granted. The Court executing the decree refused the application and granted the certificate to the plaintiff. He further urged that the property belonged to him before the date of the sale and was not the subject of the sale. The Court of first instance gave the plaintiff a decree. The lower appellate Court found that the property belonged to the judgment-debtor and was the subject of the sale, and held that the defendant was precluded by s. 260, Act VIII of 1859, from raising the plea that he was the actual purchaser.

On special appeal to the High Court by the defendant it was contended that s. 260, Act VIII of 1859, did not apply, and the question who was the actual purchaser should have been tried and determined by the lower appellate Court on the merits.

[291] Munshi *Hanuman Parshad* and Munshi *Kashi Parshad*, for the appellant.

The Senior Government Pleader (Lala *Juala Parshad*), for the respondent.

JUDGMENT.

The judgment of the Court (after stating the facts of the case) was as follows :—

In our opinion the Court has taken an erroneous view of the law. All that s. 260 declares is that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used shall be dismissed." The law will not, therefore, in strictness apply to this case, where it is the certified purchaser who is suing to enforce his alleged purchase, and where the objection is taken by the defendant who is in possession. The section should be construed literally and applied strictly. The Court will not apply s. 260 so as to assist the certified purchaser to enforce his claim against the party in possession, by relieving him from the necessity of showing the justice of his claim or excluding inquiry as to its fraudulent character. This view of the law is supported by the Privy Council rulings in *Buhuns Koonwur v. Lalla Buhoree Lalla* (1), and in *Lokhee Narain Roy* v. *Kalypuddo Bondopadhya* (2). We remand the case for trial under s. 354, Act VIII of 1859, of the issue whether plaintiff or defendant was the real purchaser at auction of the property in suit.

(1) 10 B. L. R. 159 = 18 W. R. 157.

(2) 2 I. A. 154 ; see also *Mirza Khyrat Ali* v. *Mirza Syfollah Khan*, 8 W. R. 130, and *Muthoora Nath Doss* v. *Rai Kamal Dossee*, 24 W. R. 278.

1876 AUG. 21.

APPEL-LATE CIVIL.

1 A. 291= 1 Ind. Jur. 409.

1 A. 291=1 Ind. Jur. 409.

APPELLATE CIVIL.

Mr. Justice Turner and Mr. Justice Spankie.

MAHABIR PARSHAD AND ANOTHER (*Plaintiffs*) v. DEBI DIAL AND OTHERS (*Defendants*).* [21st August, 1876.]

Pre-emption—Conditional decree.

Where a share in a certain patti was sold by the holder of the share to a stranger, and three persons, holding equal shares in the patti, were equally entitled under the village administration paper to the right of pre-emption of the share, **[292]** *held* that such persons were each entitled to have the sale made to him to the extent of one-third of the share.

The decree of the High Court in this suit specified a time within which each party to the suit should pay into Court a proportion of the purchase-money and declared that, if either failed to pay such proportion within time, the other of them making the further deposit within time, should be entitled to the share of the defaulter †.

[F., 6 A. 370 ; 7 A. 720; Expl., 10 A. 182.]

THIS was a suit to enforce a right of pre-emption. In a certain mauza, in a patti of 5 annas, 4 pies, the following persons each owned an 8-pie share, *viz.*, Darsistman, Duliman, Debi Dial, and Mahabir Parshad. Debi Dial sold his share to Musafir and Jan, strangers, by a deed, dated the 15th September 1874, in which the purchase-money was entered as Rs. 551. Under a condition in the village administration-paper relating to pre-emption, Darsistman, Duliman, and Mahabir Parshad, were equally entitled, as co-sharers to the right of pre-emption. On the 22nd July 1875, Duliman sued Debi Dial, Musafir, and Jan to enforce his right. The parties to this suit filed a compromise on the 24th July, wherein it was agreed that Duliman should obtain possession of the share on payment of Rs. 551 on or before the 13th November 1875. On the 9th August 1875, Mahabir Parshad, and Darsistman instituted the present suit against Debi Dial, Musafir, Jan, and Duliman to enforce their right of pre-emption, alleging that the actual price of the property was Rs. 199. The Court of first instance decided the two suits together, giving Duliman a decree for possession of one moiety of the property on payment of Rs. 275-8-0 on or before the 13th November 1875, and Mahabir Parshad and Darsistman a decree for possession of the other moiety on payment of Rs. 150 on or before the same date.

On appeal by Duliman the lower appellate Court gave him a decree for possession of the whole 8-pie share on payment of Rs. 275-8-0 within thirty days from the date of the decree. The appeal preferred by Mahabir Parshad and Darsistman was dismissed. On special appeal by them to the High Court it was contended, that they were entitled to a decree in proportion to their shares in the patti.

Munshi *Sukh Ram*, for the appellants.

Babu *Sital Parshad* and Babu *Jogendra Nath*, for the respondents.

[293] The Court remanded the case to the lower appellate Court in the following terms :—

It having been found that the plaintiffs and Duliman were all co-sharers, a right of pre-emption accrued to all of them, and equitably they will be

* Special Appeal, No. 279 of 1876, against a decree of the Judge of Gorakhpur, dated the 23rd December 1875, affirming a decree of the Munsif of Deoriya, dated the 8th September 1875.

† See next case.

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entitled each to have the sale made to him to the extent of one-third of the property sold. We have not to decide whether such a right is to be divided in proportion to the extent of the shares or in proportion to the number of persons entitled to pre-emption (1), for in this case three persons assert their right to pre-emption and the shares to which the right is appurtenant are equal. We cannot, however, pass a final decree until the lower appellate Court has determined what was the price actually paid for the share. This issue we remit under s. 354 for trial.

The lower appellate Court found that the price actually paid for the share was Rs. 300.

The case having been returned to the High Court, judgment was delivered as follows :—

JUDGMENT.

We accept the finding on the issue remitted, and the decree will be modified accordingly. The appellants are entitled to pay into Court within one month from this decree Rs. 200 and obtain a two-third share, and Duliman will pay into Court within the same period Rs. 100 and obtain a one-third share; and if either the appellants or Duliman fail to pay in the amounts, within the month, the other of them making the further deposit within the time shall be entitled to the share of the defaulter.

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1 A. 293=1 Ind. Jur. 410.

APPELLATE CIVIL.

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

HINGAN KHAN AND OTHERS (*Decree-holders*) v. GANGA PARSHAD AND OTHERS (*Judgment-debtors*).* [21st August, 1876.]

Pre-emption—Conditional decree—"Final" judgment and decree—Execution of Decree.

Where the plaintiff in a suit for pre-emption was granted a decree subject to the payment of the purchase-money within a fixed period, and failed to comply [294] with the condition imposed on him by the decree, *held* that he had lost the benefit of the same (2).

When a direction contained in a decree referred to the time at which such decree should become *final*, *held* that such decree became final on being affirmed by the lower appellate Court where, although a special appeal was preferred by the plaintiff against the decree of the lower appellate Court, the same was subsequently allowed to be withdrawn.

Shaikh Ewaz v. *Mokuna Bibi* (3) distinguished.

[**R.**, 15 B. 370; 16 C. 598; 9 N. L. R. 130 (133); 54 P. R. 1908=87 P.L.R. 1908=40 P.W.R. 1908; **D.**, 30 A. 385=5 A.L.J. 580=A.W.N. (1908) 161.]

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* Miscellaneous Special Appeal, No. 81 of 1875, against an order of the Judge of Azamgarh, dated the 4th September 1875, reversing an order of the Munsif of Muhammadabad, dated the 5th July 1875.

(1) Where two persons had, by vicinage, an equal right to pre-emption, the property was equally divided between them—*Misr Khem Kurun* v. *Misr Seeta Ram*, H. C. R. N. W. P. 1870, p. 257.

(2) So held in *Shaikh Ewaz* v. *Mokuna Bibi*, 1 A. 132; *Hameed-oonnissa* v. *Buksha*, S.D.A.R. N.W.P., 1864, vol. ii, 612; and *Petition of Sahah Ahmed Ali*, S.D.A, L.P., Summary Cases, 36.

(3) 1 A. 132.

1876 AUG. 21. — APPELLATE CIVIL. — 1 A. 293 = 1 Ind. Jur. 410.

THE plaintiffs in a suit to establish the right of pre-emption of a share in a certain village, such suit being founded upon custom obtained a decree in the Court of first instance on the 1st April 1874, the material portion of which decree was as follows: "That the plaintiff's claim for a declaration of right to, and possession of, the property in suit be decreed, and delivery of possession be duly effected and if the plaintiffs deposit in this Court the whole amount of the purchase-money within one month from the date this decision becomes final, this decree will be executed, otherwise it will be held null and void." Both parties to the suit appeal against this decree. It was affirmed by the lower appellate Court on the 19th May 1874. On the 26th August 1874, the plaintiffs preferred a special appeal to the High Court against the decree of the lower appellate Court. On the 9th December 1874, the High Court allowed this appeal to be withdrawn, its order being as follows: "The pleader for the appellant does not support this appeal and it is withdrawn. Costs to be paid by the appellant." On the 7th January 1875 the plaintiffs deposited in Court the amount of the purchase-money. On the 21st June 1875, they applied for possession of the property in execution of decree.

The judgment-debtors, vendees, objected to execution on the ground that the purchase-money had not been deposited within time. This objection was disallowed by the Court of first instance, but allowed by the lower appellate Court.

The decree-holders appealed to the High Court on the ground that the right of pre-emption decreed in their favour was not lost by reason of their failing to deposit the purchase-money within [295] time, and that the decree did not become final till the date of the order of the High Court.

Mr. *Mahmood* (with him Babu *Sital Parshad*), for the appellants.

Munshi *Hanuman Parshad*, for the respondent.

JUDGMENT.

The judgment of the Court (after setting out the facts of the case) was as follows:—

The first plea fails. No absolute right of pre-emption was established by the decree; the decree made the right conditional on payment of the purchase-money within a certain period. Failing fulfilment of this condition, the right under the decree became null and void and the decree incapable of execution. Whether or not such a conditional decree could be legally made (and the counsel for the appellant denies that it can) is not a question for us to consider in execution of the decree: if there is force in the objection it is one which applies to the decree, and should have been taken by review of judgment.

The next objection raises the question as to when the judgment of the Court of first instance is to be held as having become final. It is alleged by the appellant that it ought to be held as becoming final on the 9th December 1874, when this Court gave its order allowing the appellant to withdraw the special appeal. We are, however, of opinion that, under the circumstances of this particular case, the judgment became final on the 19th May 1874 when the Judge affirmed the decree of the Court of first instance. What took place in the special appeal did not and could not affect the finality of the Judge's decree. There was no decision after a hearing but only a withdrawal, by which course the plaintiffs showed the judgment to be not open to revision. So far as affecting the finality of the judgment of the Judge in regular appeal, we must look on the proceedings in special appeal as though non-existent, and in consequence hold that the

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judgment of the Court of first instance became final when affirmed by the Judge in regular appeal, and that therefore the order of the lower appellate Court should be affirmed, and this appeal should be dismissed, and we dismiss it with costs.

[296] Our attention has been drawn to a case decided by a Bench of this Court (1), where a somewhat similar question was before the Court, but there is this distinction between the two cases that in the one referred to the special appeal had been decided after trial, whereas in the case before us the appeal was withdrawn without trial.

STUART, C, J.—I have signed this judgment because I think that, under the circumstances of this case, it is right. But I wish to add that I am not to be understood as approving the practice of inserting conditions into decrees as to the time of payment or otherwise, notwithstanding the rulings of this Court to the contrary referred to.

1 A. 296.

CIVIL JURISDICTION.

(*Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.*)

IN THE MATTER OF THE PETITION OF MATHRA PARSHAD.*
[23rd August, 1876.]

Sections. 24 *and* 25 *Vic., c.* 104 *(High Court's Act), s.* 15—*Powers of Superintendence of High Court Act VIII of* 1859, *s.* 378—*Review of judgment.*

Where a Court subordinate to the High court rejected an application for a review of judgment, refusing to consider the grounds of the same because the decree of which a review was sought was given by its predecessor, the High Court in the exercise of its powers of superintendence under s. 15 of the High Court's Act, directed such Court to consider the grounds (2).

[R., 9 A. 104 (F.B.)=A.W.N. (1886), 309.]

THIS was an application to the High Court for the exercise of its powers under s. 15 of the High Court's Act. The petitioner applied on the 13th September 1875 to the Subordinate Judge of Mainpuri for the review of a judgment which that officer's predecessor had given on the 18th December 1874. The Subordinate Judge rejected the application in the following terms: "Upon a perusal of the petition with the record of case, it appeared that the judgment of the former Subordinate Judge is not correct, but I have no right to interfere with his judgment, nor has the peti-[297]tioner produced any new evidence. The objections of the petitioner have been determined by the former Subordinate Judge."

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for *the petitioner.*

Pandit *Nand Lal*, for the opposite parties.

ORDER.

The order of the High Court was as follows:—

It is obvious that the Subordinate Judge has misconceived the duty imposed on him. The circumstance that the decree, of which a review

* Miscellaneous Application, No. 25-B of 1876, against an order of the Subordinate Judge of Mainpuri, dated the 5th January 1876.

(1) *Shaik Ewaz* v. *Mukuna Bibis*, 1 A. 132.

(2) For other cases in which the High Court interfered under that section and directed the exercise of a power or jurisdiction disclaimed by a Subordinate Court, see note to *Tej Ram* v. *Harsukh*, I. A., 104. For cases in which it refused to interfere, see the same note and *Petition of Lukykant Bose*, 1 C. 180=24 W.R. 440.

was sought, was passed by his predecessor did not discharge the Subordinate Judge from the obligation of considering whether any sufficient grounds were shown for the application. Where a subordinate Court has obviously failed to perform its duty, and there is no remedy by appeal, it appears to us within the competency of this Court, under the general powers of superintendence with which it is invested under s. 15 of the Letters Patent, to point out to the subordinate Court its error and to direct it to proceed according to law. The Subordinate Judge is therefore directed to reconsider the application presented to him, and to deal with it as if a review was sought of a decree which he had himself passed.

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1 A. 297=1 Ind. Jur. 411.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Oldfield.*)

BISHAN DIAL AND ANOTHER (*Defendants*) *v.* MANNI RAM (*Plaintiff*).*
[24th August, 1876.]

Mortgage—Foreclosure—Regulation XXIII of 1806.

Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person, entitled only to one moiety of the debt, foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interest in the mortgaged property in virtue of the mortgage and foreclosure, *held* that the foreclosure was invalid and, the suits were not maintainable.

[**Ap.**, 9 A. 68 (F.B.)=A.W.N. (1886), 298; **R.**, 17 M. 12; 19 M.L.J. 221; **D.**, 3 M.L.J. 176.]

THIS was a suit in which the plaintiff claimed from Gulab Rai and Bishan Dial possession of a 4-anna share in a certain zamindari estate, in virtue of a deed of conditional sale, dated the 13th December 1864 and an order foreclosing the mortgage, dated the 11th April 1874. The facts of the case are sufficiently [298] stated for the purposes of this report in the judgment of the High Court.

Pandit *Ajudhia Nath* and Munshi *Hanuman Parshad*, for the appellants.

Lala *Lalta Parshad* and Shah *Assad Ali*, for the respondent.

JUDGMENT.

The judgment of the High Court was as follows :—

Sarab Sukh Rai, the original proprietor of mauza Barauli, died in 1844, leaving a widow, Ram Kuar, and three sons, Sheo Dial, Gulab Rai, and Bishan Dial. In 1864 Sheo Dial, who appears to have managed the business of the family in the absence of his brothers, of whom one, Bishan Dial, was residing at Lucknow, and the other, Gulab Rai, at Cawnpore, desired to raise a loan of Rs. 13,000, in order to pay off the sums due to Daula Kuar and others, decree-holders, who were in posession of mauza Barauli and mauza Darjanpur, and for other necessary purposes ; and in order to raise the sum required, Kishan Dial, on the 23rd August 1864 executed a power-of-attorney authorizing Sheo Dial to take a loan from any person

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* Special Appeal, No. 1320 of 1875, against a decree of the Judge of Cawnpore, dated the 16th September 1875, affirming a decree of the Subordinate Judge, dated the 30th January 1875.

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1 A. 297=
1 Ind. Jur.
411.

he pleased, and to execute and register in the name and on behalf of Bishan Dial "a mortgage-deed "for Rs. 13,000 in respect of mauza Barauli. On the 13th September 1864, Sheo Dial, on his own behalf and as attorney for Bishan Dial, executed a deed of mortgage of mauza Barauli for the sum above mentioned in favour of Gobind Parshad, Swami Lal, and Kashi Parshad, for a term of seven years, subject to the following condition, *viz.*, that the mortgagors should, at the expiry of the term named, redeem the mortgage by repayment of the Rs. 13,000 and the interest left unpaid. After this mortgage was registered, and the money paid to Sheo Dial, the mortgagees appear to have discovered that Gulab Rai had a share in the estate, and required that he also should join in the mortgage. Accordingly on the 9th November 1864, Gulab Rai executed a power-of-attorney in favour of Sheo Dial, in which, after reciting that Sheo Dial had executed the mortgage of the 13th September, and had registered it and that he had received and deposited the loan in the Government Treasury on account of all three brothers, Gulab Rai declared that he agreed and consented to the proceedings of his brother thereinbefore recited, and that he accordingly appointed his brother his attorney that he might execute "a deed of mortgage on his part also in **[299]** respect of mauza Borauli in favour of the mortgagees, and under conditions similar to those recorded in his own deed." On the 13th December Sheo Dial, for himself and as the attorney of his brothers, executed another deed of mortgage in favour of the same mortgagees. The deed recites the mortgage of the 13th September that Gulab Rai had been no party to it, and that consequently the mortgagees were not content with that deed, and declares that the deed now in recital had been executed in lieu of the deed above mentioned. By this deed Sheo Dial mortgaged the same property for the same sum as in the former deed, but with this difference that the mortgagees bound themselves to pay compound interest on all arrears of interest, and that whereas the former deed was a deed of simple mortgage accompanied with provisions enabling the mortgagees, in the event of default, to convert it into a mortgage with possession, in the substituted deed the mortgagees are also empowered, in the event of default, to treat the simple mortgage as a conditional sale and to obtain foreclosure. In April 1865 Gobind Parshad, Swami Lal and Kashi Parshad executed a sub-mortgage of the property to Girdhari Lal and Jagan Nath. Default having been made in payment of the sum due on the sub-mortgage, Chotai Lal, son of Girdhari Lal, and Jagan Nath, in May 1872 sued the original mortgagees and obtained decrees in execution of which they brought to sale the mortgagees' rights, and became each a purchaser of one moiety. In August 1872, Chotai Lal sold his moiety to the respondent. It appears that, on Sarab Sukh Rai's death, the estate of Barauli was recorded in the revenue registers as held by his widow and three sons in equal shares of four annas. It is alleged, nevertheless, that they remained joint Hindu family. On the 4th December 1859, Sheo Dial mortgaged his share, described as a 5-anna 4-pie share to Har Sahai, whose son, Rai Bahadur, obtained a decree on a mortgage-deed on April 15th, 1862. In execution of the decree, and of another decree held by one Har Dial for Daula Kuar, the 4-anna share standing in his name in the revenue registers was sold on the 20th July 1867, and purchased by Suraj Parshad. Sheo Dial died in 1866, and if the family was joint his brothers obtained his interest by survivorship. If the family was not joint it devolved on his daughter. On the 24th December 1867, Ram Kuar, the widow of Sarad Sukh Rai, executed a deed by which she professed to divide the 4-anna share standing

in her name, and to transfer [300] a 2 anna share to Lalta Parshad, the son-in-law of Sheo Dial, and the remaining 2-anna share to Har Parshad, the son-in-law of Gulab Rai.

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1 A. 297 = 1 Ind. Jur. 411.

The respondent having, as has been stated, acquired the one moiety in the original mortgage purchased by Chotai Lal in April 1873, issued notice of foreclosure in respect of one moiety of the mortgage, and on the expiry of the year of grace he has instituted four suits. In the first he claims in virtue of the mortgage and foreclosure to obtain the possession of 4 annas out of the two shares of 4 annas each, which are still recorded in the names of Gulab Rai and Bishan Dial respectively. In the second, on the same title, he claims possession of a 2-anna share out of the 4-anna share purchased by Suraj Parshad. In the third, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Lalta Parshad, and in the fourth, on the same title, he claims possession of a 1-anna share out of the 2-anna share standing in the name of Har Parshad. A common objection was urged in the Courts below and in this Court that the foreclosure was invalid, in that a person entitled to one moiety of a mortgage-debt cannot require the mortgagees to pay off one moiety of the mortgage-debt or to stand foreclosed of one moiety of the mortgage-money. We must allow the validity of this plea. The whole of the mortgage-debt is due to the persons claiming under the original mortgages jointly and not severally and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid mortgage-debt, except under circumstances which do not exist in this case. The notice must declare for closure if the whole of the subsisting debt is not paid before the expiry of the year of grace. We are, therefore, of opinion that these suits cannot be maintained, and in that opinion we are confirmed by ruling of the Calcutta High Court—*Bhora Roy* v. *Abilack Roy* (1). It is unnecessary to consider the other pleas raised in this and the connected appeals. The decrees of the Courts below are reversed and the suits dismissed with costs.

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1 A. 301 (F.B.)

[301] BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield*).

HANUMAN PERSHAD (*Plaintiff*) *v.* KAULESAR PANDEY (*Defendant.*)*
[20th April, 1876.]

Act X of 1859, *ss.* 3, 4—*Act* XVIII *of* 1873, *ss* 5, 6—*Rent in kind (Bhaoli)—Enhancement of Rent—Tenant at a fixed Rate.*

A rent in kind (*bhaoli*) which, though it varies yearly in amount with the varying amount of the yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of s. 3 of Act X of 1859 (corresponding with s. 5 of Act XVIII of 1873). A tenant, therefore, in a permanently

* Special Appeal, No. 733 of 1875, against the decree of the Judge of Benares, dated the 15th May 1876, modifying a decree of the Collector, dated the 8th July 1874.

(1) 10 W. R., 476; for circumstances justifying an exception to the rule that a suit must be a suit applicable to the whole property mortgaged, and a mortgagor is not to be held liable to a variety of suits and proceedings in respect of the different interests which the mortgages may, as between themselves, possess, see *Hunoomanpersaud* v. *Kaleepersaud Sahoo*, W. R., 1864, p. 25, and *Indurjeet Koonwur* v. *Birj Bilas Lall*, 3 W. R. 139.

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settled district, holding his land at such a rent, is entitled to claim the presumption of law declared in s. 4 of Act X of 1859 (corresponding with s. 6 of Act XVIII of 1873) if he proves that, for a period of twenty years next before the commencement of the suit to enhance his rent, he has paid the same proportion of the produce of his holding.

The decision of the High Cout in *Hanuman Parshad* v. *Ramjug Singh* (1) impugned, and of the Calcutta High Court in *Yacoob Hossein* v. *Wahid Ali* (2) dissented from.

This was a suit to enhance the rents of certain lands held by the defendant. The Court of first instance, applying the presumption of law declared in s. 4 of Act X of 1859, held that the rents were not liable to enhancement and dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree in respect of certain of the lands for which the defendant paid rent in kind (*bhaoli*), holding, with reference to the ruling of the High Court in *Hanuman Parshad* v. *Ramjug Singh* (3), that the presumption of law laid down in s. 4 of Act X of 1859 was not applicable to such lands.

On special appeal by the plaintiff to the High Court it was contended, *inter alia*, that the presumption did not apply to certain other lands also, as the rents of the same were paid in kind.

The Court (Pearson and Spankie, JJ.) referred to the Full Bench the question whether the ruling of the High Court above mentioned was correct or not.

[302] The *Junior Government Pleader* (Babu Dwarka Nath Banarji) and Pandit *Bishambar Nath*, for the appellant.

Maulvi *Ruhullah*, for the responent.

OPINION.

STUART, C.J., TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion.

This suit falls to be decided under Act X of 1859. By the third section of that Act it was declared that ryots who, in the provinces therein mentioned, hold land at fixed rates which have not been changed since the permanent settlement, are entitled to receive pottahs of those rates. This provision was introduced to give effect to the design announced by Government, when it established the permanent settlement, that the ryot as well as the zemindar, should derive benefit from the boon. There is nothing in the section which limits its operation only to ryots who pay rent in cash. Ryots who pay rent in grain may, therefore, claim the privilege, if they can establish that the rates at which they have held their lands are fixed rates. In the case suggested the land is held on the terms that the tenant shall render to the landlord in each year a fixed share of the crop. The quantity of produee delivered may vary in each year, but the rate or share remains the same, be it a fourth or a third or a half, as the case may be. The rate of rent does not vary, although its quantum or value may. If then the tenant proves that no alteration in the rate has been made since the permanent settlement, or entitles himself to the benefit of the presumption declared in s. 4 of the Act, he may demand a pottah at these rates as fixed rates.

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(1) H.C.R., N.W.P. 1874, p. 371.

(2) 4 W.R., Act X, Rulings, 23 ; 1 Ind. Jur. N.S. 29. This case was followed in *Thakoor Pershad* v. *Mahomed Baker*, 8 W.R., 170 ; see, however, *Ram Dayal Singh* v. *Latchmi Narayan*, 6 B.L.R. App. 26=14 W.R. 388, in which the Court expressed a doubt as to its correctness.

(3) H.C.R. N.W.P. 1874, p. 371.

PEARSON, J.—On re-consideration I am of opinion that the ruling (1) which was followed in *Hanuman Parshad* v. *Ramjug Singh* (2) is not maintainable in reference to the terms of ss. 3, 4 and 5, Act X of 1859. Sections 3 and 5 show that the word "rent" used in s. 4 means the rate of rent, and whether or not the Legislature when enacting these sections had in view a rent paid in the shape of a proportion of the produce, it is impossible to hold that the terms used will not include such a rent as well as a money rent, and that a ryot in the Province of Benares who claims to hold at fixed rates and [303] proves that he has for a period of twenty years before the commencement of a suit paid as rent the same proportion of the produce of his holding, is not entitled to the presumption which s. 4 declares.

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1 A. 301 (F.B.).

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1 A. 303=1 Ind. Jur. 314 & 385.

APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spankie.*)

SALAMAT ALI AND OTHERS (*Plaintiffs*) *v.* BUDH SINGH AND OTHERS (*Defendants*).* [16th August, 1876.]

Mortgagor and Mortgagee—Constructive Fraud.

Mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee.

Neither does the mere fact that, being aware of the second mortgage he attests the execution of the mortgage-debt, amount to such conduct, where his knowledge of the contents of the deed is not shown.

Where a prior mortgagee, however, attested the execution of the deed mortgaging the property a second time, and being aware of the contents of the deed, kept silence, and thus led the second mortgagee to think that the property was not encumbered, and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be conduct which amounted to constructive fraud on the part of the prior mortgagee and deprived him of his right to priority (3).

[R., 1 O.C. 252 (253).]

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* Special Appeal, No. 1062 of 1875, against a decree of the Subordinate Judge of Agra, dated the 30th August 1875, modifying a decree of the Munsif of Jalesar, dated the 29th June 1875.

(1) *Yacoob Hossein* v. *Wahid Ali*, 4 W. R. Act X Rulings; 23 S. C, 1 Ind. Jur. N, S. 29.

(2) H. C. R. N. W. P. (1874) p. 371.

(3) See also *Rai Seeta Ram* v. *Kishan Dass*, H.C.R., N.W.P. 1868, p. 402, in which case it was held, where a prior mortgagee stood by and allowed the mortgagor to deal with the property as if it were unencumbered, while the second mortgagee, acting in the belief that he was taking a security free from encumbrance, advanced his money upon it at the solicitation of the prior mortgagee, that the prior mortgagee, had lost his right to priority by reasons of his conduct. See also *Mac Cannell Mayer*. H.C.R.N.W. P. 1870 p. 315, in which case it was held, where a decree-holder brought to sale in execution of his decree property on which he held a mortgage without notifying his encumbrance on it and on being asked by an intending bidder at the time of the sale whether there was any encumbrance on the property, gave an evasive answer which misled the bidder and induced him to purchase the property as unencumbered, that such decree-holder could not subsequently claim as against such bidder to enforce his mortgage.

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1 A. 303 = 1 Ind. Jur. 314 & 835.

THIS was a suit for money charged on immoveable property. The facts of the case and the arguments in special appeal sufficiently appear from the order of the High Court remanding the case under s. 354, Act VIII of 1859.

[304] Pandit *Ajudhia Nath* and Pandit *Bishambar Nath*, for the appellants.

Mr. *Mahmood*, for the respondents.

ORDER.

The order of the High Court was as follows:

The appellants allege that their brother Mansab Ali having incurred debts, borrowed Rs. 400 from them wherewith to discharge the debts, and to secure the repayment of the loan executed a mortgage of the property which the appellants now claim to bring to sale for its satisfaction. The mortgage-deed in favour of the appellants was duly registered. On the 3rd August, 1870, Mansab Ali having become still more involved in debt, borrowed Rs. 2,000 from Pirthi Singh, and again hypothecated the property. One of the appellants, Intizam Ali, was a witness to the execution of the mortgage. On the 16th February 1871, Mansab Ali took Rs. 2,600 from Budh Singh to pay off the mortgage due to Pirthi Singh and for other purposes, and hypothecated the property to Budh Singh. The debt due to Pirthi Singh was discharged out of the loan taken from Budh Singh. The appellant Salamat Ali witnessed the execution of the mortgage-deed in favour of Budh Singh. This deed does not contain any statement to the effect that no mortgage subsisted on the property, nor is there any allegation that the mortgagee inquired of any of the appellants whether or not there were any charges on the property. Budh Singh brought a suit on his mortgage-deed and obtained an order for sale. The appellants were not parties to this suit, but they caused the lien they now claim to enforce to be notified at the time of the sale. The property was purchased by the respondents for a sum of Rs. 5,000. It therefore is apparent that, at the time the mortgage was executed in favour of Budh Singh, its value was more than sufficient to discharge that debt as well as the debt due to the appellants.

The respondents pleaded that the appellants are estopped from enforcing their lien because they fraudulently concealed their charge, and they further pleaded that the charge created in the appellants' favour was a merely nominal transaction for the purpose of protecting Mansab Ali's property from his creditors, or that, if *bona fide*, the debt had been discharged.

[305] The Court of the first instance held the mortgage-deed executed in favour of the appellants to have been a *bona fide* transaction, and disbelieved the witnesses called to prove that the money had been refunded. As to the plea of estoppel, the Court found that, regard being had to the value, there could have been no intention on the part of the appellants to deceive the second encumbrancers, inasmuch as it was ample to satisfy both charges, and that the mere attestation of the subsequent encumbrance was not sufficient to create estoppel. It therefore decreed the claim. On appeal the same pleas were urged by the respondents, the then appellants, as they had pleaded in the Court of the first instance. The lower appellate Court held that the appellants had purposely and intentionally concealed their prior demands, and that, had they mentioned them, the subsequent creditors would either have abstained from lending their money or would have considered their advantages and disadvantages.

The lower appellate Court, without determining the other pleas, reversed the decree of the Court below and dismissed the suit.

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1 A. 303= 1 Ind. Jur. 314 & 385.

It is contended that there was no sufficient evidence to justify the lower appellate Court in finding that the appellants fraudulently concealed their mortgage, and the mortgagees had been deceived by them, and that at least a distinction should have been made between such of the appellants as did not attest the deed under which the property had been sold and appellant who attested it.

It is conceded that all that is proved against the appellants Mumtaz Ali and Akbar Ali is that, being brothers of the mortgagor and cognisant of his dealings with his property, they remained silent and did not give the mortgagees notice of their lien. In addition it is proved against Intizam Ali that he attested the deed executed in favour of Pirthi Singh, and it is proved against Salamat Ali that he attested the deed under which the property was sold. Are these circumstances sufficient to deprive all or any and which of the appellants of the right to enforce their lien ?

Although the plea has not been taken in special appeal, we may express our opinion that the respondents, who now hold the property in virtue of their purchase at auction, are entitled to put forward the same pleas as might have been urged by the mort-[306]gagees had the question of priority arisen before the sale. Although they purchased with a knowledge of the appellants' claim, they also knew that the claim was contested, and the notification of the claim at the sale could not restore to the appellants priority if they had already lost it. Had they or have any of them lost it?

It is a rule of equity that where a man by his conduct or language wilfully causes another to conceive an erroneous impression and to act upon the impression he has so formed and to alter his position, he cannot afterwards be allowed to claim any benefit for himself by asserting that the facts were contrary to the impression he had produced, and it may be added that a man must be presumed to intend the natural consequences of his conduct or language. If a man stands by and sees another sell property which belongs to him, he is bound to proclaim his title. If he fails to do so and a stranger is induced by his silence to believe he has no title, and under that impression expends his money on the purchase of the property, equity holds the man so standing by, if he fails to explain his silence, guilty of constructive fraud and postpones his title to that of the purchaser. The cases on this point are noted in Story's Equity Jurisprudence, s. 393, and in Fisher on Mortgages, s. 1541. It is, however, of the essence of constructive fraud that the person sought to be charged therewith should be proved to have concurred or co-operated in some deceit or to have been guilty of gross negligence. It is not therefore enough to show merely that a man, knowing that persons are dealing with his property out of his presence, keeps silence—Story's Equity Jurisprudence, s. 394. "A mortgagee need not go out of his way to give notice to his security upon hearing that the mortgagor is dealing with the estate"—Fisher on Mortgagees, s. 1541. But if a person who proposes to make an advance on a property informs a mortgagee of his intention in such a manner as to show that he intended to be guided by what he might hear from the mortgagee and the mortgagee remains silent, still more if a direct inquiry is made of the mortgagee and he remains silent, then in either of these cases the mortgagee will be held guilty of constructive fraud. Again, although the mere attestation of the execution of a mortgage-deed by a prior mortgagee is not, as it was at one time

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held to be, sufficient to create estoppel, because it does not necessarily follow that a witness is aware of the contents of the [307] deed of which he attests the execution, yet where that knowledge is brought home to him, and there are circumstances to show that he acted dishonestly and disingenuously to the mortgagee, and the mortgagee was in consequence deceived, the prior mortgagee will be deprived of his priority.

Applying these principles to the case before us we are unable to hold there was any sufficient evidence to justify the lower appellate Court in finding the appellants Mumtaz Ali and Akbar Ali guilty of constructive fraud, and therefore debarred from insisting on their claim. Looking to the value of the property, it may well be doubted whether there was a design on the part of any of the appellants to deceive the mortgagee. However this may be, Mumtaz Ali and Akbar Ali simply remained silent, although cognisant of the fact that their brother was dealing with the mortgaged property elsewhere. Nor does the case seem stronger against Intizam Ali. He, it is true, attested the deed executed in favour of Pirthi Singh, but the sale was not made under that deed, nor was the mortgage executed in favour of Pirthi Singh kept alive and assigned to the subsequent mortgagee. So far as concerns Budh Singh, Intizam Ali simply remained silent. We hold that the facts proved did not justify the lower appellate Court in holding Intizam Ali had concurred or co-operated in any fraud practised on Budh Singh.

Against Salamat Ali there is the circumstance that he attested the execution of the deed of mortgage in favour of Budh Singh, that he was the brother of the mortgagor and in constant intercourse with him, whence it may be inferred he was aware of the contents of the deed he witnessed, and lastly, that possessing this knowledge he kept silent as to the existence of a prior lien in favour of himself and his brother. Under these circumstances, if Budh Singh was deceived, it would be competent to the Court to find that Salamat Ali wilfully misled Budh Singh and so co-operated and concurred in that deceit, and to hold that, in consequence, his interest in the alleged prior encumbrance must be postponed to that of Budh Singh and those who purchased under Budh Singh's mortgage. Being of opinion that there had been no sufficient investigation of the issue whether Budh Singh was deceived by Salamat [308] Ali's silence, and to enable it to pass final orders in this appeal, the Court remanded the case for the trial of the following issues ; (i) Was the mortgage on which the appellants rely executed *bona fide* and for good consideration ? (ii) If it was so executed, has the debt so created been discharged ? (iii) Was Budh Singh ignorant of the mortgage on which the appellants rely, and if he had known of its existence, would he have declined to advance his money on the security of the property ?

The lower appellate Court determined the two first of the issues above mentioned in favour of the appellants, and the third issue in favour of the respondents.

JUDGMENT.

The judgment of the Court (after accepting the finding of the lower appellate Court on the two first issues) was as follows :—

We accept the finding that Budh Singh would not have agreed to take a second mortgage of the property had he been aware of the existence of the prior mortgage in favour of the appellants. He was about to advance a large sum on the property of which the bulk was, as he knew, and as

Salamat Ali must have known, to be applied to extinguish existing encumbrances, and had he been aware of the lien held by the appellants it may reasonably be inferred he would have insisted on its satisfaction out of the monies he had advanced. Each case must of course be governed by its own circumstances, but on the facts found in this case we must hold that Salamat Ali has by his silence lost his right to priority so far as his interest in the mortgage is concerned.

It must also be presumed that the shares of the four brothers in the mortgage-debt were equal. The decree of the lower appellate Court, so far as it dismisses the claim in respect of three-fourths of the mortgage-debt and interest is reversed, being the shares of Mumtaz Ali, Intizam Ali, and Akbar Ali and the decree of the Court of first instance to this extent restored, but the decree of the lower appellate Court, so far as it dismisses the claim to one-fourth of the mortgage debt, being the share of Salamat Ali, is affirmed. The appellants will recover three-fourths of their own costs in all Courts from the respondents and pay one-fourth of the respondents' costs. The respondents or either of them are of course at liberty to pay off the three-fourths of the mortgage-debt, interest, and costs, and to prevent a sale.

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1 A. 309.

[309] APPELLATE CIVIL.

(*Mr. Justice Turner and Mr. Justice Spankie.*)

MANNA LAL (*Defendant*) v. THE BANK OF BENGAL (*Plaintiff*).*
[21st August, 1876.]

Act IX of 1872 (*Contract Act*), *ss.* 2 (*d*), 25—*Consideration—Agreement without Consideration—Void Agreement.*

While certain hundis were running the acceptor gave the holder, the drawer having become bankrupt, a mortgage of certain immoveable property as security for the payment of the hundis in the event of their dishonour when they became due. *Held*, in a suit on the mortgage-deed the hundis having been dishonoured, that there was no consideration, within the meaning of that term in Act IX of 1872, for the agreement of Mortgage, and the same was void under s. 25 of that Act.

[Appr., 22 B. 176.]

THIS was a suit to recover Rs. 5,000 on a mortgage-deed, dated the 21st May 1884. One Rai Lakshmi Chand, of Benares, drew two hundis, each for Rs. 2,500, the one payable on the 15th June 1874, the other on the 19th June 1874, on the defendant's firm at Cawnpore. These hundis were endorsed to the Bank of Bengal and discounted by the agent of that Bank at Benares, and were then forwarded to the agent of the Bank at Cawnpore, and by him presented to the defendant and accepted. On the 18th May 1874, the agent at Cawnpore was informed that drawer of the hundis was bankrupt. He immediately applied to the defendant to give security for the amount of the hundis, and on the 21st May 1874, the defendant executed the deed of mortgage in suit. This deed, after reciting that the defendant was the acceptor of the hundis, that as such he was liable thereon, and that the amount of the hundis

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* Special Appeal No. 566 of 1876, against a decree of the Judge of Cawnpore, dated the 17th March 1876, modifying a decree of the Subordinate Judge, dated the 2nd August 1875.

1876 Aug. 21. — Appellate Civil. — 1 A. 309.

was due to the Bank of Bengal from him and payable by him, proceeds as follows: "I, therefore, of my own free-will and pleasure, agreeably to the request of the Bank of Bengal, for security for the amount of the hundis due to the Bank of Bengal, Cawnpore branch, do hereby hypothecate and pledge for the said amount a house and six shops situated in the chauk in the city of Cawnpore, and a bungalow situated in the Cawnpore Cantonment, and execute this by way of a collateral security-bond. . . The hypothecated property shall remain hypothecated and pledged as long as the amount [310] of the hundis is not paid. The said Bank of Bengal is at liberty to realize on account of the hundis the amount thereof from the hypothecated property and from me in any manner it likes." On the 24th June 1874, the Bank of Bengal instituted a suit against the drawer of the hundis and the defendant in this suit at Benares to recover the sums due on the hundis, which had been dishonoured on maturity. As the defendant neither resided nor carried on business at Benares, application was made to the High Court to sanction the trial, which sanction was refused. The Bank thereupon amended the plaint in that suit and sued the drawer alone, and obtained a decree, which at the time of the present suit was unsatisfied. On the 9th March 1875, the present suit was instituted.

The defendant pleaded, among other pleas, that the mortgage was obtained from him on the promise that the Bank would exhaust every means to obtain payment of the hundis from the drawer before recourse was had to the acceptor. The agent of the Bank denied that any such promise was made, or that he had any authority to make any promise in the matter. The Court of first instance found that no such promise was made.

On appeal the defendant again urged that the mortgage had been made in consideration of the promise made by the agent of the Bank at Cawnpore, and he further pleaded that, if no such promise was made, there was no consideration for the mortgage, and the contract was void under s. 25, Act IX of 1872. The lower appellate Court found that no promise had been made, and held that, inasmuch as the acceptor of a bill derives benefit reciprocally with the drawer in banking transactions, and that both are liable for the prompt discharge of the bill on its arriving at maturity, any security given meanwhile by either of them is not devoid of consideration, inasmuch as it carries with it the prospect of a deferred demand for the money.

On special appeal to the High Court by the defendant it was again contended that there, being no consideration for the agreement of mortgage, the agreement was void under s. 25, Act IX of 1872.

Mr. *Raikes*, for the appellant.

Mr. *Colwin* and Mr. *Conlan*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows:

[311] But we must admit the validity of the plea that the contract of mortgage is void under the provisions of s. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted; but, assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the

existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

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1 A. 311 (F.B.).

BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.*)

JAGESHAR SINGH (*Plaintiff*) v. JAWAHIR SINGH AND OTHERS (*Defendants*).* [21st August, 1876.]

Act IX of 1871, *sch. ii, art.* 10—*Pre-emption—Limitation—"Actual Possession."*

Held (STUART, C.J., *dissenting*) that the purchaser of the equity of redemption of immoveable property, which is at the time of the sale in the usufructuary possession of the mortgagee, takes "actual possession" of the property, within the meaning of that term in art. 10, sch. ii of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him.

Per STUART, C.J.—That such a purchaser does not take "actual possession" of the property until he takes visible and tangible possession thereof or enjoys the rents and profits of the same, after redemption of mortgage.

[Ap., 1 A. 592; 3 A. 24 (F.B.); R., 20 A. 315 (F.B.); 24 A. 17 (P.C.)=3 Bom.L.R. 707 =5 C.W.N. 888=28 I.A. 248=8 Sar. P.C.J. 133; 5 C.L.J. 491=11 C.W.N. 593 =2 M.L.T. 207; 3 O.C. 184.]

THIS was a suit to enforce the plaintiff's right of pre-emption of a share in a certain zamindari village and for possession of the same. The right of pre-emption was founded upon a special con-[312]tract in the village administration-paper. The deed of sale which the suit impeached was dated the 15th September 1873, at which date the property was in the possession of certain usufructuary mortgagees. The deed recited that the vendees were entitled to possession on the 31st May, 1874, by redemption of the mortgage. The suit was instituted on the 5th October, 1874.

The lower appellate Court dismissed the suit as instituted after the period of limitation prescribed therefor by art. 10, sch. ii of Act IX of 1871, holding that that period began to run from the date of the sale.

On special appeal by the plaintiff to the High Court, the Court (Turner and Oldfield, JJ.) referred to the Full Bench the question as to the time from which the period of limitation began to run.

The order of reference was accompanied with the following remarks:—

By art. 10, sch. ii, Act IX of 1871, the period begins to run "when the purchaser takes actual possession under the sale sought to be impeached. The terms of the former Act were "the time at which the purchaser shall have taken possession under the sale impeached."

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* Special Appeal No. 1028 of 1875, against a decree of the Subordinate Judge of Ghazipur, dated the 24th June 1875, affirming a decree of the Munsif of Saidpur, dated the 4th December 1874.

1876 Aug. 21. — Full Bench. — 1 A. 311 (F.B.).

The word "actual" has thus been introduced in the present Act, and there appears a doubt as to the object of this change, whether in the case before us the possession meant is possession by enjoyment of the profits on expiry of the term of the mortgage, or whether such possession as the nature of the property admits of is all that is intended, dating in this case from the time of the sale.

Munshi *Hanuman Pershad*, for the respondents, contended that "actual possession" meant visible and tangible possession, or enjoyment of the rents and profits of the property, after redemption of mortgage. The meaning of the term "possession in the former Limitation Act" was doubtful, as is shown by conflicting rulings. For instance, in *Gordhun* v. *Heera Singh* (1) the Full Bench of this Court held that it meant actual, that is, visible and tangible possession, while in *Ganeshee Lall* v. *Toola Ram* (2) it held that it meant such [313] possession as the nature of the property admits of. The word 'actual' has been introduced into the present Limitation Act to remove all doubts as to the meaning of the term "possession."

Pandit *Ajudhia Nath* (with him the *Senior Government Pleader*, Lala *Juala Parshad*), for the appellant, contended that when a purchaser acquired such possession of the property sold as the nature of the property admitted of, he was in "actual possession" of the property.

OPINIONS OF THE FULL BENCH.

STUART, C. J.—I am clearly of opinion that the possession intended in art. 10, sch. ii, Act IX of 1871, is possession by enjoyment of the profits on expiry of the term of the mortgage. The time mentioned in the former Act was "the time at which the purchaser shall have taken possession under the sale impeached, and the meaning of this being doubtful, as various rulings of the Calcutta Court and this Court show, the word "actual" has been introduced into the present Act with the view no doubt of making it plain what the real date was intended to be. Actual possession, in my opinion, means personal and immediate enjoyment of the profits; and as in the present case the mortgagee was in possession at the time of the sale, the purchaser could not take actual possession till the mortgage-term had expired. And this is my answer to the reference.

PEARSON, J.—The possession of a mortgagee is tantamount to the possession of the mortgagor of his vendee, and does not interfere with his equity of redemption. Nor can the latter be said not to be in possession by enjoyment of the profits when those profits are applied to the liquidation of the mortgage-debt for which the property purchased by him is liable. He may, when he has taken his vendor's place, be reasonably held to have obtained actual possession under the sale, and from the date on which he acquired it will run the limitation prescribed by art. 10, sch. II, Act IX of 1871. The introduction of the word "actual" in that article seems to render the terms used more precise than those used in the former Act, and to adopt the Full Bench ruling in *Ganeshee Lal* v. *Toola Ram* (2) rather than to negative it, and make any change in the law.

[314] TURNER, SPANKIE and OLDFIELD, JJ., concurred in the following opinion:—

The provisions of the former law, Act XIV of 1859, declared that in suits for pre-emption, the period of limitation should be computed from the

(1) S.D.A. N.W.P., January to May 1866, p. 18; this case followed in *Gobind Parshad* v. *Bebee Fatima*, 2 W.R. 5.

(2) H.C.R. N.W.P., 1868, p. 376, followed in *Mashook Ali Khan* v. *Imdad Ali Khan*, H.C R. N.W.P., 1869, p. 9; see also *Bechun* v. *Yakoon Khan*, 8 W. R. 225.

time at which the purchaser shall have taken possession under the sale impeached. On the construction of the term "possession" this Court held in *Ganeshee Lall* v. *Toola Ram* (1) that such possession was intended as the nature of the thing sold admitted of and that it did not necessarily mean tangible or visible possession. Thus, where a property was in the possession of the mortgagee, and the rights of the mortgagor were sold, it was held that possession was acquired under the sale as soon as the right of redemption was completely transferred to the purchaser, and that limitation must be computed from that period and not from a subsequent date when the mortgage having been discharged from the usufruct the purchaser was able to resume possession. It was pointed out that at the time of the sale two persons had rights in the property, the mortgagor and the mortgagee, and that the subject of the sale was the right of the mortgagor as it subsisted at the time of the sale. Seeing that the purchaser had purchased the right to recover and enjoy the profits at an indefinite period, for it could not be ascertained with certainty at what date the debt and interest would be discharged from the usufruct, it was deemed inequitable to allow a pre-emptor to obtain the property in 1867 freed from mortgage at the price paid by the purchaser in 1860 for the estate encumbered with the mortgage. As an analogous case it was suggested that, if land were leased for a certain term at a nominal rent, and during the term the lessor sold and conveyed the reversion to a purchaser, although the purchase would not have conferred on the purchaser the right to any immediate profit from the estate, the subject of the sale would have been his and in his possession, for all intents and purposes, as completely as before the sale it was in the possession of the vendor.

The language of the present Limitation Act, IX of 1871, differs somewhat from that of the former in declaring the date from which [315] the period of limitation is to be computed in suits for pre-emption. In sch. ii, cl. 10, it is declared the period begins to run when the purchaser takes actual possession under the sale impeached, and the question put to us is whether there has been any change in the law, whether by actual possession we are to understand in all cases visible and tangible possession or such possession as the nature of the subject of the sale allows.

We have felt some difficulty, in determining this question, for it may be presumed the term actual was not introduced without a purpose. But it will equally apply to subjects of sale which admit of visible and tangible possession as well as subjects of sale which do not admit of such possession. The purchaser of an equity of redemption or of a right of reversion is, it must be allowed, actually in possession of what he has purchased, when the rights of the mortgagor or lessor have been completely transferred to and vested in him. In the one case he and he only could maintain suit for any injury to the revisioner, in the other he and he alone could maintain suit for damage done by the mortgagee to the property mortgaged in contravention of the terms of the mortgage. We are pressed, too, by the argument in *Ganeshee Lall* v. *Toola Ram* (1) that it would be inequitable to allow a pre-emptor to lie by for a number of years to see whether the purchase was beneficial or otherwise, and to come in and claim the benefit of the sale when the subject of the sale is freed from the encumbrance existing at the time of the sale, or where its market-value

(1) H.C.R. N.W.P. 1868, p. 376.

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may have considerably increased. Of course if the language of the law admitted but one construction, we could not allow this consideration to influence us, but where it is not incompatible with a construction that avoids hardship and injustice, we are at liberty to adopt that construction. It appears to us that full effect is given to the term actual possession if it be held that, where the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the date when the subject of sale is completely conveyed to and vested in the purchaser, and he has acquired such possession as before the sale was enjoyed by the seller.

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1 A. 316.

[316] APPELLATE CIVIL.

(*Mr. Justice Pearson and Mr. Justice Spankie.*)

JADU LAL (*Plaintiff*) *v.* RAM GHOLAM AND ANOTHER (*Defendants*).*
[5th December, 1876.]

Act VIII of 1859, *s.* 2—Res judicata.

When a plaintiff claims an estate, and the defendant, being in possession, and knowing that he has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff.

Where, therefore, the defendants purchased an estate in the plaintiff's possession, and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that the sale to the defendants was fraudulent and without consideration, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property—a claim which he might have asserted in reply to the former suit, *held* that he was debarred from suing to enfore such claim.

Baldeo Sahai v. *Bateshar Singh* (1) followed.

[Overruled, 26 A. 61 (F.B); F., 3 A. 189.]

As this case merely follows the decision in *Baldeo Sahai* v. *Bateshar Singh*, it is not reported in detail (2).

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* Special Appeal No. 819 of 1876, against a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 13th April 1876, reversing a decree of Sultan Hussain, Additional Subordinate Judge, dated the 27th May 1875.

(1) 1 A. 75.

(2) *Baldeo Sahai* v. *Bateshar Singh* was again followed in S. A. No. 998 of 1876, decided the 16th December 1876.

1 A. 316=1 Ind. Jur. 560.

1876 DEC. 6. — APPELLATE CRIMINAL. — 1 A. 316= 1 Ind. Jur. 560.

APPELLATE CRIMINAL.

(*Mr. Justice Pearson.*)

THE QUEEN *v.* PETERSON. [6th December, 1876.]

Bigamy—Attempt—Publication of the Banns of Marriage.

The act of causing, the publication of banns of marriage is an act done in the preparation to marry, but does not amount to an attempt to marry (1).

Where therefore a man, having a wife living, caused the banns of marriage between himself and a woman to be published he could not be punished for an attempt to marry again during the lifetime of his wife.

MR. C. DONOVAN, Magistrate of the first class, on the 7th June 1876, committed Peter Peterson, a European, to the Court of Session for trial on the following charge, amongst others, *viz.*, that he, in or about the end of December 1875, and beginning [317] of January 1876, attempted to marry Ethel Amanda Guise, by causing the publication of the banns of marriage between them when he, being a Christian, had wife alive, and that he had thereby committed an offence under ss. 494, 511 of the Indian Penal Code.

In a trial by jury held by Mr. H. G. Keene, the Sessions Judge of Agra, on the 27th July 1876, he was convicted on that charge, and sentenced to three years' rigorous imprisonment.

Peterson appealed to the High Court.

Mr. *Ross*, for the appellant.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the Crown.

JUDGMENT.

PEARSON, J.—I proceed to consider whether the prisoner has been rightly convicted of an attempt to commit the offence defined in s. 494, Indian Penal Code. He was charged with and has been found guilty of "attempting to marry E. A. Guise by causing the publication of the banns of marriage between them when he, being a Christian, had a wife alive." The question shortly is whether the publication of the banns of marriage is an attempt to marry. An attempt to commit a crime is to be distinguished from an intention to commit it and from preparation made for its commission. "Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made"—Mayne's Commentaries on s. 511, Indian Penal Code. In one of the cases cited by Mr. Mayne in his Commentaries on the Indian Penal Code in illustration of the above doctrine, it was ruled that there could be no attempt to contract a marriage until the parties stood before the Magistrate about to begin the ceremony. It would follow in the present case that the publication of the banns was not an attempt on the prisoner's part to marry Miss Guise, but only a preparation for such an attempt. The publication of banns may or may not be, in cases in which a special license is not obtained, a condition essential to the validity of a marriage, but common sense forbids us to regard either the publication of

(1) For acts amounting only to a preparation to commit forgery and not to an attempt to commit that offence, see *Queen* v. *Ramsaran Chowbey*, H.C.R. N. W.P., 1872, p. 46.

1876 DEC. 6 — APPELLATE CRIMINAL. — 1 A. 316= 1 Ind. Jur. 560.

the banns or the procuring of the license as a part of the marriage ceremony. If the rule laid down in America, that an attempt can only be manifested by acts which would end in the [318] consummation of the offence, but for the intervention of circumstances independent of the will of the party, be accepted, it is clear that the prisoner's act, in causing the banns of marriage between himself and Miss Guise to be published was not, in the eye of the law, an attempt to marry her, inasmuch as he might, before any ceremony or marriage was commenced, have willed not to carry out his criminal intention of marrying her. For the reasons above stated the verdict of the jury by which the prisoner is convicted of an offence punishable under ss. 511, 494, Indian Penal Code, and the sentence passed on him, under those sections by the Sessions Court, must be and hereby are annulled.

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1 A. 318 (F B.).

BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.*)

IN THE MATTER OF THE PETITION OF BISH NATH.* [16th December, 1876.]

Act VIII of 1871 (*Registration Act*), *s.* 73—*Refusal to register—Petition to have document registered—Person "claiming" under document.*

A deed of sale, executed by the vendor alone, which recited that the vendor had received the purchase-money, and that the purchaser had been put into possession, was presented for registration by the vendor, the purchaser not being present. The Registrar refused to register the document on the ground that the deed had not been delivered, and no consideration had passed, the vendor having stated that he had not received the purchase-money. In refusing to register, the Registrar believed that the deed was of the vendor's own creation. The vendor applied by petition to the High Court to establish his right to have the document registered. The alleged purchaser repudiated the sale.

Held by the majority of the Full Bench, that as it appeared on the face of the document itself that the petitioner was not a person "claiming" under it, the petition could not be entertained under the provision of s. 73 of the Registration Act.

Per STUART, C.J.—That the mere fact that it did not appear on the face of the deed that the petitioner could claim under it did not preclude the Court from entertaining the petition, but that, under the circumstances of the case, the registration of the deed should not be ordered.

Per OLDFIELD, J.—That it was the duty of the Court to order the registration of the deed, as it was duly executed and the requirements of the law fulfilled without entering into the question whether or not the petitioner could claim under it.

[319] THIS was a petition to the High Court to establish the petitioner's right to have a deed of sale registered. The material portion of the deed, which was dated the 8th May 1875, was as follows :—"I, Bish Nath, hereby sell all the property detailed below to Lachman Parshad for Rs. 460. I make this sale of my own free-will. I have received the whole of the purchase-money in a lump sum. I have declared the said purchaser to be my representative, and put him into possession of the entire property. I have transferred to the said purchaser, from the date of the execution of this document, all rights I possess in respect of the

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* Miscellaneous Application No. 71-B of 1876.

property sold. I have not, nor shall my heirs have, any claim or right to the property sold, or to the purchase-money." The deed was executed by the vendor only, who presented it for registration on the 19th August 1875, to Mr. J. H. Prinsep, District Judge of Cawnpore and the Registrar of the district, the purchaser not being present. On learning by inquiry from the vendor that he had not received the purchase-money, the Registrar refused on that ground to register the deed, and also on the ground that the deed had not been delivered.

On the Court (Stuart, C.J., and Oldfield, J.) calling for the records of the registration proceedings, the Registrar stated that, in refusing to register, he believed that the vendor was seeking to have registered a document of his own creation, and that the deed could not be registered in the absence of the purchaser. The purchaser denied the contract of sale.

The Court referred to the Full Bench the question whether, under the circumstances, and with reference to the provisions of Act VIII of 1871, the registration of the document should be ordered.

Munshi *Hanuman Parshad* and Munshi *Sukh Ram*, for the petitioner.

Pandit *Bishambar Nath* and Pandit *Nand Lal*, for the opposite party.

Pandit *Nand Lal*.—The petition cannot be entertained. The right of petitioning against a refusal to register is given by s. 73 of the Registration Act to a party "claiming" under the document.

The petitioner cannot be said to claim under the sale-deed.

[320] Munshi *Sukh Ram* contended that the petitioner was a party "claiming" under the sale-deed. He can claim the purchase-money under it. The Court can therefore entertain the petition.

JUDGMENT.

STUART, C.J.—It was objected by the respondent that, under s. 73 of the Registration Act, there was no appeal in a case like the present, by which, as I understand, is meant that, inasmuch as the appellant could not be said to "claim" under the document, he had no right to make the present application to this Court, being the remedy provided by s. 76, where the Judge of the district was, as in this case, the registering officer. But I am not satisfied that for the purposes of this section he must be regarded as not claiming under the document. He might not succeed in establishing his claim, say, to the purchase-money, but, although the deed was unilateral and executed by the vendor alone, it appears to be in the form of sale-deed customary in these Provinces, and on the face of it, therefore, and so far as its form is concerned, and whether it be registrable or not, I do not see that we are obliged at once to assume that it could not be given effect to, or that because it is in form unilateral the appellant could claim the purchase-money. There is, however, in relation to this point a curious inconsistency in the Act; for, whereas by this s. 73 the party desirous of making an application under it must be a person "claiming" under the document, by s. 32 the document for registration shall be presented "by some person executing or claiming under the same," not executing *and* claiming, but executing *or* claiming. Why this should be, and the parties proceeding under these two sections in different positions, it is not easy to understand, unless it was intended that a party against whom an order refusing to register had been made was in a different position, at such a stage of the proceeding, from a party merely executing the document. Be this as it may, I do not see that for the purposes of s. 73 we are bound to assume *in limine* that the applicant did not or could not

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claim under it. I therefore consider that he was not precluded from his remedy by the application he has made to this Court.

But on the merits of the question embraced in the reference before us, I must express the opinion I have formed on it, and that is that registration of the document in question should not be ordered. Even on the assumption that the applicant may be understood to [321] claim under this sale deed I am not satisfied that it is a document or instrument within the meaning of the Registration Act. It is not only not executed by the alleged purchaser, but has been repudiated by him altogether, and this is a state of the case which I think may be allowed to come within the scope and intention of s. 35 of the Act, which provides that if all or any of the persons by whom the document purports to be executed deny its execution, the registration shall be refused.

Was this so-called sale-deed a legal and enforceable document at all? I think not. As I have remarked, such unilateral instruments are not uncommon in these Provinces, and I may add that, in the practice of Scottish conveyancing, such instruments as sale-deeds, or deeds in the nature of mortgages and the like, are only signed by the seller or obligor, and no inconvenience is experienced from this where the instrument records a true contract. But when there is on evidence at hand of such a contract, the unilateral character of the instrument leaves it open to the alleged purchaser or obligee to repudiate it. In the case before us the alleged sale-deed recites no previous contract or agreement, the repudiation of it is express, and there is also the serious fact that no consideration had passed upon it. It was suggested at the hearing that there was no limit to the nature or character of the documents which might be presented for registration, but that the registering officer was bound to accept and register all documents without exception which purported to be executed at all. But this is a view of the law which I cannot concur in. If such was the position of the registrars under the Act, the public time would be wasted, and their duties would become intolerable. On the other hand, the consequences of registration are very serious, and I cannot allow that these consequences should be visited on the heads of innocent persons. The registering officers must satisfy themselves by evidence and inquiry that documents are honestly presented in their office, otherwise no one would be safe.

PEARSON, J.—The vendee was not a party to the instrument in question, which does not in any way bind him. It was executed by the vendor alone, and merely declares that he has sold the property therein mentioned, for a consideration which he has received, to Lachman [322] Parshad. But no claim could be founded upon it against Lachman Parshad or anyone else. The vendor could not, therefore, as a person claiming under it, apply by petition, under s. 73, Act VIII of 1871, to the High Court, in consequence of the Judge's refusal to register it, with a view to establish his right to have the document registered. His petition cannot be entertained. Whether the Judge was right or wrong in refusing to register it is a question which we are not required to consider and determine.

TURNER and SPANKIE, JJ.—The petitioner having, as he alleges, agreed to sell certain lands and other property to the respondent, executed a conveyance and presented it to the registrar for registration. That officer refused registration on the grounds that the deed had not been delivered nor the consideration paid. Had the question before us rested here, there would have been little difficulty in disposing of it, as the law does not prescribe either of the grounds recorded by the Registrar as justifying the

refusal of registration. The deed was in a form not uncommon, if not most usual, in these Provinces, that is to say, it was unilateral, the seller alone being a party to it. It was duly executed by the seller, who appeared before the Registrar and admitted its execution. It is not alleged, and it does not appear that there had been any failure to comply with the requirements of the law, consequently registration should not have been refused. But it is contended on the part of the respondent that the petitioner is not entitled to apply to this Court for an order for the registration of the instrument, seeing that the law accords that privilege only to a person claiming under such instrument or his representative, and that on the face of the instrument it appears that the petitioner does not claim under it. The only claim which it is suggested the petitioner could assert would be a claim to the purchase-money, but inasmuch as the instrument purports to be and is executed by the petitioner alone, it is clear that he cannot claim the purchase-money under it. It would not be the duty of the Court, we apprehend, on such an application to enter into any involved question of construction to determine whether or not the person presenting such an application has not a claim, but when, on the face of the document, it clearly appears that he can claim nothing under it, we hold that a mere unfounded assertion of a claim will not give him a *locus standi*, and that his application should be refused.

[323] OLDFIELD, J.—All documents to which the Registration Act applies may be presented for registration by some person executing or claiming under the same (s. 32), and it is the duty of the registering officer, on presentation of the document, to inquire (*a*) whether or not such document was executed by the persons by whom it purports to have been executed, (*b*) satisfy himself as to the identity of the persons appearing before him, and alleging that they have executed the document, and (*c*) in the case of any person appearing as a representative, assign or agent, satisfy himself of the right of such person so to appear (s. 34), and if satisfied on these points, it is his duty to register it (s. 35). In the present case the Judge should have ordered registration, as the above conditions were satisfied.

By s. 76 an appeal lies to this Court from the Registrar's order refusing registration, on the application of any person claiming under the document, or his representative, assign or agent, in order to establish his right to have the document registered, and the Court's duty is to order registration if it finds that the document has been executed, and the requirements of the law have been satisfied (s. 76).

It is, however, argued that the petitioner in the present case cannot appeal, for though he executed the document, he is not claiming under it, since it is a document which can support no claim. The document purports to effect a sale of certain lands on the part of the petitioner to Lachman Parshad. As such, it is certainly one of these documents capable of registration, and to which the law applies as purporting or operating to create, declare, or assign, an interest in immoveable property; it is a document which the Registrar should register on application by the petitioner. No doubt the deed is signed by the vendor only as executor, but I do not think we can look into the document and say, that since it is unilateral it can give to the petitioner no valid claim, and therefore he has no *locus standi* to appeal; the document by itself may make no complete contract, but it may go to form one; for it is possible that another forming the counterpart may have been executed completing the contract, and so we cannot say that petitioner may not be in a position to assert a claim

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under it as [324] forming part of a contract. In entering on these questions, I think we go beyond the powers given by the Act, which confines the inquiry to the question of the right to have the document registered, dependent on due execution and fulfilment of the requirements of the law. Documents of this character are not uncommon, and our refusal to allow the appeal, and order registration of such documents, may have prejudicial effects. I would admit the appeal and order the Registrar to register the document.

Petition refused.

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1 A. 324=1 Ind. Jur. 561.

APPELLATE CIVIL.

(*Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.*)

ILAHI BAKSH AND OTHERS (*Defendants*) *v.* IMAMBAKSH AND OTHERS (*Plaintiffs*).* [16th December, 1876.]

Act VIII of 1859, ss. 7, 97—Omission of part of claim—Withdrawal of suit—Institution of fresh suit, including part of claim omitted.

Where the plaintiffs in a suit were permitted to withdraw from the same with a view to bringing a fresh suit which should include a portion which had been omitted of the claim arising out of the cause of action, and such fresh suit was brought, the additional portion of the claim in that suit was not barred by s. 7 of Act VIII of 1859.

[R., 17 A. 53; 14 C.P.L.R. 105.]

THE plaintiffs in the present suit brought a suit on the 1st September 1875, to be maintained in possession as theretofore of a plot of land, alleging as their cause of action that the defendants had, on the 2nd June 1875, prohibited them from watering the trees thereon. On the 8th November the plaintiffs applied for permission to withdraw from the suit, with liberty to bring a fresh suit. This application did not contain the grounds upon which the plaintiffs applied for such permission. The Court of first instance granted such permission without recording any reason for granting the same, on payment of certain costs. On the 18th December the plaintiffs brought the present suit in which they claimed on the same cause of action to be maintained in possession of three plots of land. The Court of first instance gave them a decree, which was affirmed on appeal by the defendants.

[325] On special appeal by the defendants to the High Court, it was contended that the claim to the additional plots of land was barred by s. 7, Act VIII of 1859.

Lala *Lalta Parshad* and Babu *Baroda Parshad*, for the appellants.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondents.

JUDGMENT.

The judgment of the High Court, so far as it related to this contention, was as follows:—

As to the first plea, it would seem that the reason for which the former suit was withdrawn was that a fresh suit might be brought which should

* Special Appeal No. 1012 of 1876, against a decree of Shankar Das, Subordinate Judge of Saharanpur, dated the 7th July 1876, affirming a decree of Ahmad Hasan, Munsif of Deoband, dated the 9th May 1876.

include a portion which had been omitted before of the claim arising out of the cause of action, and the permission to bring the new suit must be reckoned to be permission to supply the former omission. This being so, we are of opinion that the additional portion of the claim in this suit is not barred by s. 7, Act VIII of 1859. A similar view was taken in special appeal case No. 180 of 1876, decided by a Bench of this Court on the 28th April last (1).

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APPELLATE CIVIL.

1 A. 324 = 1 Ind. Jur. 561.

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1 A. 325 (P.C) = 4. 1.A. 15 = 3 Suth. P.C.J. 357 = 3 Sar. P.C.J. 673.

PRIVY COUNCIL.

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, and Sir Rorbert P. Collier.

[*On appeal from the High Court of Judicature, North-Western Provinces.*]

NARAIN SINGH AND OTHERS (*Plaintiffs*) *v.* SHIMBHOO SINGH AND OTHERS (*Defendants*). [3rd and 4th November, 1876.]

First and second mortgages—Dispossession of second mortgagee—Cause of action—Limitation—Interest.

Z, being indebted to *A*, executed in his favour a written mortgage of certain lands, in which it was agreed that if the debt was not repaid within a fixed time, *A* should be put into possession of the lands. Subsequently *Z* executed in favour of [326] *P*, to whom also he owed money, a second mortgage of the same lands subject to the same condition. *P* not receiving payment within the stipulated time, sued *Z* on the mortgage and obtained a decree for possession of lands, under which he was put into possession in the year 1846. After *P* had obtained his decree *A*, whose debt had likewise remained unpaid, brought a suit as first mortgagee against *Z* and *P* for the possession of the lands, and obtaining a decree, recovered possession in the year 1847 dispossessing *P*. In the year 1870, the heirs of *Z* having paid off the debt due to *A*, resumed possession, whereupon the heirs of *P* applied to be restored to possession in execution of the decree obtained by *P* in 1845. This application having been rejected on the ground that that decree had been fully executed when *P* obtained possession under it, the heirs of *P* instituted a suit against the heirs of *Z* to recover possession and for interest during the time they were dispossessed.

Held by their Lordships of the Judicial Committee reversing the decision of the High Court, that the heirs of *P* were entitled to possession on *A's* mortgage being paid off, and that their cause of action accrued and limitation ran against them from the time when the heirs of *Z* resumed possession.

Held, also, that they were not entitled to a decree for the interest accruing during the time they were dispossessed.

[F., 2 O.C. 145 (Bench); 4 O.C. 171; 38 P.R. 1894; D., 5 C.L.R. 227.]

THIS was an appeal from a decree of a Division Bench of the High Court at Allahabad, dated the 13th May 1873, reversing the decree of the Subordinate Judge of Aligarh, dated the 23rd November 1872 (2).

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(1) In that case the application for permission to withdraw the former suit was based on the ground that a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint with which that suit had been commenced, and on that ground permission for the withdrawal of the suit and to bring a fresh suit was accorded. Under these circumstances the Court (Pearson and Spankie, JJ.) was of opinion that it would not be fair or reasonable to hold that the aforesaid portion of the claim could not be entertained in the fresh suit, although it might be true that the defect in the former plaint might have been amended without recourse to the provisions of s. 97 of Act VIII of 1859.

(2) See H. C. R. N. W. P., 1873, p. 153.

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1 A. 325 (P.C.)= 4 I.A. 15= 3 Suth. P.C.J. 357= 3 Sar. P.C.J. 673.

Mr. *Doyne* appeared for the appellants, who were the plaintiffs in the Original Court.

Mr. *Joseph Graham* appeared for the respondents.

JUDGMENT.

The facts of the case and the questions arising for determination on the appeal are fully stated in their Lordships' judgment, which was delivered by

SIR BARNES PEACOCK.—In this case the plaintiffs, as sons and heirs of Pohoop Singh, a mortgagee, seek to recover possession of 20 biswas of the zamindari right of mouza Lallpoor. The defendants in the suit are the representatives of the mortgagor. The plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, Pohoop singh, "in that, under a mortgage-deed, dated Phagoon Badi 7th Sumbat 1896, Pohoop Singh, the ancestor of the plaintiffs, having obtained a decree from the Sudder Ameen's [327] Court, was put in possess.on on the 31st August, 1846." Most of the defendants admit the claim, but the defendants Man Singh, Shimbhoo, Girdharee, and Motee, put in an answer, by the second paragraph of which they admitted that under the former decree the plaintiffs' ancestor was in possession for upwards of a year; but they set up in the fourth paragraph of the same written statement, that "the mortgage alleged by the plaintiffs is wholly unfounded. The defendants' ancestor did not receive the mortgage-money from the ancestor of the plaintiff; and Pohoop Singh, the ancestor of the plaintiffs was a person notorious for his expertness in Court affairs. He had with a view to deprive Asaram and Sheo Lall of their mortgage money, obtained by deception a decree on the mortgage-deed in suit; and the defendants' father had, according to the Shasters, no right to transfer and waste the defendants' ancestral property without any legal necessity to satisfy illegal demands. Hence under the Shasters also, the mortgage alleged by the plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the plaintiffs did obtain possession by virtue of a decree, and that he had remained in possession for a year, the defendants also, in the same written statement, alleged that the mortgage was collusive and a *benami* transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the plaintiffs' ancestor did get into possession on the 31st August 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, Asaram and Sheo Lal. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage-deed do not appear, but, as far as can be collected, it was a mortgage-bond, by which it was stipulated that in the event of the non-payment of the mortgage-debt within five years, the mortgagors would cause a mutation of names and the plaintiffs be put into possession.

[328] It appears that the plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the plaintiffs, as mortgagees, a title to the land as against the defendants, but it gave them no title as against the prior mortgagees, Asaram and Sheo Lall. When Asaram and Sheo Lall turned the plaintiffs' ancestor out of possession, it did not destroy his title and

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right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to Asaram and Sheo Lal, but it did not destroy the right which the plaintiffs obtained against the defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues: first whether the original mortgagors executed the mortgage-deed in respect of the property in suit on receiving the full mortgage-consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage-deed could take effect against the defendants according to the Hindu law. The Judge says in his Judgment:—"It is apparent that plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage-deed, and the payment of mortgage-consideration; and the fact of the decree having been made is admitted by defendants. Again, all the defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of Maulvi Inayat Ali, pleader, Chuni Lall, patwari, and two other persons, both named Hulasi, witnesses for plaintiffs. The plea urged by defendants must therefore be over-ruled; and they have failed to refute the claim." He therefore gave a decree in favour of the plaintiffs.

Upon that an appeal was preferred by Shimbhoo alone to the High Court; and one of his grounds of appeal is that there was "no cause of action and foundation for the plaintiffs' suit; neither the deed of mortgage nor the decree has been produced; the conditions agreed upon between the parties cannot be ascer-**[329]** tained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st April, 1872, could not give any legitimate cause of action (1). Nor did any right of action accrue to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870, the title of the plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title, the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it and keep the possession from the plaintiffs; and it appears to their Lordships that, having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land, to which the plaintiffs had obtained a right under the second mortgage, gave them a cause of action against the mortgagors, the defendants. The Court proceed: "The right of the plaintiffs or their forefather to possession was created by the mortgage deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the plaintiffs a

(1) Before bringing their suit the plaintiffs had endeavoured to recover possession of the land by applying for execution of the decree obtained by Pohoop Singh in 1846. The "High Court's order of the 1st April 1872," here referred to, rejected that application on the ground that Pohoop Singh's decree had been fully executed when, in 1846, he was put in possession of the land.

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title. The High Court proceeded: "The dispossession of Pohoop Singh after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title, namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained, [330] he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible and cannot be decreed even against the confessing defendants."

The High Court held that the plaintiff's suit was barred by limitation.

It appears, however, to their Lordships, that the plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the defendants after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court, so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by Pohoop Singh, the plaintiffs' ancestor. In the first place, as already stated, the written statement of the defendants admits that there was that former decree. They say that "under the former decree, the plaintiffs' ancestor was in possession for upwards of a year" and then he was turned out by the first mortgagees. Again, when Asaram and Sheo Lall, the first mortgagees, brought an action against the second mortgagee, Partab Singh, the ancestor of the plaintiffs, and Lulloo and others, the zamindars, the mortgagors, were also made parties to that suit. And in that suit, it appears that the decree of Partab Singh against the zamindars was in evidence. The Sudder Court says:—"The plaintiffs sued Lulloo and others, zamindars of the above named village for possession on a mortgage-bond, dated the 18th Kower 1859 Sumbat; but in consequence of their having omitted to specify the nature of the tenure, they were non-suited. Pohoop Singh also sued the zamindars on a mortgage-bond, and obtained a decree which was upheld in appeal." There was a finding then in that case that Pohoop Singh did sue the zemindars on the mortgage-bond and that he obtained a decree against them. Further when the first mortgage had been paid off and the plaintiffs had [331] been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against that mortgagors, and they applied to the Court for an execution of the decree. The Munsif decided that they were entitled to have an execution. In that suit Simbhoo, who is the present defendant, was one of the parties, and in that case the judgment was produced. The Munsif says:—"The record of the case having been brought forward, it appears that the objection of the defendants, judgment-debtors," that is, Simbhoo, one of the present defendants, "is that Pohoop Singh, the original decree-holder, and deceased ancestor of the plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is "to recover possession as mortgagees over the entire 20 biswas zemindari right of mauza Lallpoor,

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pargana Goree, within the jurisdiction of the Iglass Tehsili, valued at Rs. 5,000,"—the valuation is not a matter of importance,—" the principal amount of the mortgage-loan, and to recover Rs. 6,999-15-0 interest thereon during the period of the mortgagee's dispossession, as per detail given below aggregating Rs. 11,999." Now the plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be—how much is due to the plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem? The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for 6,999 rupees interest in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to [332] what the judgment ought to be. He says:—Claim to recover possession as mortgagees over the entire 20 biswas zemindari right in mauza Lallpoor, pargana Goree, valued at Rs 5,000, principal of the mortgage-loan, and Rs. 6,999-15-0 interest on the mortgage-amount." Then he says:—"Ordered that plaintiffs' claim be decreed with costs against the defendants, that the pleaders get their fees." Then he says:—"Subject-matter of decree. Recovery of possession as mortgagees over the entire 20 biswas right in mauza Lallpoor, pargana Goree, valued at Rs. 5,000, the principal amount of the mortgage-loan, and of Rs. 6,999-15-0 interest on the mortgage-amount for the period of the plaintiffs' dispossession: total Rs. 11,999-15-0." If by that decree the lower Court intended to give the plaintiffs a decree not only for recovery of the possession of the land, but also to recover Rs. 6,999 in money as interest, it appears to their Lordships that that judgment, so far as giving decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the plaintiffs merely to the possession of the land. In that case, the plaintiffs having got possession of the land, the question, as before observed, will remain open until the defendants seek to redeem the land. Then the question will arise—how much is due to the plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage?

Their Lordships therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the appellants are entitled to the costs of this appeal.

Agent for the appellants: Mr. *T. L. Wilson.*

Agents for the respondents: Messers. *Ochme and Summerhays.*

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[333] FULL BENCH,

Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

RAM KISHAN (*Plaintiff*) *v.* BHAWANI DAS (*Defendant*).*
[21st December, 1876.]

Sale in execution—Right of attaching creditor to sale proceeds—Suit for money received by the defendant for the plaintiff's use—Limitation—Act VIII of 1859, *s.* 270 *—Act* IX *of* 1871 (*Limitation Act*), *sch. ii, cls.* 15, 26, 60, 118.

Certain immoveable property was attached in execution of a money-decree held by *A*, dated the 22nd August 1871, on the 1st April 1872. The same property was subsequently attached in execution of a decree held by *B*, dated the 19th August 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of this decree. The Munsif directed that the proceeds of the sale should be paid to *B*. *A*, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that *A* was entitled to the proceeds, reversed the Munsif's order. *A* then obtained an order from the Munsif directing *B* to refund the money, which he did, and it was paid to *A*. *B* sued A to recover the money by establishment of his prior right to the same, and for the cancelment of the Judge's order, alleging that the same was made without jurisdiction.

Held, (by a majority of the Full Bench) that the suit was one for money received by the defendant for the plaintiff's use, and was therefore governed by cl. 60, sch. ii of the Limitation Act.

Per STUART, C.J , SPANKIE, J.—That the suit was not such a suit, but was one for which no period of limitation was provided elsewhere than in cl. 118 of the schedule, and that it was, therefore, governed by that clause.

Held, by the Division Bench that *A* was not entitled, as the first attaching creditor to the sale-proceeds.

[**F.**, 2 A. 354 ; **R.**, 32 C. 527=1 C.L.J. 167 ; **D.**, 13 C. 159.]

THE plaintiff in this suit claimed to recover from Bhawani Das, defendant, certain money being the part proceeds of a sale in execution of decree, by the establishment of his prior right to the same, and to render ineffectual a miscellaneous order made by the Judge of Mainpuri in another suit, dated the 7th November 1872. He alleged that the defendant had illegally realized the proceeds from him under the said order, which was made without jurisdiction. On the 12th March 1867, Ram Singh, defendant **[334]** in the two suits instituted by the present plaintiff and defendant, gave the plaintiff a bond for the payment of money in which he charged certain immoveable property with such payment. The plaintiff obtained a decree on this bond on the 19th August 1871, which directed that the property should be sold in satisfaction of the charge. Bhawani Das, who had obtained a money-decree against Ram Singh on the 22nd August 1871, caused the property to be attached in execution of his decree on the 1st April 1872. The plaintiff subsequently caused the property to be attached in execution of his decree. The property was sold in execution of the plaintiff's decree on the 20th July 1872. Bhawani Das claimed the whole of the sale-proceeds on the ground tha he had first attached the property. The Munsif ordered that the plaintiff's decree should be satisfied out of the

* Special Appeal No. 1226 of 1875, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 23rd September 1875, reversing a decree of Muhammad Nizam Ali Khan, Munsif of Etah, dated the 5th April 1875.

sale-proceeds and the balance paid to Bhawani Das. On appeal by Bhawani Das, the Judge of Mainpuri, on the 7th November 1872, declared that he was entitled to the whole of the proceeds, and reversed the Munsif's order. Bhawani Das then obtained an order from the Munsif directing the plaintiff to refund the money, which he did, and it was paid to Bhawani Das on the 26th March 1873.

In the present suit, Bhawani Das, defendant, contended in the Court of first instance that the suit was barred by limitation. The Court of first instance held that the suit was brought within time and being of opinioin that the plaintiff was entitled to recover the money in suit, gave him a decree for the same. The lower appellate Court also held that the suit was not barred by limitation, but being of opinion that the defendant was first entitled to be paid out of the sale-proceeds, by reason of his having first attached the property, it dismissed the plaintiff's suit.

On special appeal by the plaintiff to the High Court, it was contended by him that as the sale was ordered in execution of his decree to satisfy a charge declared by the decree, the defendant, the holder of a money-decree, only, was not entitled to be first paid out of the sale-proceeds by reason of prior attachment.

The Court (Pearson and Spankie, JJ.) referred the case to a Full Bench, the order of reference being as follows :—

[335] The ground of appeal is valid and is supported by two precedents which have been brought to our notice (1). But it is contended on the part of the respondent that the suit is barred by cl. 26, sch. ii, Act IX of 1871. We refer to a Full Bench the question whether that clause is applicable to the present suit, or, if not, which clause of that schedule is applicable.

Munshi *Hanuman Parshad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Ram Parshad*, for Bhawani Das, respondent.

OPINION.

PEARSON, TURNER, and OLDFIELD, JJ,, concurred in the following opinion :—

To determine what period of limitation is applicable to suit we must look to the nature of the relief sought. In the case before us, the principal relief sought is the recovery of the money. Although the plaint claims the concelment of the Judge's order and the declaration of plaintiff's prior right, these claims are subsidiary to the principal relief sought, and, indeed, since it is alleged in the plaint that the order impugned was not passed by a competent Court, it was unnecessary for the plaintiff to claim that it should be cancelled. Clause I5, sch. ii of the Limitation Act is clearly inapplicable, for that clause refers to suits brought to cancel the orders of competent Courts, it being declared that limitation runs from the date of the final order of a Court competent to pass the order.

If the Judge's order was passed by a Court which was not competent to pass it, the plaintiff is entitled to rely on the order of the Munsif as the only valid order, and in virtue of that order to contend that the money was wrongfully taken by the defendant. We do not say that the plaintiff may not be required to prove that the Munsif's order was right, that he was entitled to the priority which that order recognized. This must depend

(1) S. A., No. 228 of 1875, decided the 13th May 1875, and S. A., No. 601 of 1875, decided the 18th August, 1875.

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on the defence set up to his claim. Looking to the substantial relief sought, it appears to us that this suit must be regarded as a suit for money had and received to the plaintiff's use. It is then governed by cl. 60 of the schedule to the Limitation Act. If it is not a suit for money had and received to the plaintiff's use, then it falls under cl. 118 of the schedule, and in either case it has been brought within time.

[336] SPANKIE, J.—The claim was to get back a sum of money which the defendant had unlawfully and illegally realized from the plaintiff under an illegal and improper order of the Judge passed in appeal on the miscellaneous side. The Judge had no jurisdiction in the matter, there being no appeal, and the plaintiff seeks to have the order nullified. The suit is based on the plaintiff's preferential right to recover the money, being the proceeds of an auction-sale, he holding a decree which gave him a lien over the property and which ordered its sale in satisfaction of the decree. In satisfaction of the decree, the property was sold in due course and the entire decretal amount was made over to the plaintiff by the Munsif, who rejected the claim of the defendant, a third party, to be paid the sale-proceeds. The defendant appealed (there being no appeal), and the Judge reversed the Munsif's order, declaring defendant entitled to the amount. The defendant then obtained an order from the Munsif, directing plaintiff to refund the sale-proceeds that he had received, and plaintiff did so and defendant realized the money. Such is a brief abstract of the plaint, and it will be seen that the suit is really one for a declaration of the plaintiff's preferential right to the sale-proceeds as against the defendant, who also claims them, to have the Judge's order declared a nullity, and to get a refund of the money paid in consequence of that order from the defendant.

It was contended by respondent before the Division Bench that cl. 26, sch. ii, Act IX of 1871, bars the suit. We are asked whether that clause is applicable to the suit, or if not applicable, what clause is so.

In my opinion cl. 26, for taking or damaging moveable property does not apply to the suit. There is nothing in the claim which could be brought under this clause of sch ii. Nor is the plaintiff claiming any damages.

I was disposed to consider that cl. 15 might apply. But on fuller consideration, I do not think it is applicable. A suit under this clause is brought to alter or set aside a decision or order of the Civil Court in any proceeding other than a suit where the Court was competent to determine it finally. The Court therefore must [337] have jurisdiction which the Judge had not (1) when he reversed the Munsif's order giving the sale proceeds to the plaintiff. The order therefore is of itself a nullity and could have no effect. But even if the Judge had had jurisdiction, I am doubtful whether the clause would have applied as the plaintiff asks for something more than the reversal or, as he calls it, the nullification of the order. It has been suggested that cl. 60 applied; that this is a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. But I am unable to accept this view. The

(1) It has been held in the following cases that where there are rival decree-holders against the same judgment-debtor, not being parties to the same suit, an appeal will not lie by one of such rival decree-holders against an order relating to the distribution of the proceeds of the sale of the property of the judgment-debtor:— *Misree Kuwar* v. *Maharaj Buksh Singh*, Marsh. 527; *Harish Chunder Sircar* v. *Azimooddeen Shaha*, W. R., 1862—1864, p. 181; *Jangee Lal* v. *Birjo Beehari Singh*, 2 W.R., Misc. 21; *Afzuloonissa Begum* v. *Parbutty Koonwar*. 2 W R, Misc. 42, *Choonee Lal* v. *Futtoo Bukht*, 6 W.R. Misc. 74, and *Gogaram* v. *Kartick Chunder Singh*, B.L.R., Sup. Vol. 1022; S.C., 9 W.R, 515.

money was not in the first instance received by the defendant for the plaintiff. It was the plaintiff who had received it and who was compelled under legal process to refund the money. It was not the Judge who actually compelled the plaintiff to refund the money. It was the Munsif who directed the plaintiff to bring back the money to Court, and it is the Munsif's order that the plaintiff should have sued to set aside on the ground that the Judge had no jurisdiction to reverse the first order of the Munsif, and therefore the Munsif's second order could not be maintained. Both plaintiff and defendant claimed the sale-proceeds as their own, one by virtue of his decree which maintained his lien on the hypothecated property ordered for sale, and the other by virtue of his prior attachment of the property sold. When defendant obtained them in consequence of the Judge entertaining an appeal to hear which he had no Jurisdiction, the defendant received the money after it had been paid back into Court from the Munsif's Court for his own use, and not as belonging to the plaintiff, or to be held by defendant to his use. The plaintiff may be legally entitled to the sale-proceeds, but I do not think that it can be said that the defendant received the money under circumstances, which render the receipt of it a receipt to the use of the plaintiff. Even more, the plaintiff does not ask for the money on the ground of its having been so received by defendant, [338] but he prays the Court to declare his preferential right as against defendant to recover the sale-proceeds ; to nullify the Judge's order which led to his being compelled to refund the money into the Munsif's Court, and to have a decree given to him for the money against the defendant. I think with reference to the circumstances of this case that cl. 60 does not apply, and as I do not find any period of limitation provided for a suit of the nature of the one now before us, it falls within the terms of cl. 118 of the schedule, and six years would be the limitation from the time when the right to sue accrued.

STUART, C. J.—I am of the same opinion as that which Mr. Justice Spankie has given, although not without hesitation. I am clear that arts. 15, 26, and 60 do not apply, and there being apparently no other provision of the Limitation Act expressly applicable, the general law provided by art. 118 appears to afford the only solution of the question referred to us.

Appeal allowed.

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1 A. 338 (F.B.) = 1 Ind. Jur. 633.

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Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

ABDUL AZIZ AND ANOTHER (*Plaintiffs*), *Appellants v.* WALI KHAN (*Defendant*), *Respondent.** [11th January, 1877.]

Lease of Zamindari Right—Wrongful Dispossession of Lessee by Lessor—Suit for Compensation—Civil Court—Revenue Court—Jurisdiction—Act XVIII of 1873 (*N.W.P. Rent Act*), *s.* 95, *cl.* (*m*).

A granted B a lease of his zamindari rights in certain villages for a term of years at a fixed annual rent. Two years before the term expired, in breach of

* Special Appeal No. 311 of 1876, from a decree of G. P. Money, Esq., Judge of Bareilly, dated the 25th November, 1875, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge, dated the 17th March, 1875.

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the conditions of the lease, he dispossessed *B*, and thereafter made collections of rent from the agricultural tenants himself. *B* sued him in the Civil Court to recover the moneys so collected by him in those two years. *Held* (by a majority of the Full Bench) that the Courts of Revenue were open to *B*, and that, as he could obtain in such a Court the relief he sought in the suit by an application for compensation for wrongful dispossession, the Civil Courts could not, under cl. (*m*), s. 95 of Act XVIII of 1873, take cognizance of the suit.

Per STUART, C. J.. and SPANKIE, J.—That as the matter was not one on which *B* could make an application to a Revenue Court of the nature mentioned in cl. (*m*), s. 95 of Act XVIII of 1873, the suit was properly instituted in the Civil Court.

[R , 15 A. 387 (F.B.).]

[339] The plaint in this suit stated that the plaintiffs claimed to recover from the defendant certain moneys, which were illegally collected by the defendant in 1280 and 1281 Fasli, from certain villages leased to the plaintiffs by the defendant, after the lease (*katkina*) was in operation, and contrary to the conditions of the same, and which moneys the defendant had appropriated; and that the cause of action in respect of the money collected fn 1280 Fasli arose on the 1st Asadh 1281 Fasli (1st June 1874), and in respect of that collected in 1281 Fasli on the 1st Asadh 1282 Fasli (20th June, 1875). Under the lease, which was dated the 8th June, 1869, the defendant granted the plaintiffs for a term of five years his zamindari rights in the villages at a fixed annual rent. Two years before the expiry of this lease the defendant dispossessed the plaintiff of the villages, and made collections of rent from the tenants himself.

The Court of first instance and the lower Court of appeal agreed in holding that the suit was one for compensation for wrongful dispossession, as described in cl. (*m*), s. 95 of Act XVIII of 1873, and was therefore under that section cognizable only by a Court of Revenue.

On special appeal by the plaintiffs to the High Court it was contended by them that the suit was virtually one for money received by the defendant for the use of the plaintiffs, and was therefore cognizable by the Civil Courts.

The Court (Pearson and Spankie, JJ.) referred the case to a Full Bench, the order of reference being as follows:—

We refer to the Full Bench the question whether, as ruled by the lower Courts, they are precluded from taking cognizance of this suit by the provisions of s. 95, Act XVIII of 1873, with reference to cl. (*m*); or whether, as contended by the appellants, the suit being not one for compensation for wrongful dispossession, but for the recovery of money improperly received and wrongfully detained by the defendant (respondent), and in the eye of the law had and received by him for their use, is cognizable by the Civil Courts.

Mr. *Leach*, for the appellants.

[340] Pandit *Bishambar Nath* and Mir *Zahur Husain*, for the respondent.

JUDGMENT.

STUART, C. J.—I am clear that both the lower Courts are wrong, and that the suit is not one of the kind described in cl. (*m*) of s. 95 of Act XVIII of 1873. The lease given by the defendant to the plaintiffs was not merely an agricultural one, and did not simply establish the relation of landlord and tenant, but within its limits constituted an independent and indefeasible title and right which the defendant invaded. The defendant is therefore answerable to the plaintiffs in damages, the

measure of which materially is the money improperly received and wrongfully detained by him, the defendant, and such a claim is alone cognizable by the Civil Courts.

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PEARSON, TURNER, and OLDFIELD, JJ., concurred in the following opinion :—

The appellants took a lease of several villages from the respondents, and they allege that, after the lease had been acted upon the respondent in breach of the conditions of the lease collected the rents and profits which in virtue of the lease appertained to the appellants, and they have instituted the present suit to recover the sums actually collected. The respondent pleaded that the claim was virtually one for damages for wrongful dispossession and therefore could not form the subject of an application in the Revenue Court. To this the appellants have replied that the Rent Act does not apply to persons who in these Provinces are known as thikadars or katkinadars and in the old Regulation and Acts are denominated under-tenants, persons who take from the zemindars lease of their zemindari rights in lands.

Although no express mention of this class under any of the particular designations by which they are ordinarily known may be found in the Rent Act, when their position in relation to the lessors is regarded they are unquestionably tenants, and they are not deprived of this character because in relation to the actual cultivators of the whole or some parts of the property leased they may be described as landlords. They hold an intermediate estate in the property leased which the proprietors have as it were carved out of [341] their own estate; they hold the property leased under the proprietors; the payments they make to the proprietors are rent, and fall within the definition of that term in the Rent Act; and therefore, although all the sections of the Rent Act may not apply to such lessees, but some are restricted in their operation to particular classes of tenants, the persons whose position we are considering are not the less subject to those provisions of the Act which apply to tenants of all classes. Before the last Rent Act was passed it was not doubted that the class of thikadars was competent to sue and liable to suit in the Revenue Courts; and inasmuch as the intention of the framers of the Rent Act was to extend rather than curtail the jurisdiction of the Revenue Courts, the presumption favours the construction that the general provisions of the Rent Act apply to this equally with all other classes of tenants, save those who by the proviso to the first section are excluded from the operation of the Act.

There remains then the question raised by the respondent's plea that the Civil Courts are not competent to entertain the suit by reason of the provisions of s. 95 of the Rent Act. Although the suit is brought not to obtain damages for illegal dispossession, but to recover moneys which the appellants allege were payable to them under their lease, and which have been wrongfully collected by the respondent in breach of the provisions of the lease, it is clear that on an application for compensation for wrongful dispossession it would be incumbent on the Revenue Court to award compensation for wrongful collections actually made, as well as for the other profits which the lessees might have enjoyed had their possession not been disturbed; and it is also clear that by making collections in breach of the lease, the respondent disturbed the possession of the lessees. The 95th section of the Act prohibits Courts other than the Revenue Courts from taking cognizance of any dispute or matter on which an application of the nature mentioned in that section might be made. One

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of the applications mentioned in that section is an application for compensation for wrongful dispossession and inasmuch as under such an application the appellants could obtain what they now claim, it must be held that the jurisdiction of the Civil Courts is ousted, and that the appellants can obtain relief only in the Revenue Court.

[342] SPANKIE, J.—I cannot think that the provisions of cl. (*m*), s. 95 of Act XVIII of 1873, are applicable to the case referred to us. I regard the clause as applying to the ordinary tenant or agricultural ryot paying rent for the use or occupation of land, and not to the lessee of an entire estate for a fixed term of years as the plaintiff is, or rather was in the case before us. The application for compensation on account of wrongful dispossession referred to in cl. (*m*) must be brought within six months from the date of the wrongful dispossession, and the compensation applied for must refer to some loss or injury already suffered by the applicant, and not to the loss of profits in future year.

The plaintiffs were the lessees of several villages and aver that two years before their lease expired they were dispossessed by the lessor, who appropriated the collections of those two years. But for the wrongful ejectment, the lessees would have made the collections on account of those two years. They waive any claim, if they had one, for compensation under cl. (*m*), s. 95 of Act XVIII of 1873, and sue to recover in a Civil Court the sums actually collected by the defendant in breach of the terms of the contract between them. In such a suit the Collector could not give to the plaintiffs all the relief prayed for the compensation claimable under cl. (*m*) is for an injury that has already accrued in consequence of the wrongful dispossession, loss of seed sown, or of crop, or otherwise, on account of the harvest immediately following the wrongful dispossession. The ordinary tenant has no claim for compensation on account of future years; for under cl. (*n*), s. 95 of the Act, he can at once claim recovery of occupancy of the land from which he has been wrongfully dispossessed. So that the claim for compensation for the loss already sustained and for recovery of the land can proceed *pari passu*.

"Tenant" has not been defined in the Rent or Revenue Acts, though "landholder" has been defined to be the person to whom a tenant is liable to pay rent, and rent is whatever is to be paid, delivered, or rendered by a tenant on account of his holding, use or occupation of land. In Act XVIII of 1871 an Act for the levy of rates on land in the North-Western Provinces, tenant is described [343] as any person using or occupying land and liable to pay rent thereof, and land means land used for agricultural purposes or waste land which is culturable. Again, in the Rent Act there is no distinction made between a tenant holding on a patta, which is the ordinary term for a ryot's lease and a thikadar katkinadar, or other lessee holding for a term of years a portion of an estate, or the whole of it. Any one to whom the entire estate is leased is, for the term of his lease, placed in the position of the owner as regards the ordinary agricultural tenants of that estate. A lessee of this character does not fall within the provisions of ss. 24, 25, 26, or 27 of Act XVIII of 1873, for all other tenants mentioned in s. 27 must be those tenants who do not pay at fixed rates, and who are not proprietary and occupancy tenants, *i.e.*, they must be tenants without a right of occupancy: for the only classes of tenants recognized by s. 10 are—*first*, tenants at fixed rates; *secondly*, ex-proprietary tenants; *thirdly*, occupancy tenants; *fcurthly*, tenants without a right of occupancy. Having regard to the definitions referred to above and the classification of tenants in the Act, I find it difficult to bring in the lessee

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for a term of years of an entire mehal as tenant without rights of occupancy, and to include him in class 4. It seems to me that the section includes only agricultural tenants and classifies them in their relation to the landlord or other person, entitled to receive rent from them; but it does not include persons like the plaintiffs in the case before us, who for a certain fixed annual payment occupy the same position towards the four classes of tenants mentioned in the Act as the absolute owner of the estate would do, had he not for a term of years withdrawn himself from that position by assigning the management of his estate and the collection of rents from the ryots to another. I do not deny that a farmer or lessee could sue or be sued in certain suits under the old Rent Act which has been repealed. But the lessee could not have brought a suit of the nature of the one referred to us in a Revenue Court. He must have gone into a Civil Court. In the present Rent Act, whether designedly or by some accidental omission, an intermediate lessee between the owner of the property and his tenants appears to have been overlooked. Such a lessee might perhaps, as the person entitled to receive the rents form the agricultural tenants, sue for arrears due to him. But I think it doubtful [344] whether he could make an application to a Revenue Court under cl. (*n*) (application for the recovery of the occupancy of any land of which a tenant has been wrongfully dispossessed), s. 95, cl. (*n*) seems the complement of cl. (*m*), application by a tenant for compensation for wrongful dispossession, which applies to the tenants of the four classes specified in s. 10, and to them only.

With this view of the case, I would say that the suit was not barred, as the claim was not of the nature of an application that could be made to a Revenue Court under cl. (*m*), s. 95, Act XVIII of 1873, and that it was properly instituted in the Civil Court.

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1 A. 344.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

RAJABARDAKANTRAI (*Plaintiff*) *v.* BHAGWAN DAS AND OTHERS (*Defendants*).* [15th January, 1877.]

Interest under Regs. XV of 1793 *and* XVII of 1806—*Conditional decree for redemption.*

Under s. 6, Reg. XV of 1793, interest claimable under a bond must not exceed the amount of principal. Section 3, Reg. XVII of 1806, is not inconsistent with the application of Reg. XV of 1793, inasmuch as the Regulation of 1806 refers to *rates* of interest, and the Regulation of 1793 to *accumulations* of interest irrespective of rate.

A conditional decree fixing a period for payment of money found to be due on mortgage bonds entitling the mortgagor to redemption, though not claimable as of right by the mortgagor, who ordinarily should be ready at once with his money is a proper and judicious order passed by an appellate Court, where the Court of first instance determined the amount payable under the mortgage, but failed to fix any time in its decree for the payment of such amount.

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* Special Appeal, No. 1076 of 1876, against a decree of W. R. Benson, Esq., Officiating Judge of Benares, dated the 31st May, 1876, modifying a decree of Syed Ahmed Khan, C.S.I., Subordinate Judge of Benares, dated the 31st August 1876, decreeing the plaintiff's claim.

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THE plaintiff in this suit sued, tendering payment of Rs. 700, amount due on two bonds, one for Rs. 500, bearing no interest, and the other for Rs. 200, bearing interest at fifteen per cent. per annum to redeem and recover possession of three pucca houses with land appurtenant thereto, mortgaged by Krishna Ram, the agent of the plaintiff's ancestor, under a deed dated Magh badi, 11th Sambat 1851, or 16th January, 1795, to Musammat Pema, to whom [345] possession of the property was given under the deed. The bond for Rs. 200, bearing interest, contained a proviso that it should be tacked on to the mortgage-deed. The mortgagee's rights in two of the houses were sold by her representatives to third persons under a deed, dated 4th January, 1844, and the third house was sold under a deed, dated the 28th June, 1872, to Musammat Dakhee, as the ancestral property of the representatives of the mortgagee, the sale-deed containing no mention of the mortgagor's right therein.

The plaintiff's agent deprived Musammat Dakhee of possession of the third house ; and in a regular suit instituted by her for recovery of possession by virtue of the sale-deed, dated 28th June, 1872, it was eventually decided by the High Court in special appeal on the 31st March 1874, that Musammat Dakhee was entitled to possession as mortgagee, but not as proprietor under the sale-deed of 28th June, 1872.

The several defendants in possession under the above-named deeds pleaded limitation, and that plaintiff was not entitled to redeem without payment of the sum of Rs. 2,357-8-0, interest at fifteen per cent. per annum due on the bond for Rs. 200 tacked on to the original mortgage deed, dated 16th January, 1795, and to a further sum for additions, improvements, and repairs, made to the premises under the terms of the said deed.

The Subordimate Judge held that limitation was saved by the acknowledgment of mortgage rights contained in the deed of 4th June 1844, which recited the mortgagors' rights in all three houses as well as by the High Court decision of 31st March, 1874, and decreed plaintiff's claim or payment of Rs. 1,000, allowing Rs. 200 as maximum interest on the tacked bond for Rs. 200, under s. 6, Reg. XV of 1793, and Rs. 50 principal, plus Rs. 50 interest, for necessary repairs made to the buildings, and rejected the defendant's claim to the cost of the improvements. On defendant's appeal to the Judge he confirmed the Subordinate Judge's decision, but modified the decree of the Court of first instance by making redemption conditional upon the payment of the amount found to be due within one month from date of appellate Court's decision. The plaintiff in special appeal to the High Court impugned the validity [346] of the Judge's decree restricting the right of redemption to a period which curtailed statutory rights, and the defendants respondents in special appeal filed objections to the Judge's decree under s. 348, Act VIII of 1859, on the grounds that Reg. XV of 1793 was not applicable to the case, that defendants (respondents) were entitled to the cost of improvements as well as repairs, and that the Judge was not justified by law in giving plaintiff the benefit of a conditional decree for redemption.

Lala *Lalta Parshad*, for the appellant.

Munshi *Hanuman Parshad*, for the respondent.

JUDGMENT.

The High Court judgment after giving the facts of the case proceeded to determine the points in special appeal as follows :—

The plaintiff has appealed only with reference to that part of the judgment fixing a period for payment. We are of opinion that his objection

cannot be maintained. As the lower Court's decree stood, the payment might be made so long as the decree remained capable of execution, the judge's order limiting the period to a fixed one of one month from the date of his decision appears to be proper and judicious; a conditional decree of this nature cannot be claimed as of right by the mortgagor, who ordinarily should be ready at once with his money, and it scarcely lies in his mouth to question the order of the Court as exercising a discretion in this respect.

The respondents have preferred objections under s. 348, Act VIII of 1859, to the effect that Reg. XV of 1793 does not apply to the mortgage in suit so as to limit the interest in any way, and that the cost of improvements should have been allowed to them, and that a conditional decree should not have been given.

On the last point we see no reason to interfere, the Courts have been in the habit of granting such decrees under certain circumstances, and we cannot say that the order is not justified in this case.

The deed which is the subject of this suit was executed on 16th January, 1795, and the determination of the suit is governed by the law applicable to the province of Benares.

Regulation XV of 1793 was extended to the province of Benares by s. 2, Reg. XVII of 1806, and we are of opinion that s. 6, Reg. XV of 1793, will govern this case, and [347] that the lower Court's decision applying that provision, and only allowing the amount of interest on the loan of Rs. 200, equivalent to the principal, is correct.

By s. 6 of Reg. XV of 1793 "if the interest on any debt calculated according to the rates allowed by this Regulation shall have accumulated so as to exceed the principal, the Courts are not in any case whatever, excepting the cases specified in s. 12," (and this is not one of those cases) "to decree a greater sum for interest than the amount of such principal."

This section was extended to the province of Benares by s. 2, Reg. XVII of 1806, and came into force on 1st January, 1807, that is, it will govern the decision of suits instituted after that date; the Regulation nowhere declares that it shall not have retrospective effect in cases when the cause of action may have arisen prior to that date.

There is nothing in s. 3, Reg. XVII of 1806, inconsistent with its application. That section does no more than declare the *rate* at which interest is to be decreed in cases where the cause of action has arisen before a certain period; s. 3, Reg. XVII of 1806, refers to *rates* of interest; s. 6, Reg. XV of 1793, to *accumulation* of interest irrespective of rates. The two sections should be read together and so applied.

Nor is there anything in s. 6, Reg. XVII of 1806, which affects the question before us. That section declares that the rule by which redemption of mortgaged property takes place when the principal sum lent and simple interest due thereupon have been realized from the usufruct, shall not have retrospective effect in the province of Benares, but we are not called upon to apply that rule in the case before us, which is not a case where there is a question of principal and interest having been realized from the usufruct, but is one where interest is claimed on a loan and is realizable otherwise than from usufruct, and where the interest has accumulated so as to exceed the principal. It is a case to which s. 6, Reg. XV of 1793, is peculiarly applicable. We notice a decision of this Court at p. 194 of the volume for 1867, where the rule in s. 6, Reg. XV of 1793, has been applied. We also consider that the Judge is

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right in disallowing respondents [348] credit for expenses incurred in improvements of the property; they appear to have been unnecessary and not sanctioned by the terms of the mortgage.

We affirm the decree of the lower appellate Court, and dismiss the appeal, but each party will pay their own costs of this appeal.

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1 A. 348 = 1 Ind. Jur. 704.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

MUSAMMAT BHAWANI KUAR AND OTHERS (*Judgment-debtors*) *v.* GULAB RAI AND OTHERS (*Decree-holders*).* [30th January, 1877.]

Act VIII of 1859, *ss.* 236, 252—*Decree charging land—Immoveable property—Sale of judgment-creditor's right in immoveable property.*

The sale of a decree charging land for its satisfaction in the course of execution proceedings against judgment-creditor is a sale of an interest in immoveable property. *Held*, that the provisions of the Code of Civil Procedure relating to sales of immoveable property will apply to such sale.

[R., 9 M. 5 (9); 10 M. 169 (172); D., 15 A. 134 (135).]

IN the course of execution proceedings by Gulab Rai and another against Musammat Bhawani Kuar and another, the decree-holders, attached and brought to sale a decree, dated 23rd August, 1875, held by the judgment-debtors against Madho Singh and others in which certain land stood charged as liable to sale. The said sale was effected through the Court of the Subordinate Judge of Aligarh as though the decree, notwithstanding that it charged immoveable property, was itself moveable property. On application by Musammat Bhawani Kuar and another, judgment-debtors, to set aside the sale as invalid on the ground of its having been effected as a sale of moveable property, and no sale notification of the property as immoveable property having been promulgated or affixed, in consequence of which irregularities property worth Rs. 1,869 was sold for only Rs. 1,000, the Subordinate Judge held that the sale of the decree was of moveable property, and that under s. 252, Act VIII of 1859, the said sale could not be set aside. The Judge on appeal by the judgment-debtors was of opinion that inasmuch as only the [349] rights in the decree had been sold, the Subordinate Judge was right in holding the sale to have been one of moveable property and dismissed the appeal.

In special appeal to the High Court the judgment-debtors contended that the sale of a decree charging immoveable property should be governed by the law applicable to sales of immoveable property.

Lala *Lalta Parshad* and Pandit *Ajudhia Nath*, for appellant.

Pandit *Bishambhar Nath* and Pandit *Nand Lal*, for respondents.

JUDGMENT.

The High Court ruled the point in the following judgment remanding the case to the Judge for decision on the merits :—

A preliminary objection is taken by the pleader for the respondents under s. 252 of the Procedure Code which provides "no irregularity in the

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* Miscellaneous Special Appeal No. 71 of 1876, from an order of H. M. Chase, Esq., Judge of Aligarh, dated the 2nd August 1876, affirming an order of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 20th May 1375.

sale of moveable property under an execution shall vitiate the sale, but any person who may sustain any injury by reason of such irregularity may recover damages by a suit in Court." But this assumes that the subject of sale here is moveable property, and that the judgments of the lower Courts are right in that respect. We are, however, clearly of opinion that the right which is the subject of sale under the decree is legally of the nature of immoveable property, and that s. 252 does not therefore apply. As against the appellants the decree is for Rs. 1,593-3-0 together with Rs. 194-10-6, amount of costs, and it order sabsolutely that the money shall be recoverable from 5 biswas, 11 biswansis and 2½ kachwansis.

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The decree is, therefore, absolutely for money recoverable by sale of immoveable property hypothecated for its payment. The right and interest which it creates is a right in a judgment debt recoverable by sale of immoveable property charged with its payment. The decree thus conveyed to the decree-holders a subsisting interest in the nature of a charge on the hypothecated property, and the sale of their rights under the decree must be held to be a sale of such an interest in moveable property to which the provisions of the Code for sales of immoveable property will apply.

We reverse the order of the Judge and remand the case to him for decision on the merits, he has erred in considering the sale in this case to be a sale of immoveable property.

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1 A. 350.

[350] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

STOWELL, MANAGER, UNCOVENANTED SERVICE BANK, LIMITED (*Decree-holder*) *v.* BILLINGS (*Judgment-debtor*).* [31st January, 1877.]

Act VIII of 1859, ss. 285-341—*Act XIV of 1859*—*Act IX of* 1871—*Compromise under decree—Execution—Limitation—Payments under compromise—Proceedings under barred decree.*

Where a decree-holder entered into a compromise with the judgment-debtor agreeing to accept payment by instalments, which was ratified by the Court executing the decree, the case being struck off the execution file on the basis of the compromise and more than three years after the date of the Court's order sanctioning the compromise, subsequent proceedings were taken by the decree-holder to enforce the original decree. *Held*, that such subsequent proceedings when execution of the original decree had been already barred by limitation could not avail to keep the decree alive.

[Ap., 3 A. 585; R., 2 A. 322.]

THE execution proceedings in this case arose out of a decree passed by the High Court on the 5th January, 1869, against the judgment-debtor for Rs. 7,879-14-5, bearing interest at six per cent. per annum.

The Uncovenanted Service Bank, decree-holder, entered into a private arrangement with the judgment-debtor to accept payment, in monthly instalments bearing interest at 12 per cent. per annum. A petition was presented by the judgment-debtor on the 23rd August, 1869, to the Court of the District Judge, executing the decree. This petition notified the terms of the compromise, which acknowledged the decree-holder's right to revert to execution of the original decree with interest at the additional

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* Miscellaneous Regular Appeal No. 48 of 1876, against an order of H. G. Keene, Esq., Judge of Agra, dated the 22nd April 1876.

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rate in the event of failure of any two consecutive monthly instalments. The Court, on the 7th September 1869, ratified the said compromise and struck off the case from the execution file.

On the 15th February, 1873, the decree-holder applied for a certificate under s. 285, Act VIII of 1859, to enable him to execute the decree of 5th January, 1869, out of the Court's jurisdiction where the judgment-debtor resided. After notice to the judgment-[351]debtor, the certificate issued on the 25th April, 1873. No proceedings were taken by Government under the certificate as the judgment-debtor resumed payment of instalments to the decree-holder direct. On the 15th January, 1876, the decree-holder applied to the District Court at Agra, which had issued the certificate in April, 1873, to execute the decree of 5th January, 1869. The judgment-debtor pleaded that execution was barred by limitation, and that the decree had been satisfied.

The Judge overruled the plea of limitation on holding that under Act XIV of 1859, which he considered to be in force in 1873, the payment of instalments under a duly sanctioned agreement was a proceeding to enforce or keep in force a decree. The Judge cited a case (1) in support of his view and decided that limitation must be reckoned from date of the proceedings in 1873. On the other hand the Judge ruled that the compromise of 1869 could not alter or modify the terms of the High Court decree of 5th January, 1869, and dismissed the decree-holder's claim to interest thereon at twelve per cent. The decree-holder in appeal to the High Court among other objections to the mode in which the appellant's accounts had been prepared, pleaded that in decreeing simple interest at six per cent., and disregarding the arrangement of 1869 accepted by the judgment-debtor, and ratified by the Court, the Judge had acted against law and equity. The judgment-debtor, respondent, filed objections under s. 348, Act VIII of 1859, to the effect that execution of the decree was barred and that the appellant's accounts had been erroneously prepared.

Mr. *Conlar*, Mr. *Raikes*, Mr. *Mahmud*, and the *Junior Government Pleader* (Babu Dwarka Nath Banerji), and Munshi *Hanuman Parshad*, for the appellant.

Mr. *Ross* and Pandit *Bishambar Nath*, for the respondent.

JUDGMENT.

The judgment of the High Court after reciting the above facts continued as follows:—

The Judge holds that as Act XIV of 1859 was in force in March, 1873, when the notice to show cause was issued, there was "a proceeding to enforce or keep in force a decree," and therefore the present application made within three years from that date is within time.

[352] But respondent's counsel contends that in 1873, when the above proceedings took place, the decree which appears to be dated 5th January, 1869, was dead, and that it was even so if the time be reckoned from the 7th September, 1869, when the arrangement referred to was made. He also contends that no arrangement made between the parties though recognised by the Court can enlarge the period allowed by law for the execution of decrees, nor can the terms of a decree be varied by the Court executing the decree, and in support of this contention he cites the Full Bench ruling of the Calcutta Court dated 4th September,

(1) 1 B. 63.

1869, (1) and a decision of this Court to the same effect (2). This Court referred to the ruling of the Calcutta High Court already referred to and held that the receipts of instalments by a decree-holder out of Court in pursuance of a compromise made between him and his judgment-debtor is not a proceeding to enforce or keep in force a decree, and the Court added that the condition in a compromise that on default being made in a certain number of instalments, the decree should be executed in full, cannot prevent limitation from running. This Full Bench decision of the Calcutta High Court held that such a compromise, even though recognised by the Court executing the decree, could not enlarge the limitation, and therefore the ruling in that case applies more strictly to the case before us than the decision of this Court. But the principle is the same in both cases.

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1 A. 350.

When the two instalments fell due in May and June, 1872, more than three years had expired since the date of the decree and the fact that there were proceedings in 1873, which would make the application of 1876 within time, is we think of no service to the decree-holder. We must look behind the application of 1873 when pressed upon the point of limitation, and as more than three years had elapsed between the 7th September, 1869, and 15th February, 1873, the claim to execute the decree then and now is clearly barred.

We are therefore compelled to dismiss the appeal and reverse the order of the Judge, and we must do so with costs as the objections now urged by respondent were taken below.

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1 A. 353 (F. B.).

[353] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

ABLAKH RAI AND OTHERS (*Plaintiffs*) v. UDIT NARAIN RAI AND ANOTHER (*Defendants*).* [19th February, 1877.]

Act XVIII of 1873, *ss.* 8, 9—171—*Right of occupancy tenant when transferable—Sale in execution.*

Held (by a majority of the Full Bench) that the right of an occupancy tenant is transferable by sale in execution of decree, but only as between persons who have become by inheritance co-sharers in such right.

Per STUART, C. J. That such right is transferable by sale in execution of decree without any restriction.

[R., 10 C.P.L.R. 53 (54); **Cons.**, 2 A. 451 (F.B.); **D.**, 1 A. 547; 30 B. 290=7 Bom. L.R. 941.]

THIS was a suit to protect a right of occupancy from sale in execution of decree by cancelment of an order passed on the miscellaneous side. One Lekhraj was the occupancy tenant of certain land of which the plaintiffs were the proprietors. Udit Narain Rai, defendant in the suit,

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* Special Appeal, No. 288 of 1876, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 22nd December, 1875, affirming a decree of Maulvi Syad Bakhsh, Munsif of Muhammadabad, dated the 23rd August, 1875.

(1) 4 B. L. R. F. B. Rulings, p. 101, *Krishna Kamal Singh D. H.* v. *Hira Sirdar and others.*

(2) H.C.R. N.W.P. 1873, p. 100, *Abas Imam*, Appellant.

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caused Lekhraj's right of occupancy in the land to be attached in execution of a decree which he had obtained against him in a Civil Court. The plaintiffs preferred an objection to the sale of such right, but the same was disallowed on the 6th July, 1874.

Both the lower Courts dismissed the suit.

On special appeal by the plaintiffs to the High Court, the Court (Spankie and Oldfield, JJ.) referred to the Full Bench the question whether, having regard to s. 9 of Act XVIII of 1873, the right of occupancy held by occupancy tenants can be sold by public auction in execution of a decree of the Civil Court.

Maulvi *Obeidul Rahman*, for the appellants.

Munshi *Hanuman Parshad*, for the respondents.

OPINION.

STUART, C.J.—My opinion of the question submitted by this reference is an answer in the affirmative, and that the right of occupancy held by occupancy tenants can be sold by public auction in execution of a decree of the Civil Court. Section 9 of Act XVIII of 1873, after declaring that the rights of tenants at [354] fixed rates shall be heritable and transferable, goes on to provide as follows:—"No other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such right." I consider that the words "or otherwise" must be understood to be a general expression controlling the particular words which go before "grant will" and to mean "or otherwise by the voluntary act or deed *ejusdem generis* of the parties, and that they do not mean to exclude a transference of the right by sale in execution of a decree.

Our attention at the hearing was directed to s. 171 of the Act. By that section it is provided:—"In the execution of any decree for the payment of arrears of rent or revenue, or of money, under this Act, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor." If this section should be read in connection with s. 9, the construction I have put on the latter might be said to be strengthened, but it is unnecessary to consider that, as I hold that s. 9 is sufficient for this case, and that whatever else the parties in possession of the right of occupancy may do as voluntary agents, they cannot prevent a transfer by sale of that right under a decree against them, for in my opinion the right to enforce legal process against property cannot under any circumstances be taken away excepting by express words to that effect.

PEARSON, J.—Section 9, Act XVIII of 1873, declares that the rights of occupancy tenants other than tenants at fixed rates shall not be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights, which, therefore, if sold at auction in execution of a decree of the Civil Court, can only be sold to such persons, but subject to that restriction may thus be sold.

TURNER, SPANKIE and OLDFIELD, JJ., concurred in the following judgment:—

We see no reason to think that the Legislature intended to restrict the provision of the second paragraph of s. 9 of the Rent Act to voluntary transfers only. The first paragraph declares [355] generally that the rights of tenants at fixed rates shall from the date of the passing of the Act be heritable and transferable. In, as we read them, equally general

terms the second paragraph declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between persons who have become by inheritance co-sharers in such rights. The term "otherwise" is strictly equivalent to the term in any other way, and must we think include all transfers, whether voluntary or involuntary. It follows that rights of occupancy other than at fixed rates are not transferable by auction sale in execution of decree to strangers, but may be transferred by such sale to any of the persons in whose favour the exception is specially declared.

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1 A. 355 (F. B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

PARAS RAM (*Decree-holder*) v. GARDNER (*Judgment-debtor*).*
[21st February, 1877.]

Act IX of 1871, *sch. ii, art.* 167—*Act VIII of* 1859, *s.* 246—*Execution of decree—Limitation—Proceeding to enforce—Previous application—Intermediate suit—Objector.*

Held by a Full Bench (PEARSON, J., dissenting) that an application to execute a decree against judgment-debtor's property, made more than three years after the last application for execution was not barred by limitation under art. 167, sch. ii, Act IX of 1871, when the last application was interrupted by a successful objector against whom the decree-holder had to bring a regular suit and succeeded in obtaining a decree; and that the renewed application to execute within three years from the date of the decree in the said suit was not a fresh application for execution against the judgment-debtor, but a continuance or revival of the previous application interrupted by the objector.

Per PEARSON, J., *contra* that under art. 167, sch. ii, Act IX of 1871, execution of decree was barred.

[**Diss.**, 10 M. 22 ; **F.**, 5 A. 243 ; 5 B. 29 ; 28 M. 50 (**F.B.**); **Expl.**,23 A. 13 ; **R.**, 3 A. 484; 17 A. 425 ; 18 A 482 (**F.B.**) : 19 A. 71 ; 16 B. 294 ; 23 C. 397 ; 23 C. 437 ; 37 C. 796=12 C.L. J. 328=15 C.W.N. 337=6 Ind. Cas. 537 ; 13 C.W.N. 521 ; 14 M.L. J. 401 (**F.B.**); **D.**, 7 B. 293 ; 17 C. 268 ; 7 M. 595.]

PARAS RAM sued one Jehangir Samuel Gardner on a bond hypothecating a ten biswa share of Datlana, and obtained a decree on the 23rd March, 1871. An application for the execution of this decree was filed on the 10th June, 1871; and the 21st August, 1871 was fixed for auction sale of the property.

[356] One Dabi Das objected to the attachment of the said property in execution of Paras Ram's decree, on the ground that the share aforesaid had been advertised for sale in satisfaction of the decree of Birj Basi and others, and had been purchased by the objector. The objection was allowed on the 16th August, 1871 and the property was released from attachment.

On the 17th June, 1872, Paras Ram sued to bring to auction sale a seven-biswa share out of the ten annas purchased by Dabi Das. In this suit Dabi Das was the sole defendant, and it was decreed against him on the 10th August, 1872.

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* Miscellaneous Special Appeal, No. 10 of 1876, from an order of H. M. Chase, Esq., Judge of Aligarh, dated the 3rd December, 1875, affirming an order of Maulvi Sami-ul-Lah Khan, Subordinate Judge of Aligarh, dated the 2nd July, 1875.

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Subsequently on the 25th March, 1875, Paras Ram applied to the Court of the Subordinate Judge of Aligarh to execute the decree dated 23rd March, 1871, against Gardner.

The Subordinate Judge ruled that under the provisions of art. 167, sch. ii, Act IX of 1871, execution of the decree was barred, the suit against Dabi Das not being an application to enforce or keep in force the decree against Gardner.

The Judge in appeal holding that the decree-holder could have filed application to keep the decree in force against Gardner, whilst prosecuting the suit against Dabi Das, confirmed the judgment and decree of the Subordinate Judge.

Paras Ram in special appeal before the High Court contended that the regular suit against Dabi Das was an application to enforce the decree of 23rd March, 1871, and that art. 167, sch. ii, of the Limitation Act, did not apply to the case.

The Court (Turner and Oldfield, JJ.) referred for decision by the Full Bench the question whether Paras Ram's application, dated 25th March, 1875, for execution of the decree, dated 23rd March, 1871, was an application brought within the period allowed by art. 167, sch. ii, Act IX of 1871, referring to two cases (1) of the Calcutta High Court decided under Act XIV of 1859.

The Junior Government pleader (Babu *Dwarka Nath Banerji*) Pandit *Bishambhar Nath*, and Munshi *Hanuman Parshad*, for appellant.

The respondent was unrepresented.

JUDGMENTS OF THE FULL BENCH.

[357] The following judgments were delivered by the Court:—

STUART, C. J.—We are asked by the reference whether the application of the 25th March, 1875, has been brought within the period allowed by art. 167, sch. 2, Act IX of 1871. It was suggested that art. 167 does not apply to such a case, and no doubt it does not come so literally and precisely within the limits provided by the article. But in my view art. 167 does apply, inasmuch as the application of the 25th March, 1875, was not a new or fresh act, but was in legal continuance of the application of June, 1871, and in my judgment therefore art. 167 applies constructively, the three years allowed by the article being reckoned from the 10th August, 1872, when Paras Ram's rights as against Dabi Das were restored to him.

That the execution of the decree is not barred clearly appears from the dates and legal character of the procedure. Paras Ram, the appellant, obtained his decree on the 23rd March, 1871, and he applied for execution of it by attachment and sale of the hypothecated property on the 10th of June, 1871, and the 21st of August 1871, was fixed for the sale. In the course of the attachment, one Dabi Das objected to the sale on the ground that he had bought the property in execution of a decree he held against the same judgment-debtor, and on the 16th August of 1871, his objection was allowed. On the 17th of June, 1872 (being within a year from the 16th August, 1871), Paras Ram brought a regular suit against Dabi Das and obtained a decree in his favour on the 10th of August, 1872. On the 25th of March, 1875, Paras Ram filed an application for the execution of his original decree of March, 1871. It is not explained why he allowed the interval to elapse without attempting to use his decree, but he had

(1) VIII W.R. 98-99.

three years from the 10th of August 1872, and, therefore, as between that date and the 25th of March, 1875, he was clearly within his rights.

The interruption to the execution of his decree was not occasioned by any fault or laches of his own, but was caused by the illegal intervention of Dabi Das. Paras Ram's procedure, therefore, under his decree must be held to have been legally continuous, and he may proceed to its execution.

[358] As to the application of the 25th of March, 1875, being a fresh application having no such connection with what had gone before as we can now take judicial notice of, I cannot so regard it. On referring to it, I find that it recites the whole previous procedure and simply repeats the prayer for execution of the decree which was made in June, 1871. It was, therefore, an application in legal continuance of the former process up to the 10th August, 1872, when Paras Ram obtained his decree in regular suit, and it ought to be granted as being within time.

PEARSON, J.—The application of the 25th March, 1875, may be regarded as an application to the Court to proceed with the former application of the 10th June, 1871, the proceeding under which had been interrupted by Dabi Das' objection and the order allowing it; but if so regarded, is, nevertheless, in substance and effect an application for the execution of the decree of the 23rd March, 1871; and art. 167, sch. 2, Act IX of 1871, is applicable to it, and requires that it should have been presented within three years from the date of the former application above mentioned. It can scarcely be contended that there is no limitation to the time within which the decree-holder was competent to make such an application as that of the 25th of March, 1875; but if the limitation prescribed by art. 167 be not applicable, I do not find any other limitation provided by the law. I see nothing in the law to warrant us in ruling that he was at liberty or bound to make such an application within three years from the date of the decree obtained by him in his suit against Dabi Das on the 15th August, 1872. It might be reasonable and equitable to exclude from the computation of the period of limitation fixed by art. 167 the time during which such a suit was pending, but such a course is not authorized by the law. The absence of any provision for the exclusion of that time may be a defect in the law, and cases may be supposed in which the defect might cause hardship. In the present case the decree-holder delayed for 10 months to bring his suit against Dabi Das, and after obtaining a decree therein delayed for thirty-one months to apply to the Court to proceed with the execution of the decree of the 23rd March, 1871. His suit against Dabi Das was pending less than two months; and the exclusion from the computation of the period of limitation of the time during which it was pending would not [359] bring his application within time. In my opinion the lower Courts have rightly held art. 167 to be applicable to his application of the 25th March 1875, and preclude its entertainment.

TURNER, J.—The application made for the execution of this decree by attachment and sale proceeded to such a point that as against the judgment-debtor a sale was ordered when its further prosecution was interrupted by the intervention of a third party, who succeeded in establishing his objection to the satisfaction of the Court executing the decree. The only course open to the decree-holder to procure a revision of the order allowing the objection was by the institution of a regular suit against the objection. This course he adopted, and having obtained a decree setting aside the order allowing the objection and declaring the

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liability of the property to be brought to sale in execution of the decree he had obtained against the original judgment-debtor, he then applied to the Court executing that decree to proceed with the application for execution which had been interrupted. On the ground that the application we are considering is not a fresh application to execute the decree, but an application to carry out the order which as against the judgment-debtor had become final, and of which the prosecution was interrupted by the allowance of the objection of a third party since disallowed, I am of opinion that the provisions of the Limitation Act relating to applications for the execution of decree do not apply to it.

SPANKIE, J.—I accept the view that the application of the 25th March 1875 must be regarded as one for a continuance of the former proceedings in execution and not as a fresh application for execution within the meaning of art. 167, sch. ii, Act IX of 1871. Section 246, Act VIII of 1859 provides that a suit may be brought to contest an order made under it, and if the suit be duly instituted within one year as required by Act IX of 1871, and the order of the Court in execution be reversed, it appears to me that the decree-holder is at liberty to ask that the order which should have been, but was not, made should issue.

I hardly think that we are called upon to consider whether this view of the case would not do away with limitation altogether. **[360]** All that is contended is that the former application was practically reversed when a decree in the regular suit allowed by s. 246, Act VIII of 1859, reversed the order of the Court executing the decree. It may be said that there are circumstances in the case referred to us, which are unfavourable to the decree-holder and show that he did not use due diligence in bringing his suit or in making his application to revive the former execution proceedings. This may be so, and, if so, it is for the divisional bench to deal with that part of the case.

OLDFIELD, J.—I think we may hold that the last application may be considered as a continuance or renewal of the former application for execution in which the proceedings had been interrupted by the reference to the Civil Court, and were renewed on the second application, the latter will not therefore be an application to which the period of limitation in art. 167 will apply.

ORDER OF THE DIVISION BENCH.

THE DIVISION BENCH, TURNER AND OLDFIELD, JJ., made the following order in the special appeal.—In accordance with the opinion expressed by the majority of the Court, we hold the application within time. Setting aside the order of the Courts below, we remand the application for disposal on the merits to the Subordinate Judge's Court. Costs of the appeal in the Judge's Court and in this Court to abide and follow the result.

1 A. 360=1 Ind. Jur. 851.

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APPELLATE CIVIL.

1 A. 360=1 Ind. Jur. 851.

APPELLATE CIVIL.

(*Before Mr. Justice Pearson and Mr. Justice Turner.*)

CHUNIA AND ANOTHER (*Plaintiff*) *v.* RAM DIAL AND ANOTHER (*Defendants*).* [2nd February, 1877].

Act VII of 1870 (*Court Fees Act*) ss. 3 (c), 12, *and sch.* (*ii*) *art.* 17 (*iii*)—*Suit for a Declaratory Decree—Consequential Relief—Decision of questions relating to valuation—Appeal.*

Section 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee, but does not prevent a Court of appeal from determining whether or not consequential [361] relief is sought in a suit, so that it may determine under what class of cases the suit falls for the purpose of the Court Fees Act.

A suit by a person against whom an order has been made, under s. 246 of Act VIII of 1859, disallowing his claim to the attached property, for a decree declaring his right to the property, need not be valued according to the value of the property, but can be brought on a stamp of Rs. 10, under Act VII of 1870, sch. ii, art. 17 (iii) (1).

[N.F., 13 C. 162 ; F., 28 C. 334 ; 12 C.L.R. 148 ; R., 2 A. 720 (F.B.) ; 7 A. 528; 12 A. 129 (F.B.) ; 16 A. 308 (312) (F.B.) ; 23 B. 486 ; 31 C. 511 ; 4 M. 204 ; Cons., 4 M. L.J. 183 F.B.).]

THIS was a suit in which the plaintiffs, who were still in possession, claimed a declaration of right as owners to the moiety of certain shops, and to the whole of a certain other shop. They had preferred a claim to this property, when attached in execution of decree, but after investigation their claim had been disallowed under s. 246 of Act VIII of 1859, on the 27th March 1875.

On the institution of the suit, the plaintiffs paid in respect of the plaint a Court-fee of Rs. 10, being the fixed fee payable under Act VII of 1870, sch. II, art. 17 (iii), in respect of a plaint of a memorandum of appeal in a suit where no consequential relief is prayed. Subsequently by order of the Court of first instance, they had paid a Court-fee computed on the market value of the property in suit. The Court of first instance dismissed the suit.

The plaintiffs appealed, praying in respect of their memorandum of appeal the same Court-fee as they had, at first paid in respect of the plaint in the suit. On the 5th May 1876, on the appeal coming on for hearing, the lower appellate Court being of opinion that consequential relief was sought in the suit, returned the memorandum of appeal to the plaintiffs, directing them to pay in respect of the same a court fee computed on the market value of the property, and to present it again within three days. On the 26th June 1876, the plaintiffs having failed to present the

* Special Appeal, No. 1032 of 1876, from a decree of S.S. Melville, Esq., Judge of Cawnpore, dated the 26th June, 1876, affirming a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 27th September 1875.

(1) See, however, *Mufti Jalaluddeen Mahomed* v. *Shohorullah*, 15, B.L.R., App. 1, in which it was held that a suit brought under the provisions of s. 246 of Act VIII of 1859 to set aside an order allowing a claim to attached property and releasing the property from attachment in a suit to try the title and establish the right of the person who brings the suit, and such a suit must be valued according to the value of the property, and cannot be brought upon a stamp of Rs. 10, under No. 17 of sch. ii of the Court Fees Act ; and *Motichand Jaichand* v. *Dadabhai Pestonji*, 11 B.H.C.R. A.C.J. 186, where it was held that a suit, having for its object the relief of property from attachment, seeks consequential relief.

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memorandum of appeal as directed, the lower appellate Court dismissed the appeal.

[362] On special appeal by the plaintiffs to the High Court, it was contended on their behalf that inasmuch as no consequential relief was sought in the suit, but a declaration of right only, the plaintiffs were right in paying a fee, in respect of their memorandum, of Rs. 10.

Mir *Akbar Husain*, for the appellant.

Pandit *Ajudiah Nath* and Babu *Aprokash Chander Mukerji*, for the respondents.

JUDGMENT.

It is contended by the respondents that the Court is bound by the provisions of s. 12 of the Court Fees Act and cannot determine whether this suit is one in which specific relief is sought or not, so as to determine under what class of cases it falls for the purpose of the Court Fees Act. We observe, and it has been so held in the Calcutta Court (1), that s. 12 of the Court Fees Act prohibits appeals on questions "relating to *valuation* for the purpose of determining the amount of a fee." There is no question of valuation for the purpose of determining the amount of a fee raised in the appeal before us, for if the appellant is right in his contention, a special and certain fee is fixed for all suits of the nature of the present suit and no question of valuation arises. We therefore overrule the objection and entertain the appeal.

It appears to us that the appellant correctly contends he seeks a declaration of right and no consequential relief. The Civil Procedure Code declares that a person against whom an order is pessed under s, 246 may bring a suit to establish his right. If he obtains a decree in such a suit he will then present himself to the Court executing the decree by which the order was made, and that Court will be bound to recognize the right declared, and either withdraw or order attachment as the case may be. We set aside the decree of the lower appellate Court, and remand the case to that Court for decision on the merits. Costs of this appeal to abide and follow the result.

Decree set aside and case remanded.

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1 A. 363=1 Ind. Jur. 818.

[363] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

ABDUL RAHIM (*Defendant*) *v.* RACHA RAI AND ANOTHER (*Plaintiffs*).*
[14th February, 1877.]

Act VIII of 1859 (*Civil Procedure Code*), ss. 376, 378—*Review of Judgment—Appeal.*

Although the order itself for granting a review of judgment is final, yet in appeal against the decision passed in review, objection may be taken that the review was improperly granted (2).

* Special Appeal, No. 1028 of 1876, from a decree of Pandit Har Sahay, Subordinate Judge of Azamgarh, dated the 16th July 1876, affirming a decree of Lala Mahabir Prasad, Munsif of Nagra, dated the 29th June, 1875.

(1) See *Gango Monee Chowdhrain* v. *Gopal Chunder Roy*, 19 W.R. 214.

(2) See also *Bhyrab Chunder Surmah* v. *Madhubra Surmah Chowdry*, 11 B.L.R. 423, in which case it was held by a Full Bench of the Calcutta High Court, that parties

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1 A. 363 = 1 Ind. Jur. 818.

An application for a review of judgment was made to a Court of appeal on the ground that certain very material documents on which the Court of first instance had relied had been summarily discredited without being inspected by the Court of appeal, and that the Court of appeal had erred in declaring the report of a Commissioner appointed by the Court of first instance for the purpose of making a local enquiry to be unworthy of reliance because he was a muharrir of the Court of first instance.

Held that, in granting the review applied for, the lower appellate Court had not exceeded the discretion vested in it by law.

THE Court of first instance gave the plaintiffs in this suit a decree on the 29th June 1875. On appeal by the defendant the lower appellate Court, on the 29th November 1875, reversed the decree of the Court of first instance and dismissed the suit. On the 17th January 1876, the plaintiff applied for a review of the lower appellate Court's judgment. On the 15th April 1876, the lower appellate Court made an order for granting the review, and on the 15th July 1876, after re-hearing the appeal, it dismissed the same.

On special appeal by the defendant to the High Court it was contended that the review of judgment was improperly granted, inasmuch as no new evidence had been adduced, nor was it shown [364] that there had been any error in law in the former judgment, and that if any new evidence was adduced no reason as required by law was given for its not having been produced at the original trial of the case.

On behalf of the respondents it was contended that an order for granting a review of judgment was final, and no objections to the same could be taken in appeal.

Mr. *Raikes*, Pandit *Bishambar Nath*, and Shah *Asad Ali*, for the appellant.

Lala *Lalta Parshad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court :—

STUART, C. J.—I agree with Mr. Justice Pearson that although an order on an application for a review of judgment is final, objection may be taken in special appeal against that order, and that, therefore, the present special appeal was competently preferred. I am also of opinion with him that the review of judgment was properly granted in this case, and that the evidence on which it was based was material and essential to the just determination of the suit.

In his judgment of the 29th November 1875, the first Subordinate Judge points out the particulars in the way of evidence in regard to which the plaintiffs' case in his opinion was defective, *viz.*, the absence of any sufficient evidence of the arbitration award of the patwari's deposition; and further, in allusion to the circumstances that the plaintiffs had not adduced any parol testimony, he remarks—" Besides this no documentary evidence, such as 'khasra,' 'khatani,' or rent-roll, has been filed on the part of the plaintiffs, from which it could have been shown that the names of the plaintiffs and their ancestors were ever recorded as shareholders in respect of this grove." All this important information, however, was subsequently supplied, and it was considered by the second Subordinate Judge when the application for a review of his predecessor's judgment

in a special appeal were at liberty to show that there had been error or defect in procedure by the granting of the review, which had affected the decision of the case upon its merits by producing a different decision from what had been before come to. See, however, *Gurumurtti Nayudu* v. *Pappa Nayudu*, 1 M.H.C.R. 164 ; and *Dhunka Devla* v. *Hira Ramla*, 4 B.H.C.R. A.C.J. 57.

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(in which application, it is to be observed, it was distinctly offered) was before him, and as the new evidence, which it appeared had been filed with some other record, and the first Subordinate Judge had not, therefore, an opportunity of perusing it **[365]** showed not only good and sufficient reason, but also evident error and omission, the review was properly and justly granted. This special appeal, therefore, fails and is dismissed with costs.

PEARSON, J.—Under the provisions of s. 378, Act VIII of 1859, the order made by a Court to which an application for a review of judgment is preferred, whether for rejecting the application or for granting the review, is final, but I am nevertheless of opinion that objection may be taken in appeal against the decision passed on review on the ground that the review was improperly granted. I proceed, therefore, to consider the pleas in appeal.

In his decision of 29th November 1875, the officiating Subordinate Judge observed that "the Munsif, in proof of the plaintiff's right, had relied on a copy of the abitration award, dated Aghan Badi 5, 1265 Fasli, wherein the share of Adhar Rai's brothers, *i.e.*, the ancestors of the plaintiffs, has been declared. A copy of the award is, however, not filed on the record in this case, though it may have been filed with the records of the case formerly decided, but there is no trace of the original award, and the Munsif himself admits that it is not signed by the presiding officer. Then, under these circumstances, it is quite useless to rely on such a paper which is not free from suspicion, and no arguments can be adduced in support of its genuineness. The copy of the patwari's deposition also is not filed in this case, and the said copy, without its original, and in absence of the original arbitration award, is of no use." The lower appellate Court's proceeding of the 15th April last states that "the application for review is filed with three copies, and it is urged briefly that the aforesaid copies were not perused at the time of the disposal of the appeal case, and that they go to establish the averment of the plaintiffs. It appears on reference to the record that really the above-mentioned copies were not perused at the time of disposing of the appeal case. The reason for the non-production of the said copies on the first occasion as stated by the petitioners is that the copies in question were filed with the record of some other case, and this appears to be a good reason." The application for review of judgment was therefore allowed, and the result has been the confirmation of the judgment of the Court of first instance.

Referring to the pleas in appeal, I remark that the adduction of newly discovered evidence is not the only ground on which a **[366]** review of judgment may be allowed. "Any other good or sufficient reason" is permitted by s. 376, and s. 378 allows a review to be granted when "necessary to correct an evident error or omission, or otherwise requisite for the ends of justice. "In this case it would seem that some very material documents on which the first Court had relied had been summarily discredited without being inspected by the lower appellate Court, which, if it did not think proper to call for and inspect the record of the case in which copies of those documents were to be found, might at least have given the plaintiffs permission to file copies of them. The application for review of judgment urged, moreover, that the lower appellate Court, in its decision of the 29th November, 1875, had erred in declaring the report of the Commissioner appointed by the Munsif for the purpose of making a local enquiry to be unworthy of reliance, because he was a muharrir of the Munsif's Court, and it is presumable that the lower appellate Court was

influenced by this argument in granting the application. On the whole I see no sufficient reason for holding that the lower appellate Court exceeded the discretionary power vested in it by the law in granting the review applied for, or that the reasons assigned by it for its final decision are insufficient in law. I would, therefore, dismiss the appeal with costs.

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Appeal dismissed.

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1 A. 366=1 Ind. Jur. 777.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

BISHESHUR SINGH (*Plaintiff*) *v.* MUSAMMAT SUGUNDHI (*Defendant*).*
[10th February, 1877.]

Act XVIII of 1873, ss. 93, 189, 191—*Appeal to Judge—Proprietary right—Rent—Revenue—Sub-proprietor—Settlement.*

Where the defendant pleaded in answer to plaintiff's suit for arrears of rent that defendant no longer held as tenant but as sub-proprietor under settlement made direct with defendant by settlement officer, *held* that under s. 189 of Act XVIII of 1873 the suit involved a question of proprietary title, and that an appeal lay to the Judge of the district, although the amount in suit was less than Rs. 100.

[367] THIS was a suit to recover arrears of rent for the kharif of 1283 Fasli under s. 93 of Act XVIII of 1873, on the strength of a decree passed by the High Court in a previous suit between the parties. The defendant pleaded that since the date of that decree there had been a sub-settlement made by the settlement officer for the revenue of the land in dispute, direct with the defendant, of whose malikana holding the land formed part, and that, therefore, there could be no liability for rent to the plaintiff. The Assistant Collector decreed the claim, but on appeal by the defendant, the Collector of Fatehpur reversed the Assistant Collector's decision, holding that defendant could not be made liable, as tenant to plaintiff, for rent, since defendant's status as a sub-proprietor had been definitely determined by the settlement officer, and revenue became payable to the plaintiff, as lambardar, on land previously not assessed. The Collector further held that plaintiff's remedy lay in an application for revision of the settlement proceedings.

The Judge of Cawnpore, on appeal by plaintiff, ruled that as the Collector considered the defendant's status had been definitely determined and the value of the suit being less than Rs. 100, no appeal lay to the Judge under s. 189 of Act XVIII of 1873.

A division bench of the High Court, in special appeal by the plaintiff, reversed the decision of the Judge in the following judgments, which ruled that the suit involved a question of proprietary title, and that therefore an appeal did lie to the Judge.

Lala *Lalta Prasad*, for appellant.

Pandit *Ajudhia Nath* and the Junior Government Pleader (Babu *Dwarka Nath Banerji*), for respondent.

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* Special Appeal. No. 1271 of 1876, from a decree of S. S. Melville, Esq., Judge of Cawnpore, dated the 8th August 1876, affirming a decree of G.L. Lang, Esq., Collector of Fatehpur, dated the 3rd May 1876.

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JUDGMENT.

STUART, C. J.—In this case I am clear that there is a question of proprietary title within the meaning of ss. 93 and 189, Act XVIII of 1873, and that the Judge was bound to hear and determine the appeal to him, and that being so, this special appeal was under s. 191 of the same Act competently preferred. This suit is to recover Rs. 5 on account of arrears of rent, and in defence defendant asserts a sub-proprietary right in respect of which a sub-settlement was made with her for revenue, and that she is not a tenant liable to pay rent. Thus a question of title is directly raised, and it is unnecessary to say more. We therefore allow [368] this appeal, reverse the order of the Judge, and remand this case for disposal on the merits under s. 351 of Act VIII of 1859. Costs to abide the result.

OLDFIELD, J.—The first and second pleas in appeal are valid. The plaintiff sues defendant as a tenant for the recovery of arrears of rent, and the defendant pleaded that she held the land as a proprietor subject to the payment of revenue, but not of rent. The Collector decided that the settlement officer had determined that she was a sub-proprietor liable for revenue, and he held that this decision of the settlement officer was final and binding until set aside, and he therefore dismissed the suit. The settlement officer has thus in this suit determined the proprietary title of the defendant on the basis of the settlement officer's order. His decision *in this suit* is not the less a decision of proprietary title, because another Court may have already in another case decided the same. His decision no doubt is one of fact, whether the settlement officer has made any such order, but it involves for the purposes of this suit a decision of title when it determines the effect of the settlement officer's order on a title. It is possible that the order may have been wrongly interpreted, or is not binding, though I offer no opinion on this point. An appeal will therefore lie to the Judge, and I would reverse the decree and remand the case under s. 351 of Act VIII of 1859, for a trial on the merits. Costs to abide the result.

Decree set aside and cause remanded.

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1 A. 368=1 Ind. Jur. 741.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BINDA PRASAD AND OTHERS (*Appellants*) *v.* AHMED ALI AND ANOTHER (*Respondents*).* [14th March, 1877.]

Execution—Acquiescence.

Certain property was attached in execution of a decree against the judgment-debtor in the year 1847. This attachment was set aside on the application of persons claiming the property as their own. These persons were sued [369] together with the judgment-debtor, by the judgment-creditor, and another decree was passed in 1855, declaring the said property liable to sale in execution of the decree of 1847. The decree of 1847 has been satisfied in part in execution proceedings taken under the decree of 1855 against the heir of the judgment-debtor. *Held*, that the balance of the decree of 1847 could not be recovered in execution under the decree of 1855, against the heirs of the judgment-debtor, and that no

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* Miscellaneous Special Appeal, No. 76 of 1876, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th November 1876.

acquiescence in the past on the part of the judgment-debtor under the decree of 1847 could render such execution valid.

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THIS was a miscellaneous special appeal to the High Court arising out of the following circumstances. In the year 1847 one Fakira Ram obtained a money-decree against Sheo Din Rai, the father of the appellants, objectors in the present execution proceedings. Fakira Ram having sold that decree to Abdul Hayi, the ancestor of the respondents decree-holders, the said Abdul Hayi in execution of the decree of 1847, caused certain landed property to be attached and advertised for sale, as the property of Sheo Din Rai. Musammats Myna Kuar and Gulab Kuar preferred objections to this attachment, claiming the said property under an arbitration award. The objections was allowed and the property released from attachment. The decree-holder, Abdul Hayi, subsequently brought a regular suit against the said objectors and Sheo Din Rai, claiming to have the property released brought to sale in execution of the decree of 1847, on which a balance of Rs. 1,200 remained due. The decree in this suit, dated the 28th March 1855, declared the property liable to sale in satisfaction of the said balance, but exempted Sheo Din Rai from costs and interest on the ground that he had been no contesting party, either in the execution proceedings, or in the regular suit. The said decree of 1855 had erroneously continued in execution by the representatives of the decree-holder, Abdul Hayi, against the heirs of the judgment-debtor, Sheo Din Rai, at various periods from the year 1855, down to the last application for execution on the 23rd November 1875, when execution was sought for a balance of Rs. 5,865-11-11, alleged to be still due on the said decree, The heirs of the judgment-debtor filed objections on the 9th May 1876 to this last application for execution, pleading that the decree of 1847, and not the one of 1855, was the decree under which alone the objectors could be made liable, inasmuch as the decree of 1855 was limited to the declara- [370] tion of the decree-holder's right to bring to sale the property claimed by persons other than Sheo Din Rai, and that Sheo Din Rai was expressly declared not liable to costs and interest under the said decree, and that execution of the decree of 1847 wss barred by limitation.

The Subordinate Judge of Cawnpore disallowed the above objections, except with respect to the item of costs on the decree of 1855, which, by the Subordinate Judge's order, were declared not recoverable from the objectors. On appeal by the objectors, the Judge held that the objections were nominal, and that the previous applications for execution of the decree of 1855 having been resisted on the grounds other than the present, which had been overruled by the High Court, it was not competent to the judgment-debtors to raise new pleas against the said execution.

The appeal was accordingly dismissed, and the heirs of the original judgment-debtor filed a special appeal in the High Court on the grounds that execution of the decree of 1847 was barred by limitation, that the decree of 1855 was neither against the special appellants nor their ancestor, and that the appellants were not precluded from raising the present objections by their omission to raise the pleas in previous stages of execution.

Lala *Lalta Prasad*, for appellant.

Pandit *Bishambhar Nath*, for respondent.

JUDGMENT.

The respondents are the holders of a decree dated the 28th March 1855, and have applied for its execution against the appellants who are the

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representatives of one Sheo Din Rai by realization of Rs. 5,865-11-11, from the judgment-debtor's property.

It appears to us that the objection taken by the appellants is valid, that the respondents cannot recover the money under this decree from appellants.

There was a decree dated 9th June 1847 against Sheo Din Rai for a a sum of money, and in its execution certain ladies objected to the sale of certain property, claiming it in their own right.

The decree-holder in consequence brought a suit against them and the judgment-debtor, Sheo Din Rai, and it was in this [371] suit that the decree dated 28th March, 1855, which is now in execution, was made.

The object of that suit was to have certain property claimed by the ladies declared liable to sale in execution of the decree of 1847, and if the judgment and decree be examined it will be seen that the claim was only decreed against the ladies, and the decree was in effect a declaration that the property was not the property of the ladies, and so far as their claim to it was concerned, it was liable to satisfy the decree of 1847. The decree-holder cannot realize the balance of the decree of 1847 under the decree of 1855, by executing it against those who are the judgment-debtors under the former decree, but this is what he has been doing. The balance still due of the decree of 1847 can only be recovered in execution of that decree, and it is no answer to the objection that respondent has on previous occasions taken out execution in the same way without opposition on the part of the appellants. There has been a grave illegality which no acquiescence in the past can justify.

We decree the appeal and set aside the orders of the lower Courts with costs.

Appeal allowed.

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1 A. 371 = 1 Ind. Jur. 742.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

MUSSAMAT JAGESRI KUAR (*Plaintiff*) *v.* RAM NATH BHAGAT AND ANOTHER (*Defendants*).* [14th March, 1877.]

Declaratory decree—Suit by reversioner.

The plaintiff's mother was entitled to certain property for her life under award, under which the plaintiff was entitled to succeed to the property after her mother's death. The plaintiff sued her mother and the holder of a decree, in execution of which the property had been sold, praying for a declaration of her right to succeed to the property, and that the said decree and sale might be declared void against her; alleging that the decree had been obtained and executed by collusion between the defendants. *Held* that the suit could be maintained under the exception in the judgment of the Privy Council in *Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuri Natchiar* alias *Kattama Natchiar* v. *Dorasinga Tevar* alias *Gowry Vallaba Tevar* (1).

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* Special Appeal, No. 1469 of 1876, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 25th November 1876, reversing a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 11th January 1876.

(1) 15 B.L.R. 83.

[372] THE plaintiff in this case, the daughter of one Ganga Dubey, sued to have her right declared to certain paternal ancestral gaundadary property, and to have a decree of the 21st August 1863, and the auction sale of a four-anna share of the above property, in execution of the said decree, declared void against her by reason of collusion and fraud between the defendant Ram Nath Bhagat, the holder of the alleged collusive decree, and the auction-purchaser of the said property, and defendant Anjora Kuar, mother of the plaintiff. The latter defendant was entitled to the said four-anna share during her lifetime, under an arbitration award which reserved plaintiff's right as daughter to succeed to the said property on the death of her mother. The Subordinate Judge of Ghazipur decreed the suit, finding distinctly the existence of fraud and collusion between the two defendants on the issues of fact framed in the case. The first defendant, the decree-holder, appealed from the said decree to the Judge of Ghazipur. The Judge, without deciding the case on the merits, held on the strength of rulings of Her Majesty's Privy Council (1) that, inasmuch as the plaintiff's suit did not involve any right to consequential relief, such a suit could not be maintained during the lifetime of the widow, and the Judge accordingly dismissed the suit. The High Court over-ruled the Judge as to the effect of the latest ruling of the Privy Council and remanded the case under s. 351 of Act VIII of 1879, for trial.

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Munshi *Sukh Ram*, for appellant.

Pandit *Ajudhia Nath*, Lala *Lalta Prasad*, and Pandit *Anandi Lal*, for respondents.

JUDGMENT.

The following judgment was delivered by the Court:—

We are of opinion that the present suit is maintainable. The Lords of the Privy Council (2) expressly except the case of a [373] suit brought by a Hindu reversioner from the operation of the general rule.

The appeal is decreed and the suit remanded under s. 351 for trial. Costs of the appeal to abide and follow the result.

Appeal decreed and cause remanded.

(1) *Sree Narain Mitter* v. *Sreemutty Kishen Soondary Dassee*, 11 B.L.R. 171; *Strimathoo Moothoo Vijia Ragoonadha Ranee Kolandapuree Nátchiar* alias *Kattama Natchiar* v. *Dorasinga Tevar* alias *Gowry Vallaba Tevar*, 15 B. L. R. 83.

(2) *Strimathoo Moothoo Vijia Ragoonadha Ranee Kolandapuree Natchiar* alias *Kattama Natchiar* v. *Dorasinga Tevar* alias *Gowry Vallaba Tevar*, 15 B. L. R. 83.

The portion of the judgment of their Lordships referred to here was as follows:—

"The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindu female in possession from acts of waste, although his interest during her life is future and contingent. Suits of the kind form a very special class and have been entertained by the Courts *ex necessitate rei*."

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1 A. 373=1 Ind. Jur. 778.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

AKBAR KHAN AND OTHERS (*Plaintiffs*) *v.* SHEORATAN AND OTHERS (*Defendants*).* [20th March, 1877.]

Regulation VII of 1822, *s.* 9, *cl. i—Act XIX of* 1873, *s.* 66—*Cesses—Civil Court—Suit for declaration of zamindari rights to cesses.*

Notwithstanding the zamindari cesses cannot be collected until recognized and sanctioned by the Settlement authorities, there is nothing in Regulation VII of 1822 or Act XIX of 1873 to preclude a Civil Court from taking cognizance of suits seeking a declaration of zamindari rights to such cesses.

THE plaintiffs sued for a declaration of their rights as zamindars to half the fruit and timber of certain groves which they alleged they were entitled by ancient custom to receive. The Officiating Munsif of Azamgarh found in favour of the existence of the custom and decreed the suit.

The Judge, on appeal by the defendants, held that s. 66 read in connection with preceding sections of Act XIX of 1873 was a bar to civil suits seeking to establish rights to cesses, unless such rights had been recorded by the Settlement Officer; and the Judge, without entering into the question of existence of the alleged custom, dismissed the suit on the ground that the Settlement Officer had not recorded the existence of such rights.

The High Court remanded the case under s. 354 of Act VIII of 1859 over-ruling the Judge as to the inadmissibility of the suit in the following order:—

Mr. *Colvin* and Munshi *Hunuman Prasad*, for appellant.

Pandit *Ajudhia Nath* and Mir. *Akbar Husain*, for respondent.

ORDER.

[374] It has been held by this Court (1) that a Civil Court is not precluded by the terms of Regulation VIII of 1822, s. 9, cl. i, from enquiring into and declaring a right on the part of the zamindar to cesses and collections, although not avowed and sanctioned, nor taken into account in fixing the Government jama at the time of settlement, notwithstanding that until so avowed and sanctioned they cannot be collected by the zamindar, and there is nothing in the terms of s. 66 of Act XIX of 1873 to a contrary effect. The plaintiffs claim the right and the cess on the old custom, and this question of custom, which has not been distinctly determined must be tried by the lower appellate Court.

We remand the case for this purpose under s. 354 of Act VIII of 1859 and allow seven days for filing objections to the finding.

The Judge's finding on remand having been in favour of the plaintiff's right and confirmatory of the alleged custom, the High Court decreed the appeal in the following judgment:—

JUDGMENT.

We accept the finding of the lower appellate Court, to which no objections have been preferred, and reverse the decree of the lower appellate Court and restore that of the Court of first instance and decree this appeal with costs.

Appeal allowed.

* Special Appeal, No. 748 of 1876, from a decree of R. F. Saunders, Esq., Judge of Azamgarh, dated the 13th March 1876, reversing a decree of Maulvi Sakhawat Ali, Officiating Munsif of Azamgarh, dated the 8th December 1875.

(1) H. C. R. N. W. P. 1870, p. 425.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SUKHAI (*Defendant*) *v.* DARYAI (*Plaintiff*).* [20th March, 1877.]

Act VIII of 1859, *ss.* 256, 257—*Act XVIII of* 1861, *ss.* 11, 35—*Auction-sale—Order cancelling sale—Appeal—Suit to set aside.*

A Munsif having cancelled an auction-sale of landed property on the sole objection of the judgment-debtor that the property realized a low price and the Judge having dismissed the auction-purchaser's appeal from the said [375] order on the ground that the Munsif had no authority to cancel the sale under the terms of s. 257 of Act VIII of 1859, without some irregularity in conducting or publishing the sale being proved, and that the said order must therefore be taken to have been passed under s. 11, Act XXIII of 1861, which admits of no appeal by the auction-purchaser who was no party to the execution proceedings. *Held*, that such order passed by the Munsif was not a proceeding under s. 11 of Act XXIII of 1861, but an order passed *ultra vires* under s. 257 of Act VIII of 1859, and that a suit would lie for its cancelment, the finality of an order under ss. 256 and 257 of Act VIII of 1850 depending on its compliance with the terms of those sections.

[Appl., 3 A. 206 (F.B.); R., 3 C.W.N. 99.]

THE plaintiff sued for confirmation of an auction-sale and establishment of plaintiff's right of purchase of a third share of a five biswa zemindari property, and for the setting aside of the orders passed on the miscellaneous side by the Munsif and the Judge, by which the said auction-sale was declared cancelled.

The orders on the miscellaneous side referred to were passed on an objection preferred by the judgment-debtor in the Munsif's Court to the effect that the property had been sold for an inadequate price. The Munsif held this to be sufficient cause for cancelling the auction-sale. The auction-purchaser appealed to the Judge, who admitted the invalidity of the Munsif's order cancelling the sale, but ruled that, inasmuch as the Munsif's order was passed under s. 11 of Act XXIII of 1861 and not under s. 247 of Act VIII of 1859, under which the Munsif assumed that he was acting, no appeal would lie on the part of an auction-purchaser who was no party to the decree in execution. The Judge accordingly dismissed the appeal on the miscellaneous side, and the auction-purchaser brought the suit. The Munsif of Kaimganj dismissed the suit on the ground that his order on the miscellaneous side was final under s. 257 of Act VIII of 1859, and that under s. 11 of Act XXIII of 1861, no suit would lie for setting aside such orders passed in execution of decree; and further, that the auction-purchaser's right only accrues after the sale has been sanctioned and completed, and that, therefore, under s. 32 of Act VIII of 1859, the suit could not be heard, as no right had accrued to the plaintiff. The Subordinate Judge, on appeal by the plaintiff, reversed the Munsif's decision, holding that the Munsif had no power under the terms of ss. 256 and 257 of Act VIII of 1859 to cancel the sale by reason of mere inadequacy of price, and without any irregularity in conducting [376] or publishing the sale alleged by the judgment-debtor, who sought to set it aside; that, consequently, as no valid final order had been passed by the Munsif under ss. 256 and 257, his order must be taken to have been

* Special Appeal No. 25 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 4th November 1876, reversing a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 11th July 1876.

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passed under s. 11 of Act XXIII of 1861, and that the suit was maintainable. The Subordinate Judge decreed the plaintiff's appeal. The defendant in special appeal to the High Court impugned the Appellate Court's decision on the ground that the order passed on the miscellaneous side, setting aside the sale, was final, and that no suit would lie for its cancelment.

Babu *Barodha Prasad*, for appellant.

Munshis *Sukh Ram* and *Kashi Prasad*, for respondent.

JUDGMENT.

If this matter rested solely on the plea in special appeal, there would be no difficulty in disposing of the case. For if the first Court's order in execution of decree setting aside the sale was final, there could have been no appeal to the Judge, and any order made by him might have been cancelled under s. 35 of Act XXIII of 1861. But here the order made by the Munsif setting aside the sale was not one that could be legally made under s. 257 of Act VIII of 1859, since no material irregularity in publishing or conducting the sale and consequent substantial injury to the objector, by reason of the irregularity, were established. The Munsif's order, therefore, setting aside the sale, because the sale price was inadequate, no material irregularity being proved, was in excess of the power granted to him by the section. But it was certainly not an order made, as the District Judge assumed in miscellaneous appeal, under s. 11 of Act XXIII of 1861, because there was no question arising between the parties to the suit which the Munsif was called upon to dispose of when he made his order. If it had been such a question, there could have been no separate suit. But here the auction-purchaser having fulfilled all the conditions of the sale, calls for confirmation, which is refused on no legal ground by the Court executing the decree. He had bought the property, and all that was wanting was a confirmation of his title. If no application of a legal character was made to set aside the sale, the Court executing the decree, to use the words of the section, *shall* confirm the sale. As in this case no objection permissible by s. 256 had been made, the Court executing the **[377]** decree was absolutely bound to confirm the sale, and as it did not do so but acted in excess of its jurisdiction in refusing to do so, and in cancelling it, it appears that the suit will lie. We are justified in this opinion by a decision of a Division Bench of this Court of the present appeal, No. 1437 of 1876, decided on the 13th March of the present year.* We, therefore, affirm the judgment of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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* In this case the plaintiff sued to establish his right as auction-purchaser to, and to obtain possession of, the property sold by auction, by setting aside the order passed on the miscellaneous side by the first and appellate Courts which cancelled the said auction-sale. The plaintiff added a claim to obtain mesne profits from date of sale to date of possession.

The lower Courts having on insufficient grounds assumed fraud in the auction-sale by reason of inadequacy of price and other irrelevant circumstances, and having held that the orders passed on miscellaneous side under ss. 256 and 257 of Act VIII of 1859, precluded a fresh suit to establish the auction-purchaser's right to the property, sale of which was annulled, the High Court (Pearson and Turner, JJ.) remanded the case for trial on the merits in a judgment of which the following extract is the material portion :—

"The order passed by the Munsif on the 10th March 1875, setting aside the sale, and that passed by the Judge on the appeal from it on the 5th June 1875, did not, it would seem, proceed on the ground of any material irregularity in publishing or conducting

1 A. 377.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

RAMANAND, *Judgment-debtor (Appellant)* v. THE BANK OF BENGAL, *Decree-holder (Respondent).** [24th March, 1877.]

Act VIII of 1859, *s.* 273—*Act XX of* 1866, *s.* 52—*Act VIII of* 1871, *ss.* 53, 54, 55—*Appeal—Execution—Procedure—Repeal.*

No appeal lies against orders passed in execution of decrees under Act XX of 1866, the procedure under that Act having been expressly saved by Act VIII of 1871, which repealed Act XX of 1866.

[Overruled, 1 A. 583.]

THE judgment-debtor appellant filed the above miscellaneous appeal from an order of the Subordinate Judge of Cawnpore under [378] s. 273 of Act VIII of 1859, alleging that execution of the decree passed under Act XX of 1866 was barred by limitation according to the provisions of cl. 166, sch. iii, Act VIII of 1871, and that, on the facts established by the record, the appellant was entitled to his discharge from prison, the decree-holder having failed to show that appellant was possessed of any property.

Babu *Dwarka Nath Mukerji* and Shah *Asad Ali*, for appellant.

Messrs. *Hill* and *Greenway*, for respondent.

JUDGMENT.

This is a miscellaneous regular appeal from an order made by the Subordinate Judge of Cawnpore in execution of a decree, and a preliminary objection is taken by the respondent's counsel that the appeal cannot be heard inasmuch as no appeal lies from such an order.

The circumstances appear to be these: The judgment-debtor, being indebted to the Bank of Bengal in a very considerable sum, upwards of Rs. 76,000, made an agreement for the liquidation of the debt under s. 52 of Act XX of 1866 which agreement was duly registered. It is here to be observed that although that Act was repealed by Act VIII of 1871, the procedure for such cases as the present is thereby expressly saved and is provided by the subsequent ss. 53, 54 and 55 of the Act. Under s. 53 of that Act the Bank obtained a decree against the judgment-debtor, and as that section provides that such a decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure, he was arrested under a warrant issued pursuant to s. 273 of Act VIII of 1859 in execution of the decree, and on the 23rd of October 1876, he applied for his discharge under s. 8 of Act XXIII of 1861. Subsequently the Bank were called upon to show cause, on the 4th November 1876, why they should not proceed against their judgment-debtor's property and he himself be discharged, and such cause having

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the sale, and cannot, therefore, in reference to the provisions of s. 257 of Act VIII of 1859, bar the present suit, which the plaintiff is entitled to have tried on the merits. He cannot indeed obtain in this suit all the relief he asks for; but if he should succeed in showing that the sale made to him was a valid one which should have been confirmed, he would be entitled to a decree annulling the order above-mentioned, and declaring his right to obtain from the Munsif an order confirming the sale, a certificate of the nature described in s. 259, and delivery of the property which was the subject of the sale in the manner provided by s. 263 or s. 264 of Act VIII of 1859."

* Miscellaneous Regular Appeal No. 75 of 1876, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th November 1876.

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been shown to the satisfaction of the Court, the judgment-debtor's application was refused, and he himself sent back to prison. Against this order, the present appeal has been preferred.

Section 55 of the Act of 1866 expressly provides that "there shall be no appeal against any decree or order made under ss. 53, [379] 54, or this section." It would thus appear that the preliminary objection taken to the hearing of his appeal was well founded. The respondent's counsel in support of his objection referred to two Calcutta cases respectively (1). But to my mind the law is too clear to admit of any doubt on the subject, and it is quite unnecessary to refer to any other rulings. The objection is, therefore, allowed, and the appeal is dismissed with costs.

OLDFIELD, J.—I concur in the proposed order.

Appeal dismissed.

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1 A. 379=1 Ind. Jur. 743.

JURISDICTION AS COURT OF REVISION.

Before Mr. Justice Spankie.

THE EMPRESS OF INDIA *v.* RAMESHAR RAI. [23rd April, 1877.]

Act XLV of 1860 (*Indian Penal Code*), ss. 192, 193, *and* 414—*Fabricating false evidence—Voluntarily assisting in concealing stolen property—Act X of* 1872 (*Criminal Procedure Code*), s. 297—*Separate offences.*

Where the petitioner was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, *held*, that the Magistrate was right in convicting and punishing the petitioner for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193 of the Indian Penal Code, and of voluntarily assisting in concealing stolen property under s. 414, Indian Penal Code.

Mr. A. E. C. CASEY, Assistant Magistrate of the first class, stationed at Ghazipur, convicted a zemindar, Rameshar Rai, of having employed one Musammat Bhagi Bindin to secrete stolen railway pins in the godown and fields of Rameshar Rai's enemy Sedari, for the purpose of implicating the said Sedari as the thief.

The Assistant Magistrate convicted Rameshar Rai of fabricating false evidence for the purpose of being used in a stage of judicial proceeding, and under s. 193, Indian Penal Code, sentenced Rameshar Rai to two years' rigorous imprisonment and to pay a fine of Rs. 50 or in default, to be further rigorously imprisoned for six months, and on the same facts the Assistant Magistrate found Rameshar Rai guilty of the additional offence of voluntarily assisting in concealing stolen property, and sentenced him under s. 414, [380] Indian Penal Code, to a further term of two years' rigorous imprisonment and to pay a fine of Rs. 50, or in default, to be rigorously imprisoned for an additional term of six months, the second sentence to commence on expiration of the first.

Rameshar Rai's appeal to the Judge of Ghazipur having been dismissed on the merits, the prisoner applied to the High Court under s. 297 of the Code of Criminal Procedure, to revise the above sentences on the ground that on the facts found but one offence had been committed, and

(1) Petition of Peare Lal Sahoo, 7 W.R. 130 ; 18 W.R. 512.

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1 A. 379 = 1 Ind. Jur. 743.

that the conviction of the prisoner for separate offences, under ss. 193 and 414 of the Indian Penal Code was illegal.

Mr. *Colvin*, for the petitioner.

JUDGMENT.

The Court (SPANKIE, J.) delivered the following judgment :—

It is admitted that the pins were stolen property. It was brought home to the prisoner, Rameshar Rai, that he had voluntarily assisted in concealing, or disposing or making away with this property which he knew, or had reason to believe, to be stolen property and he was punished for this offence. He also is found to have concealed the property in the filed of one Sedari, an enemy of his own with a view that it might be found in his (Sedari's) house and field and that he might be apprehended and charged with the theft. There is also a strong presumption that he instigated one Bhagi to conceal pins in Sedari's house. It is argued that if the disposal of the property was committed with the object of placing it, or causing to be placed, in Sedari's field to bring him into trouble, one offence only and not two distinct offences were committed. But I cannot accept this view of the case. It may be that the Magistrate was of opinion that there was not sufficient evidence to show that the offence fell under s. 411, *viz.*, that there was a dishonest receiving of stolen property within the meaning of the word "dishonesty"* as defined in the Penal Code. He therefore applied s. 414. In the commission of an offence, under this section, it is sufficient that the accused be proved to have voluntarily assisted in concealing, disposing of, or making away, with property, which he knew, or had reason to believe, was stolen property. The fact, that he did so, [381] convicts him of an offence against property under Chap. XVII of the Penal Code. He may then, or at the time, have entertained the idea that by placing it where he did, he would cause evidence to be found whereby he hoped that Sedari might be convicted of the theft of the property so concealed by him. But he nevertheless committed an offence under s. 414 of the Code against the property. Also he fulfilled the condition of the offence as defined in that section. It did not matter where he concealed it. He should not have concealed it at all, or caused it to be concealed voluntarily, either in Sedari's house or land, or elsewhere, if he knew or had reason to believe that it was stolen property.

In concealing it as he did in Sedari's field, with the intention found by the Magistrate, the prisoner committed another and distinct offence against public justice under Chap. XI of the Penal Code, as he intentionally fabricated false evidence to be used in a judicial proceeding. He was punished under s. 193. The offence possibly was one more nearly coming under s. 195 of the Penal Code. There could be no doubt that in hiding the pins in Sedari's field intending that they might be found and that the circumstance of their being found in Sedari's field might appear in a judicial proceeding, and that this circumstance might lead the Magistrate to believe that he, Sedari, had been connected with the theft, under s. 192 would be and is fabricating false evidence, and is a distinct offence from the offence of voluntarily assisting in disposing of the stolen property. I see no reason to interfere, and dismiss the petition.

Petition dismissed.

* "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly."

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FULL BENCH.

1 A. 381 (F.B.).

1 A. 381 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

BADRI PRASAD (*Plaintiff*) *v.* MUHAMMAD YUSUF AND ANOTHER (*Defendants*).* [12th April, 1877.]

Adjudication of right—Binding on parties to proceedings—Act VIII of 1859, *s.* 246—*Claimant—Conclusive order—Defendant in possession—Limitation—Objector—Suit to establish right—Title.*

[382] In a suit brought by plaintiff to establish his right as auction-purchaser to certain immoveable property sold in execution of a decree, under the provisions of s. 246 of Act VIII of 1859, disallowing the claim of the objector—represented by the defendant—and adjudging the property attached to be that of the judgment-debtor, represented by the plaintiff—the said order not having been set aside in a regular suit by the defendant. *Held* (by a majority of the Full Court) that an order passed under the provisions of s. 246 of Act VIII of 1859, unless overruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it, and is conclusive.

(PEARSON, J., *per contra*, s. 246 of Act VIII of 1859 provides for an adjudication of proprietary right on the basis of possession, but the matter is not "*res judicata*" as to matters in dispute between decree-holder and claimant unless the party against whom an order is passed under s. 246 of Act VIII of 1859 fails to bring a regular suit to establish his right. In the case mentioned in the order of reference as apparently conflicting with the above view, there had been no adjudication on the basis of possession by the Court passing an order under s. 246 of Act VIII of 1859, and the defendant in possession was therefore at liberty to assert his proprietary title against the lien set up by plaintiff under the said order passed without jurisdiction on the miscellaneous side.

[F., 1 A. 541; 2 A 455; 18 A. 413=A.W.N. (1886) 129; 14 B. 372; 22 B. 640; 8 M. 506; Cited 34 A. 365 (369)=9 A.L.J. 474=14 Ind. Cas. 790 (792); R., 9 B. 35; 18 B. 260; 20 B. 270; 22 B. 875; D., 1 C.W.N. 701.]

The following are the matters of fact out of which the Full Bench ruling in this case arises. On the 8th March 1866, one Imam-ud-din got his name entered in the revenue records as half sharer of a grove near Aligarh, one Rahim Bakhsh claiming to be the other half sharer.

Subsequently Imam-ud-din's right to a half share of grove was attached, and upon this attachment Rahim Bakhsh appeared as an objector under s. 246 of Act VIII of 1859, claiming the whole interest in the grove, and repudiating Imam-ud-din's right to, or possession of, any portion of the property.

The Munsif of Aligarh on the 30th April 1870, under s. 246 of Act VIII of 1859, disallowed Rahim Bakhsh's claim to the share of Imam-ud-din, in an order, of which the following is a translation :

"Whereas the Patwari has submitted the Nikasi papers of the year 1273 Fasli, wherein the name of Imam-ud-din, son of Man-ul-la appears, though not very clearly, and whereas in support thereof it is proved by copies of documents, and the parol evidence of the Patwari, the judgment-debtor, as representative of Man-ul-la, holds possession of half the grove in dispute which is under attachment; it is ordered that the claim preferred in respect to the matter in dispute be disallowed with costs to be borne by the objector.

* Special Appeal No. 423 of 1876 from a decree of H. M. Chase, Esq., Judge of Aligarh, dated the 8th March 1876, reversing a decree of Munshi Kishen Dyal, Munsif of Aligarh, dated the 22nd June 1875.

[383] The said share was, on the 30th May 1870, put up to sale and purchased by Badri Prasad, present plaintiff, and the auction-purchaser was put in possession, after confirmation of the sale, on the 4th July 1870.

Subsequently, Rahim Bakhsh's alleged rights in the whole grove were attached in execution of another decree. The said rights were, on the 19th July 1870, purchased at a Court sale by the defendants, who were put in possession on the 25th February 1871. On the 20th September following, the plaintiff, Badri Prasad, petitioned the Munsif's Court, pointing out that he had been put in possession as auction-purchaser of Imam-ud-din's share in the grove under a Court certificate, and urging that, therefore, the defendants as subsequent auction-purchasers of Rahim Bakhsh's alleged rights in the whole grove ought not to be certified to hold possession under the said sale of more than half the grove, or what constituted Rahim Bakhsh's real rights therein. The Munsif passed an order on the said petition, recording that Badri Prasad's possession by right of purchase of Imam-ud-din's share, prior to sale of Rahim Bakhsh's interests, could in no wise be affected by the purchase made of the alleged rights of Rahim Bakhsh. The defendants, having realized the rent of the grove, succeeded in getting the Settlement Officer, on the 26th May 1874, to record their actual possession over the whole grove, qualifying the defendant's possession as to half by the mention that it was held on behalf of Badri Prasad, who was referred to the Civil Court to obtain enjoyment of his right.

Badri Prasad, accordingly, sued in the Munsif's Court to establish his right, among other things, to possession of half of three bighas out of the four bighas and six biswas, the area of the grove. The defendants pleaded in answer to the suit that the whole estate was owned and possessed by Rahim Bakhsh and sold in execution of the decree obtained against him, that defendants being the auction-purchasers under that decree, the plaintiff could not succeed in disturbing defendants' possession without suing to set aside the said auction-sale, and that such suit would be barred by limitation, more than a year having elapsed between the date of auction-sale and date of suit; that the suit was also beyond time by reason of Imam-ud-din's [384] never having had any interest in, or possession of, the property, and finally that the order of the 30th April 1870, was neither binding on defendants nor conclusive, because it was based on mere entries in revenue, records without regard to actual possession, and because defendants had obtained possession of the whole rights purchased before the said order had become final. The Munsif held that the order was final and conclusive, unless set aside in a regular suit brought within a year by Rahim Bakhsh, or his representatives, and that no such suit having been brought, it was not open to the defendants to question the adjudication of right involved in the said order as between the parties to the present suit. On the merits the Munsif found that Imam-ud-din had been in proprietary possession of half the grove, and that the plaintiff as his representative was entitled to the property in suit.

On appeal by defendants, the District Judge of Aligarh held that the plaintiff having merely purchased the alleged rights of Imam-ud-din in the land, and having sued for a declaration of right and possession, the plaintiff was bound to prove his title to the property, which as against the defendants, who were in possession, was not conferred by the Munsif's order, the Judge allowed nevertheless that such an order on the miscellaneous side would be binding, unless reversed in a regular suit, on a party not in possession, the fact of possession constituting an exception to the

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rule, and the Judge accordingly decreed the defendant's appeal, and remanded the case under s. 351 of Act VIII of 1859 to the Court of first instance for a finding as to the nature and extent of Imam-ud-din's rights, purchased by the plaintiff.

The plaintiff, thereupon, appealed to the High Court on the principal ground that the Judge had erred in his construction of the effect of an order passed under s. 246 of Act VIII of 1859 upon the rights of parties to such miscellaneous proceedings.

The Division Bench of the High Court (Stuart, C. J., and Turner, J.) referred the question contained in the subjoined order of reference to the Full Bench :—" We are inclined to think that when a Court executing a decree has investigated a claim under s. 246 and determined it against an objector, the decision is final, and binds the objector's right, unless, within the time limited, he sues to establish his right. As such a ruling would apparently **[385]** conflict with the decision in special appeal No. 751 of 1874, we refer the question to the Full Bench."

Babus *Aprokash Chander Mukerji*, *Jogendro Nath Chaudhri*, Pandit *Ajudhia Nath* and Lala *Ramprasad*, for appellant.

Messrs. *Ross*, *Mahmud*, the Junior Government Pleader (Babu *Dwarka Nath Banerji*), Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for respondents.

JUDGMENTS.

The following judgments were delivered by the Court :—

TURNER, J., (STUART, C. J., SPANKIE and OLDFIED, JJ. *concurring*).

The 246th section of the Code of Civil Procedure declares that when a claim is made to immoveable property attached in execution of a decree as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding section, proceed to investigate it, and if it shall appear that the property was in the possession of the party against whom execution is sought, as his own property, at the time when the property was attached, the Court shall disallow the application. This follows the clause out of which the question before the Court arises. The order which shall be passed by the Court under this section shall not be subject to appeal, but the party against whom the order may be given, shall be at liberty to bring a suit to establish his right, and the Limitation Act prescribes that such a suit must be brought within one year from the date of the order.

Two questions were principally raised at the hearing, one as to the effect of the order, the other as to the pertinency of the enquiry, whether the order was passed on a correct decision of the issue as to possession.

Now it appears to us that when an enquiry has been duly held under s. 246, and an order passed thereon, so long as the order remains unquestioned by the procedure directed in the Code, it is as final and conclusive on all persons who are parties to it as any other final order or decree of a Court of Justice. Until it **[386]** has been overruled in a regular suit, brought in virtue of the permission expressly given by the Code, no Court is at liberty afterwards to go behind the order, and inquire whether the Court, which disallowed the objection, had correctly appreciated the evidence as to possession, or had come to the conclusion erroneously, that possession was with the judgment-debtor. Consequently, at the hearing, we expressed our opinion that it was immaterial to the determination of

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the question submitted to us, whether or not the Court which had investigated the claim had formed an erroneous judgment on the question of possession.

The effect of the order cannot be affected by the propriety, or otherwise, of the decision at which the Court, which investigated the claim, arrived as to the fact of possession.

We proceed, then to consider what is the effect of the order. Inasmuch as the Code declares that, in the suit brought to contest it, the claimant must prove his *right*, we understand the Legislature to have intended that the order until reversed is conclusive as to right.

It is not a novelty in Indian law that possession, which is *prima facie* evidence of title, should be accepted as justifying a record of title unless and until the record is amended in pursuance of a decree obtained in a regular suit brought within a limited time.

Thus Settlement Officers, when engaged in preparing the record of rights under Regulation VII of 1822, were directed to enquire into present or very recent possession, and to frame their record in accordance with the result of that enquiry, and if the parties affected appear before them, and an award is made, that award is final and conclusive, unless, within three years from the date of the award, the party who is aggrieved by it, institutes a regular suit to question it. We are unable to distinguish the principle on which the case cited at the argument was decided from the principle which should guide the Court in determining the point now before it. It appears not unreasonable that, to give some little security to titles which, in this country, are exposed to much peril, as titles derived from auction sales in execution of a decree, the Legislature should have required any person who makes a claim to attach property, **[387]** to come in within a limited time, and vindicate his rights if he have any, or thereafter to be barred from asserting them.

The argument that limitation does not apply to a defendant is not in our opinion pertinent. The question is, whether or not the defendant is not bound by an order which he did not contest within the time allowed by law. In our judgment, having failed to prove his right within that time, he is precluded from asserting it, by an order which has become final.

PEARSON, J.—" The finding of the Court, under s. 246 of Act VIII of 1859, whether the attached property is in the possession of the party against whom execution of decree is sought, as his own property and not on account of any other person, or is in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators or other persons paying rent to him, or whether it is not in his possession or in the possession of some other person in trust for him, or in the occupancy of ryots or cultivators paying rent to him, or that being in his possession, it is not so on his own account, or as his own property, but on account of, or in trust for, some other person, appears to me to be an adjudication of proprietary right on the basis of possession. The order which may be passed on such finding is declared not to be subject to appeal, and would not, I conceive, be contestable at all, but for the express permission which is given by the concluding words of the section to the party against whom an order may be given to bring a suit to establish his right. Those words show that the matter in dispute between the decree-holder and the claimant is not, by reason of the finding and order under s. 246, so absolutely a *res judicata* as not to be open to re-adjudication in a suit brought by the party against whom the order was passed to establish his right. But in the event of no such suit being brought, the matter in dispute must be held to have been

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finally disposed of by the finding and order under s. 246, and to be absolutely a *res judicata*."

The learned Judge then distinguished the circumstances of the present case from those in special appeal No. 751 of 1874, in which as the judgment continued "there had been no adjudication on [388] the basis of possession, in respect of the proprietary right in the property, which therefore could not be regarded as a *res judicata*; while the order disallowing the claim on the ground of a lien was beyond the scope of the Munsif's jurisdiction under the section."

The DIVISION BENCH (STUART, C.J., and TURNER, J.,) made the following order:—In accordance with the ruling of the majority of the Full Bench of this Court, we must allow the appeal, and reversing the decree of the lower appellate Court restore that of the Court of first instance, with costs.

Decree reversed.

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1 A. 388=2 Ind Jur. 23.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

AGRA SAVINGS BANK, LIMITED (*Defendant*) *v.* SRI RAM MITTER (*Plaintiff*).* [20th April, 1877.]

Act XXIII *of* 1861, *s.* 11—*Barred suit—Excess payment made by mistake in execution of decree—Jurisdiction—Small Cause Court—Suit in nature of damages.*

Where the plaintiff sued defendant in a Civil Court for recovery of a sum alleged to have been paid by plaintiff to defendant under a mistake, in excess of the sum due in satisfaction of a decree of the Small Cause Court—*Held* by STUART, C.J., Pearson, J., dissenting, that such a suit was in the nature of one for damages cognizable by the Court of Small Causes, and was not barred by the terms of s. 11 of Act XXIII of 1861, the question involved in the claim not being one which could properly arise in execution proceedings, that must be confined to matters embraced in the decree passed between the parties to the suit.

[Diss., 2 A. 61 (F.B.); Cons., 5 A. 94.]

THE plaintiff in this case sued the defendant for the recovery of a sum realized by defendant in excess of the dscree against plaintiff which defendant had executed in the Small Cause Court; the cause of action alleged in the plaint was the discovery by plaintiff of the mistake he had made in paying interest not provided for in the decree. The Munsif dismissed the suit on the ground [389] that it was barred by the terms of s. 11 of the Act XXIII of 1861, being a question relating to the execution of decree between the parties to the suit in which the decree was passed. On plaintiff's appeal to the Judge, the Judge decreed the appeal, holding that the question involved in the suit was not one which could be raised in execution of decree, inasmuch as questions under s. 11 of Act XXIII of 1861, must relate to matters comprised in the decree, and the decree being silent as to interest, the claim for the recovery of such amount paid under a mistake was properly brought by a suit in the Civil Court. The defendant, in special appeal before the High Court contended that the claim

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* Special Appeal No. 1408 of 1876 from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 6th September 1876, reversing a decree of Babu Mritonjoy Mukerji, Munsif of Allahabad, dated the 21st June 1876.

was of the nature of suit cognizable by the Small Cause Court, and that the Civil Court, therefore had no jurisdiction over the subject-matter of the claim, and secondly, that the plaintiff having unsuccessfully claimed the refund in the execution department under s. 11 of Act XXIII of 1861, the suit was barred.

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A Division Bench of the High Court, while agreeing in their decree dismissing the suit, arrived at such conclusion on different grounds detailed in the following judgments delivered by the Court.

Mr. *Wollaston*, for appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Lala *Ram Prasad*, for respondent.

JUDGMENTS.

PEARSON, J.—I am of opinion that the suit is barred by the provisions of s. 11 of Act XXIII of 1861. The money now claimed by the plaintiff in this suit was claimed and realized from him in execution of a decree which the defendant had obtained from the Small Cause Court. Whether it was rightly so claimable and realizable was a question to be determined by the Court executing the decree, and cannot be made the subject of a separate suit. The precedent cited (1) by the lower appellate Court in support of the contrary opinion does not support it. I need not **[390]** discuss the other questions raised by the pleas in appeal. The appeal should in my opinion be decreed with costs, the lower appellate Court's decree being reversed, and that of the Court of first instance being restored.

STUART, C. J.—The impression made upon me at the hearing of this appeal was that, contrary to my sense of justice, we were bound to hold that the suit was barred by s. 11 of Act XXIII of 1861 ; I say contrary to my sense of justice, for it seemed to be monstrous that the law should forbid a remedy in such a case as this when money had been paid in excess of a decree by mistake, and only because, by inadvertence or otherwise, the blunder had been omitted to be noticed in the execution department, yet the language of s. 11 seemed to me to exclude all recovery by separate suit, when it says "all questions regarding the amount of any mesne profits, which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest, which may be payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the question before us appeared to be one relating to a sum which had been paid in discharge, or satisfaction of the decree, or the like, and was also a question relating to the execution of a decree.

But on reconsideration, I have arrived at the conclusion that such is not a right application of s. 11 to the present case, and that, therefore, we need not do injustice in difference to a literal and arbitrary construction of that section. The provisions of s. 11, should, I think, be confined to matters within limits of, and not outside, the decree, and money paid in

(1) 4 B.L.R. 111—*Ekowri Singh and others* v. *Bijay Nath Chattapadhya.* See also *Kunhi Moidin Kutti* v. *Ramen Unni*, 1 M. 203.

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excess of the amount decreed is, in my opinion, a matter outside the decree.

I have looked into the records in this case, and I find that the amount due under the decree was Rs. 516-8-3, but that by mistake the amount actually recovered was Rs. 592-11-0, the difference in [391] excess, Rs. 76-2-9, being the sum now sued for. These figures do not appear to be disputed and they show that Rs. 76-2-9 not only never formed any portion of the decree, but could in no construction of it be items connected with it. It was simply a sum of money that was improperly, erroneously and illegally obtained under the guise of the process of execution, and with regard to which no order could be made in the execution department. The present suit was, therefore, the necessary remedy. These views I find are supported by two Calcutta rulings, in which it is laid down that s. 11 of Act XXIII of 1861, does not enable any party to recover in execution anything, except that which has been given by the decree, and that the "question" as used in s. 11 must relate to something comprised in the decree, and that any other cannot be a question relating to its execution, *Ekowri Singh and others* v. *Bijay Nath Chattapadhya* (1), following *Haromohan Chaudhrani* v. *Dhumari Chaudrani* (2). It is true that the ruling appears to be opposed to a full bench decision of the Madras High Court, *Arunchilla Pillai* v. *Apava Pillai* (3), by a majority of three Judges to two, but, for myself, I prefer the reasoning of the Chief Justice (Sir C. Scotland, C. J.) and Mr. Justice Innes, which, so far as it goes, is in accordance with the principle of construction recognized by the Calcutta ruling to which I referred.

Respecting, therefore, the competency of this suit, I agree with the Zilla Judge. But I differ from him when he says that the suit is cognizable by the Civil and not by the Small Cause Court, for, in my judgment, the claim is in the nature of damages within the meaning of s. 6 of Act XI of 1865, and this conclusion seems to be in conformity with several Calcutta rulings (4).

I would, therefore, annul the judgment of the lower appellate Court, and dismiss the suit on the ground of want of jurisdiction, but without prejudice to the plaintiff suing in the Small Cause Court, and for that purpose direct the plaint to be returned to him. It is unnecessary to say anything as to the plea of limitation.

Decree reversed

(1) 4 B.L.R. Ap. C. 111. (2) 1 B.L.R. Ap. C. 135. (3) 3 M.H.C.R. 188.
(4) 2 B.L.R. Ap. C. 172 ; 2 B.S.N. 13 ; 10 W.R. 75 ; and 9 W.R. 336.

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[392] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

BASANT RAM (*Plaintiff*) v. KOLAHAL AND OTHERS (*Defendants*).*
[2nd May, 1877.]

Act XXIII of 1861, *s.* 4—*Defendants not all within jurisdiction—Bankruptcy of acceptor of hundi—Holders' option.*

In a suit on a hundi payable at Calcutta, the acceptor there having become bankrupt before the hundi reached maturity, brought by the holder in the place where the hundi was drawn against the two partners of the firm that drew the hundi, and also the acceptor, who resided at the time of suit, beyond the local jurisdiction of the Court passing the decree, the lower appellate Court having dismissed the suit on the ground that the Court of the first instance could not without the sanction provided by s. 4 of Act XXIII of 1861 pass a decree against the defendant who resided beyond its jurisdiction. *Held*, following the English law, that it was not necessary to sue the bankrupt, defendant, and that the holder of a hundi is not bound, in the event of its dishonour, to sue all the parties liable under it, but may select any one or more of them.

THE plaintiff in this case was the payee of a hundi drawn by two of the defendants who resided at Basti, on the third defendant, Ram Kishen, who managed a branch of the firm at Calcutta. After due presentation and acceptance of the hundi by the third defendant at Calcutta, the latter became insolvent before the hundi matured. The payee of the hundi, accordingly, sued all three defendants for the recovery of the amount which he had paid to the first and second defendants on obtaining the said hundi.

All three defendants pleaded that plaintiff having sold the hundi could no longer sue on it, that the suit was barred by limitation, and that the suit as brought, was not cognizable by the Munsif's Court. The Munsif, finding that the hundi had not been paid and that the three defendants carried on the same business together within his jurisdiction, decreed the suit against them. The Subordinate Judge of Gorakhpur, on appeal by the defendants held, that inasmuch as the third defendant did not reside within the local jurisdiction of the Munsif's Court, the Munsif was not competent to pass a decree against all three defendants, without obtaining the [393] permission of the District Court within the limits of which the third defendant resided. The Subordinate Judge accordingly dismissed the suit as brought. The plaintiff preferred a special appeal to the High Court, on the ground that all the three defendants being engaged in a joint business within the jurisdiction of the Court of first instance, the suit was properly brought in the Court of the Munsif, and that even if, by reason of the third defendant's residing beyond the jurisdiction of the Court, the Munsif had no power to pass a decree against all three defendants, yet that this defect did not warrant the Subordinate Judge in dismissing the suit altogether.

The Senior Government Pleader (Lala *Juala Prasad*), Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), for respondent.

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* Special Appeal No. 1354 of 1876, from a decree of Maulavi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 24th August, 1876, reversing a decree of Maulavi Muhammad Kamil, Munsif of Basti, dated the 25th March, 1876.

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1 A. 392.

JUDGMENT.

If it had been necessary to make Ram Kishen a defendant in this case, the procedure should have been as provided by s. 4 of Act XXIII of 1861, and the sanction of the proper Court, in Calcutta obtained, but we do not consider that it was necessary to implead him at all even if he had not declared his bankruptcy which it appears he did, when the hundi was presented to him for payment. The holder of a hundi, or, in other words, of a bill or note, is not bound, in the event of its dishonour, to sue all the parties liable to him under it, but he may, at his option, select his defendant or defendants as he may judge best for recovery of the money. This is the law of England, where, although the holder of a bill may have issued the writs, or a writ, against all or any of his debtors, he is not bound to sign judgment against them all, but may select any one or more of them, and I am not aware that the law is different here. Besides, in the present case, the two defendants, Kolahal Ram and Gobind Ram, were those who got the whole Rs. 600 from the plaintiff, and it would have been sufficient to have proceeded against them, and to have left their bankrupt representatives in Calcutta alone, especially as his declared bankruptcy, which was tantamount of itself to a refusal to pay, gave the plaintiff a cause of action against the other two. This view of the law also avoids objection on the ground of misjoinder.

[394] We set aside the decrees of both the lower Courts, and remand the cause under s 351 of Act VIII of 1859, for trial of the suit on its merits against the two defendants, Kolahal Ram and Gobind Ram, for the whole amount claimed under the hundi. The costs of this appeal to abide the result.

Decree reversed and case remanded.

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1 A. 394.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SITAL AND ANOTHER (*Defendants*) v. MADHO (*Plaintiff*).*
[9th May, 1877.]

Acts not done void—Exclusive gift—Father's powers—Hindu law—Mitakshara—Implied prohibition—Self-acquired immoveable property—Son's right—Smriti Chandrika—Spiritual responsibility.

A Hindu son, subject to the Mitakshara law of inheritance, sued to obtain a declaratory decree for a moiety of a house which the father had conveyed by deed of gift to plaintiff's brother, being the self-acquired immoveable property of his father, on the ground that, under the Hindu law, a father is not permitted to make a gift of immoveable property to one son to the injury of the other.—*Held* (reviewing all the authorities and precedents on the subject) that although prohibition of such a gift, on moral or spiritual grounds, may be implied by the texts of Hindu law, yet, where it is not declared that there is absolutely no power to do such acts, those acts, if done, are not necessarily void, and that, therefore, an exclusive gift to one son by the father of self-acquired immoveable property is not illegal.

[R., 20 A. 267 (P.C.)=2 C.W.N. 273=25 I.A. 54=7 Sar. P.C.J. 279; 10 B. 528; 10 M. 251.]

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* Special Appeal No. 308 of 1877, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 10th December, 1876, affirming a decree of Babu Mritonjoy Mukerji, Munsif of Allahabad, dated the 4th July, 1876.

Pandit *Ajudhia Nath* and Babu *Baroda Prasad*, for appellants. 1877 MAY 9.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for respondent.

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1 A. 394.

JUDGMENT.

THE facts of the case out of which the present appeal arose, and was decreed by the High Court, will be found fully set forth in the Court's judgment which was delivered by—

SPANKIE, J.—The plaintiff and defendant, Sadho, in this suit are the sons of one Sital, also a defendant.

The property in dispute is a dwelling-house purchased by Sital in 1861, and transferred by gift on the 13th September, 1875, by him to Sadho.

[395] The plaintiff sues to avoid the deed for gift in favor of Sadho, and claims a declaratory decree for a moiety of the house, on the ground that his father was not permitted by the Hindu law to make a gift of immoveable property to one son to the injury of the other.

The defendant Sadho contends that the plaint discloses no ground of action, and the property in suit having been acquired by Sital, he was at liberty to dispose of it as he pleased.

The Munsif held that, if the Hindu law did not allow the gift, the plaintiff had good cause of action. On the point of law it was not necessary to express an opinion, as the High Court determined it, laying down that the exclusive gift of self-acquired property to one son, when there were other sons, is illegal: *Mahasukh* v. *Budri* (1).

In appeal the Judge affirmed the decree, holding himself bound by the precedent cited by the Munsif (1), and believing that it represented the commonly received doctrine in these provinces, though the Calcutta Court had taken a diametrically opposite view of the law (2).

The defendant in special appeal urges, as in the first Court, that the property having been self-acquired by Sital, he was quite competent to make a gift of it in favour of one son to the exclusion of the other.

The case cited as having been determined by this Court refers to no authority expressly. The learned Judges observe that the texts of the law support the doctrine that a man's immoveable property, although self-acquired, is not within his power of disposal so absolutely, by gift in his lifetime, as to enable him to give it all to one son, or grandson, in exclusion of the rest. The Court also remarked that they had not to deal with the case of an unequal division of immoveable property, for the gift was an exclusive gift; as the learned Judges do not cite their authorities, we do not consider ourselves bound by the decision.

[396] The learned pleader for the appellant, Pandit Ajudhia Nath, referred to various authorities and precedents of this, and the presidency Court. Some of the cases cited (3) are not absolutely conclusive on the point before us. The judgment of the judicial committee of the Privy Council in *Rungama* (appellant) *v. Atchama* (respondent), (4) determined a question relative to a second adoption of a son, the first adopted son being still alive. It appears, however, to recognise the competency of a father to dispose of property that was not ancestral, by an act "*inter vivos*"

(1) H. C. R. N. W. P. 1869, 57.
(2) 10 W.R. 247, *Bawa Misr* v. *Raja Bishen Prokash Narain Singh*.
(3) Mitakshara, Chap. I. p. 27, sec. 1; Chap. I, secs. 5. 10, 11; Moore's Indian Appeals, Vol. IV, p. 103; Vol. IX, p. 96; 6 W.R. p. 71, 10 W.R. p. 287; Agra S.D.A., 1861, 223; H. C. N.W. P. R. A., No. 150 of 1874, dated 11th May, 1875.
(4) 4 M.I.A. 1.

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without the consent of all his sons, and so far the principle would extend to the case before us, the other case cited *Nana Narain Rao* (appellant) *v. Huree Punth Bhao, Sree Newas Rao,* and *Balwant Rao* (respondents) (1) does not touch the matter now in dispute. It establishes a will which disposed of the testator's self-acquired property unequally amongst his sons, but it does not go beyond this. The case decided by the Agra Sudder Dewany Adawlat in 1861 is of no authority (2). It refers to no texts, and does not enter into the point, or any argument.

The precedent of the Calcutta Court, "Muddun Gopal Thakur and others" (3), refers to a case in which the plaintiff's grandfather originally acquired the lands in dispute. He had several wives and several sons. By deed of gift he gave the property in dispute to the plaintiff's father, and provided for all his sons by other deeds of gift. The plaintiff's father made a deed of sale of the property in favor of the defendant. It was held that, according to the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself; also that landed property acquired by a grandfather, and distributed by him amongst his sons does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale, without the consent and to the prejudice of the grandsons. In this decision the texts and authorities are directly referred to, and the question is exhaustively treated. The other case cited from the Weekly Reporter, [397] (4) "Bawa Misr," follows this judgment:—The question, however, was, whether the father could, by will, make an unequal distribution of his self-acquired estate amongst his heirs. But the principle of the Court's ruling would apply to the suit before us, and both the decisions put the same interpretation on the texts in the Mitakshara, that we are disposed to do. Para 27, chapter I, s. 1, declares that it is a settled point that property in the paternal or ancestral estate is by birth. The father is declared to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor, since it is ordained that though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons, they who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, and no gift or sale should therefore be made. The respondent's pleader relies on this passage as being an absolute declaration that any such gifts or sale of self-acquired property is illegal. But the words do not go quite so far as this. Such a sale or gift *should* not be made without convening all the sons. It would be wrong, and contrary perhaps, to the spirit of the Hindu law, to make such a sale or gift that might prejudice the rights of the sons, or tend to limit their means of support, but there is no declaration that the transaction would be absolutely void. The father, it is true, is to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor. But even this control appears to be limited. In s. 5 of the Mitakshara, in which the equal rights of father and son in ancestral property are discussed, para. 9 declares the grandson's right of prohibition if his unseparated father is making a donation, or a sale of effects inherited from his grandfather. But he has no right of interference if the effects were acquired by the father; on the contrary, he must acquiesce because he was dependent. Para 10 goes on to explain the

(1) 9 M.I.A. 96.
(2) S.D.A. Agra, 1861, 223.
(3) 6, W.R. 71.
(4) 10 W.R. 287.

difference. Although the son has a right of birth in his father's and his grandfather's property, still, as he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must [398] acquiesce in the father's disposal of his own acquired property, but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, but then only if the father be dissipating the estate.

In noticing the apparent contradiction between para 27, s. 1, chap. I, and paras 9 and 10, s. 5, chap. I, the learned Judges who decided the case of Muden Gopal (1) remark that the apparent conflict is reconciled if the right of the sons in the self-acquired property of the father is treated as an imperfect right, incapable of being enforced at law. The words "should not" and "shall not" imply a prohibition, but not an absence of power to do the prohibited act. The learned Judges add that a colour is further given to this construction, by a passage in the Mitakshara on the administration of justice, chap. IV, para. 10. Macnaghten's Hindu Law, vol. 1, p. 227, where the author, in stating who are capable of maintaining actions, says: "In case of land acquired by the grandfather, the ownership of father and son is equal, and therefore if the father make away with the immoveable property so acquired by the grandfather, and if the son have recourse to a Court of Justice, a judicial proceeding will be entertained between the father and the son." But the right of suit is not mentioned as extending to the case where a father alienates his own self-acquired immoveable property.

In the regular appeal (2) cited by the appellant's pleader as having been determined in 1875 by this Court, the learned Judges have also remarked on these apparent contradictions, and they observed that the only rational mode which has been suggested of reconciling the apparently contradictory doctrine is to suppose that para 27, s. 1, refers to acquisitions of immoveable property made by the father with the use and by the aid of ancestral funds. The community of interest which the son has with the father in the grandfather's property is the foundation of the restriction of the father's power in respect thereof. But the son has no community of interest with the father in property acquired by him independently of ancestral funds, and consequently there can be no restriction [399] on the latter's freedom in dealing with it. But with due respect to the learned Judges who made these remarks, the true reason appears to be this, that as long as the father lives, the control remains with him. The sons, as we have seen, are dependent on the father. In chap. I, s. 5, para. 7, which declares "the dependence of sons," is affirmed in the following passage, "while both parents live, the control remains, even though they have arrived at old age," must relate to the effects acquired by the father or mother. This other passage "they have not power over it" (the paternal estate) "while their parents live," must be referred to the same subjects (self-acquired property). In ss. 9 and 10, which we have already quoted above, the dependancy on the father, and the predominant interest of the father in self-acquired property, is what restricts the son from exercising any interference with its disposal. This view of the question is borne out by a passage in chap. VIII of the Smriti Chandrika, a work of special authority of the Madras school, where the interest of the son in the father and grandfather's property is treated of.

(1) 6 W.R. 71.

(2) Unreported Regular Appeal, No. 150 of 1874, decided on 11th May 1875.

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In para. 21 it is asked how could there exist such inequality while the son possesses a right by birth in both his grandfather's and father's property. The reply is, that in the case of the grandfather's property, the ownership, and also the independent power, are both equal in the father and son, whereas in the case of the father's property, while he is alive and free from defect, he alone possesses independent power, and not the son.

We, however, are prepared to rest the reconciliation of the apparent contradiction, on the ground that there is nothing more than a prohibition implied in para. 27, s. 1, chap. I. There is no express declaration that a gift or sale so made is *ipso facto* void, because the donor or vendor has no power to make it, and we also consider that the rulings of this Court on other points of Hindu law have recognized the principle that, though prohibition of certain acts may be implied, yet, where it is not declared that there is absolutely no power to do them, those acts, if done, are not necessarily void. This recognition is partially supported by Sir Thomas Strange, who admits a certain discretion on the part of the father to deal with self-acquired property, and also by a passage in Macnaghten's Principles of Hindu Law, chap. I, where he lays down, as the result of [400] all authorities, "that with respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility."

Vide chap. IX on Partition.

Entertaining this view of the point in dispute, and finding, as we believe, that authority and precedent are with us, we have no hesitation in holding that the decision of the Judge is wrong, and that this exclusive gift by Sital the father, to his son Sadho, of the house in dispute, was not illegal under the Hindu law, and the facts not being disputed, the claim should have been dismissed. We accordingly decree this appeal and dismiss the claim, by reversing the judgments of the Court below, with costs.

Decree reversed.

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1 A. 400=2 Ind. Jur. 66.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

MAJOR-GENERAL SHOWERS (*Defendant*) *v.* SETH GOBIND DASS (*Plaintiff*). * [28th May, 1877.]

Act VIII of 1859, *ss.* 240, 248—*Act XIX of* 1873, *s.* 3. *cl.* 1—*Irregularity in publication of Court sale of Khalisa Mahal.*

In the case of a sale by the Civil Court of forest land, which formed a grant from Government under a deed describing the property as a "Khalisa Mahal," subject to the payment of revenue after a term of years, the sale not having been proclaimed at the site of the grant. *Held*, that the sale was invalid by reason of irregularity in the publication, and because it was not competent to the Civil Court to sell land chargeable with, although not actually paying revenue at the time of sale, such Khalisa Mahals being revenue-paying lands within the meaning of s. 248 of Act VIII of 1859, and s. 3, cl. 1, Act XIX of 1873, and that therefore the sale should have been held by the Collector.

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* Miscellaneous Regular Appeal, No. 5 of 1877, from an order of R. Alexander, Esq., Judge, Small Cause Court, Dehra Dun, with special jurisdiction, dated the 11th December 1876.

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THE decree-holder, respondent in this case, attached through the Court of the Judge of Small Causes exercising the powers of a Subordinate Judge in Dehra Dun, a grant of forest-land comprising 2,080 acres conferred by Government upon the judgment-debtor, General Showers, on terms embodied in a deed. By the said deed [401] it was stipulated that revenue on the land conveyed by the grant would become payable after the expiration of three years, during which term the land should be held free of revenue. Upon attachment of the land during the said term, and after the order for its sale by the Court Amin, had been passed by the Dehra Dun Court, the judgment-debtor, by petition, objected that the land attached and advertised for sale was in fact a Khalisa Mahal (and so described in the deed of grant), paying revenue to Government, and that under the provisions of s. 238 of Act VIII of 1859 the sale should be effected through the Collector. The Subordinate Judge overruled the objection on the ground that s. 248 of Act VIII of 1859 applied to land actually paying revenue to Government, and not to land which would be subject to revenue at some future time.

The sale having been effected by the Court, the judgment-debtor petitioned the Court again, praying that the sale might not be confirmed, as publication of the sale was irregular in that it was not duly proclaimed at or near the land ; further, that the sale notification neither described the property to be sold with the requisite distinctness, nor contained any mention of where the sale would be held, in consequence of which material irregularities the judgment-debtor had been greatly prejudiced. The Court found against the petitioner on all the irregularities alleged, except as to the sale not having been proclaimed on the land, which omission the Court, however, held not to be a material irregularity and accordingly disallowed the petition.

From these orders of the Subordinate Judge, the judgment-debtor appealed to the High Court, on the ground that the sale proceedings were in contravention of the provision of s. 248 of Act VIII of 1859, whereby the appellant sustained substantial injury, and that the said Court was not competent to conduct the sale of property paying revenue to Government.

The High Court in the followimg judgment decreed the appeal with costs, holding that the sale was invalid, both by reason of the irregularities alleged in conducting the sale, and because the property sold, though not paying revenue at the time of sale, was a [402] Khalisa Mahal paying revenue to Government, and that the sale should, therefore, have been held by the Collector.

Messrs. *Ross* and *Hill*, for appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Munshi *Hanuman Prasad*, for respondent.

JUDGMENT.

We are disposed to hold that the irregularities in publishing and conducting the sale are such as to render it invalid.

The place where the sale was to take place was not described with sufficient distinctness, nor was proclamation made on the spot as required, and there is no reason why the requirements of the law in this respect should have been omitted. But we further hold that the sale should not have been conducted by the officer of the Civil Court, but should have been held by the Collector, the estate being that paying revenue to Government within the meaning of s. 248 of Act VIII of 1859.

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The property is a jungle grant situated in the eastern Dun, which at the time of the sale, had been granted to, and was in possession of, General Showers. It was granted under rules for such grants, which were subsequently formally embodied in the deed of 21st February, 1877. Under the terms of the grant, no revenue was payable by the grantee for the first three years, but became payable for the fourth or following years. But because no revenue was payable at the time of actual sale, we cannot hold with the Judge that the estate was not a revenue paying estate within the meaning of the section.

The term "paying revenue" in s. 248 is used in contradiction to "revenue free" and will apply to all lands known as "Khalisa." The Government treated this estate as such, for it is so described in para. XI of the deed of grant, and such lands have always been so regarded, as may be implied from para. 20 of the present rules dated the 7th October, 1876, for grant of waste lands. When the land granted on such terms as these is considered to be a mahal, as defined in s. 3, cl. I, of Act XIX of 1873, and subject to all conditions attaching by law to such terms, the remission of revenue for a few years on the land will not alter its general character as [403] Khalisa or revenue paying, the revenue still remains assessed. It often happens that Government remits the revenue of revenue paying estates for several years, on various grounds, but the estates do not cease to be considered revenue paying so far as to be subject to the conditions attaching by law to such estates.

We decree the appeal with costs, and set aside the order of the Judge, and set aside the sale.

Decree reversed.

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1 A. 403,

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

PARAM SINGH (*Defendant*) *v.* LALJI MAL (*Plaintiff*).*
[28th May, 1877.]

*Agreement not to execute decree—Breach of faith—Deed of conditional sale—Defeating claims of third persons—Disavowal of trust—Estoppel—Execution—*Ex-parte *decree —Fictitious transaction—Forclosure proceedings—Justice, equity and good conscience—Limitation—Position under deed—Prejudice—Real nature of transaction—Relief—Suit to enforce agreement—Wrongful execution.*

The plaintiff sued in 1875 to recover possession of immoveable property which the defendant had obtained in 1873, in execution of an *ex-parte* decree dated the 8th June 1861. That decree was found on a deed purporting to be a deed of conditional sale dated the 24th December 1853, executed by the plaintiff in favour of the defendant. The plaintiff alleged that the deed was executed in order to protect the property against the claims of plaintiff's son, and the plaintiff sought to set it aside on account of defendant's breach of an agreement dated the 16th January 1856, whereby the defendant stipulated that plaintiff's possession should not be disturbed. The defendant *inter alia* pleaded estoppel and the bar of limitation against plaintiff's suit. *Held*, that the suit was not barred by limitation, as plaintiff's cause of action only arose when defendant first practically disavowed the trust by seeking more than nominal execution of decree, and [following (1) and (2)] that plaintiff is not estopped from showing the real

* Regular Appeal, No. 7 of 1876, from a decree of Mauluvi Muhammad Wajhul-lah Khan, Subordinate Judge of Moradabad, dated the 30th November 1875.

(1) 10 M.I.A. 551. *Ram Saran Singh* v. *Musammat Ram Peary.*
(2) 27 L.J.N.S. 262. *Bowes* v. *Foster.*

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truth of the transaction between plaintiff and defendant, and from obtaining relief through the Court against defendant's breach of good faith, because of plaintiff's attempt to hinder or defeat the possible claim of a third party, the maxim "*in pari delicto potior est conditio possidentis*" not being applicable without qualification to India, where justice, equity and good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed when the parties claiming under it, or their representatives, have been induced to alter their position on the faith of such instrument.

[Diss., 11 B. 709; N.F., 23 B. 406; 27 C. 231; 7 C.P.L.R. 50; R., 3 B. 30; 16 B. 186 (190); 33 C. 967=4 C.L.J. 22=10 C.W.N. 650; 6 M. 54 (59); A.W.N. (1884) 128; 1 C.P.L.R. 171.]

[404] THE plaintiff in this suit, filed on the 27th July 1875, claimed to "recover possession of a ten biswa share in each of the mauzas Mayola and Dudhrajpur, pargana Thakurdwara, valued at Rs. 8,000 by cancelment and invalidation of a deed of conditional sale dated the 24th December 1853," in favour of defendant. The plaint set out that the deed of conditional sale was a fictitious transaction entered into with the defendant, an intimate friend, to protect the property in consequence of disagreements between plaintiff and his son that the defendant had executed an agreement on the 16th January 1856, stipulating that should the deed of conditional sale be followed by foreclosure proceedings and a decree of Court, nevertheless that the defendant would not attempt to disturb plaintiff's possession over the property,—that in breach of this agreement defendant attempted in 1877 to execute decree for possession obtained on the 8th June 1861, when plaintiff's claim to the property was allowed by the Munsif. The Munsif's order was dated 19th April 1873, and was reversed by the Principal Sadar Amin on the 27th July 1874, on appeal by the defendant, on the ground that it was not competent to the Munsif to set aside a decree on the miscellaneous side, the questions of collusion and fraud involved in the Munsif's order being properly the subject-matter of a regular suit. The cause of action alleged in the plaint was the High Court judgment dated the 11th December 1874 affirming the Principal Sadar Amin's decision of the 27th July 1874, in the miscellaneous proceedings in execution of decree above referred to, which awarded possession of the property in dispute to the defendant.

The defendant's written statement, filed on the 31st August 1875, put forward the following pleas in defence, that the decree, dated the 8th June 1861, having been *ex parte*, and plaintiff not having applied to set it aside under s. 119 of Act VIII of 1859, the decision became final, and the suit was barred under s. 2 of Act VIII of 1859; that the claim to set aside the deed of conditional sale was barred by cl. 92 of sch. II of Act IX of 1871, which provides that a claim to cancel and set aside an instrument must be brought within three years from the date of execution of the instrument, that the claim to set aside the decree of the 8th June 1861 was barred by cl. 96, sch. II of Act IX of 1871 [405] which provides a period of three years' limitation from the time when the fraud became known to the party wronged, and that the claim for specific performance of the contract, as based on defendant's alleged agreement dated 16th January 1856, was barred by cl. 113 of Act IX of 1871, which provides that specific performance of a contract must be sought within three years from the time when plaintiff has notice that his right is denied. On the merits, various defences were set up which are stated in the judgment.

The Subordinate Judge decreed the suit, and the defendant appealed to the High Court on grounds which, in effect, recapitulated the pleadings contained in defendant's written statement given above.

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Pandits *Bishambar Nath* and *Nand Lal*, for appellant.

Munshis *Hanuman Prasad*, *Sukh Ram*, and Babu *Baroda Prasad*, for respondent.

JUDGMENT.

The judgment of the Court was delivered by TURNER, J.

"The respondent was the owner of a ten biswas share in each of the mauza Mayola, Dudhrajpur, and on the 24th December 1853 he executed a deed of conditional sale transferring these properties to the appellant for an alleged consideration of Rs. 1,000 repayable with interest at twelve per cent. in four years. The deed declared that possession had been given to the conditional vendee. In 1860 the appellant caused a notice of foreclosure to be issued, and on the 28th June 1861, he obtained an *ex parte* decree for possession.

On the 18th July 1861, Nathmal Das obtained a decree for money against the respondent, and in execution of that decree he attached the rights and interests of the respondent in the property above mentioned. The appellant intervened, and on his objection the property was released on the 26th January 1865. Nathmal Das then instituted a suit to contest the order. He alleged that the conditional sale-deed of December 1853 was fraudulent and collusive. The appellant and respondent were both made parties to this suit. The appellant appeared and contended that the mortgage was valid and he also pleaded the foreclosure and decree obtained in 1861. The respondent did not appear. The Principal **[406]** Sadr Amin held that Nathmal Das had failed to establish his case, and dismissed the suit, and on appeal his decree was affirmed.

The first occasion on which the appellant applied for execution of his decree of the 8th June 1861 was on 25th April 1864. On the 28th June 1864 it was ordered that notice should issue, and the amin's fee be deposited. It does not appear whether notice was served; the proceedings were struck off the file on the 11th July 1864, because the amin's fee had not deen deposited,

The next applications were made on the 19th June 1865 and on the 10th August 1869, but the decree-holder did not proceed with them. On the 24th June 1866 another application for execution was put in and notice issued. On the 10th July the decree-holder informed the Court that, inasmuch as arrears of revenue were still due, he did not desire to obtain possession, and prayed that the proceedings might be struck off the file. On the 13th July 1866 the respondent put in a petition in which he alleged the decree was collusive, and that the applicant was, in fact, a trustee for him.

On the 2nd March 1870 the appellant presented another application for execution, but immediately afterwards, he informed the Court he did not desire to proceed with it, and that, if any settlement took place, a sulehnamah would be filed.

At last, in 1872, the appellant seriously took proceedings to execute his decree and obtained possession. The respondent resisted the application. He alleged, as he alleges in this suit, that in order to prevent his eldest son, by his first marriage, from obtaining the property, he had arranged with the appellant, his intimate friend, to make a pretended transfer of the property to him, and that in pursuance of this arrangement he executed the deed of conditional sale of December 1853, that in fact no money passed as consideration for the deed, that in 1856 the appellant, at his instance, executed a deed acknowledging the respondent's title to

the property that the decree of 1861 was also obtained to conceal the true ownership of the property, and that he had all along remained in possession and dealt with the property as his own to the knowledge of the appellant. The Munsif allowed the objection, and dismissed the application for execution. The Principal Sadr Amin reversed [407] the Munsif's order, and the High Court affirmed the Principal Sadr Amin's order, on the ground that it was not competent to a Court executing a decree to annul the decree. The appellant consequently obtained possession.

The respondent then instituted the suit which is now before this Court in appeal. He averred that the deed of conditional sale had been executed without consideration, and with a view to defeat a claim which he thought might be made by his son by his first wife, that in prosecution of the design to conceal the ownership of the property he contrived the foreclosure proceedings, and the suit which customarily follows such proceedings, that in fact it was not intended the property should pass to the appellant, that he was a mere trustee, *ismfarzi*, for the respondent, that the respondent had, notwithstanding the proceeding above referred to, remained in possession of the property, and exercised acts of ownership, until by the execution of the decree, in fraud of the respondent, the appellant obtained possession. The respondent also relied on the terms of an agreement, which he asserted had been executed by the appellant on the 16th January, 1856, and which is in the following terms :—

"I, Param Singh, son of Bhup Singh, by caste Jat, and resident of mauza Jahangirpur, pargana Thakurdwara, do hereby declare that whereas Lalji Mal, a resident of mauza Mayola, has executed in my favor an *ismfarzi* deed of conditional sale, dated the 24th December, 1853, in respect of a ten biswa share in each of the mauzas Mayola aforesaid and Dudbrajpur in pargana Thakurdwara, because Ganga Ram, the son of the said Lalji Mal, by his first wife, deceased, quarrels with him, and is trying to get the said share from him. I record and agree that even if I, as a matter of expediency, obtain a decree by suing on the said deed of conditional sale, or if I should try directly or indirectly, privately or through the Court, to take or obtain possession of the property entered in the said deed of conditional sale, or if any of my heirs should wish to take or obtain possession, I, or my heir or successor, shall not, according to the agreement, be competent to be the owner of the said property, and that should I in contravention of the terms of this agreement obtain possession, or endeavour to obtain possession, all the proceedings connected [408] with the sale and the foreclosure shall be deemed invalid according to this instrument. I have, therefore, executed this agreement that it may serve as evidence."

(Sd.) PARAM SINGH, with his own pen.

The stamp paper on which this agreement is written bears an endorsement to the effect that it was purchased by the appellant a few days before the date of agreement.

The appellant replied that the *ex parte* decree obtained on the 8th June, 1861, the order obtained by him when objecting to the execution of Nathmal's decree, the dismissal of the suit brought against him by Nathmal, and the rejection of the respondent's objection when he took out execution of the decree of 1861, estopped the respondent from maintaining the suit, and that the claim, involving the supersession of the conditional sale deed executed in 1856 and the decree of 1861, was barred by limitation. On the merits, the appellant pleaded that the deed of

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conditional sale had been executed for the consideration therein expressed, and he denied the execution of the agreement of 1856, and accounted for the stamp endorsement by asserting that in 1869, he had been attacked by Kesri, the brother-in-law of the respondent, and had been robbed of a bundle of papers from which a blank paper, bearing a stamp, might have been extracted and the agreement fabricated. The Subordinate Judge over-ruled the defences set up on points of law, and on the issues of fact, while he considered the appearance of the agreement suspicious, he considered the proof of its execution, on the whole, trustworthy, and apart from the agreement, adopting the reason given by the Munsif in support of his order in April, 1873, the Subordinate Judge declared, he entertained no doubt that the deed of conditional sale, the foreclosure, and decree for possession, were obtained by collusion, and he pointed out that this was admitted by Azmat Ali, a witness, who had been summoned by the appellant. The Subordinate Judge, considering that both parties had been parties to a fraud, nevertheless held that the appellant ought not to obtain the benefit of the further fraud he had practised on the respondent, and, therefore, he passed a decree in favor of the respondent. In appeal, it is contended on the part of the appellant that the suit is not maintainable in that the respondent cannot be allowed to set up his own fraud, but is bound [409] thereby ; that the decree of June, 1861, having become final, the suit is barred; that inasmuch as the claim involves the setting aside of the decree of 1861, it is barred by limitation ; that the execution of the deed of conditional sale for consideration is proved ; that the alleged agreement of 1856 is false and fabricated and that the decree of 1861 was not obtained in collusion with the respondent.

Before entering on the question of law, it will be more convenient to determine the question of fact raised in the appeal. We see no reason to dissent from the conclusion at which the Subordinate Judge has arrived as to the facts of the case. (The learned Judge after discussing the evidence relating to consideration proceeded as follows :)

On the facts, then, found by the Court below and by this Court, is the respondent entitled to relief ? That the suit is not barred by limitation is clear. The cause of action alleged by the respondent is the possession obtained by the appellant in 1875. According to the averments of the respondent, no cause of action accrued to him until the appellant disavowed the trust, and proceeded to obtain possession of the property against the will of the respondent. The mere proceeding to keep alive the decree would not be a disavowal of the trust. The appellant seriously sought to execute his decree in 1872, and limitation ought not to be computed from an earlier date than that application ; if the suit is to be regarded as a suit not merely for possession, but for a declaration that the conditional sale deed was not intended to pass the property, and that the decree should not operate to injure the right of the respondent, in which view of the suit, six years is the period prescribed ; or if, by rejecting as surplusage the claim for the invalidation of the conditional sale deed, the suit be, as we think it should, a claim for possession, the period of limitation is 12 years, to be computed from the date on which possession was obtained in execution of the decree of 1861, which could not have happened till the Munsif's order was reversed by the Judge in 1873 ; consequently, in either view, the suit instituted in July 1875 was not barred by limitation.

We have next to determine whether, on the facts found, the respondent was entitled to maintain the suit. Four several issues [410] arise on this point. Is he estopped by the execution of the deed of conditional sale

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from asserting that it was executed, not to secure the repayment of a loan, but for the purpose of creating an apparent title in the appellant? Is he estopped by the decree obtained after foreclosure in 1861? Is he estopped by the judgment in the suit brought by his creditor against the respondent and the appellant? and, lastly: Is he estopped by the circumstance that he is obliged to have recourse to the Court for relief, by reason of his attempt to hinder, or defeat, the possible claim of a third party?

In this country where *ismfarzi* transactions are so common, and when they have been so commonly recognized by the Court, we should establish a dangerous precedent were we to rule that, under all circumstances, a party is bound by his deed, and concluded from showing the truth. That the respondent may show that nothing was due on the deed, that certainly, if he were defendant, he would not be estopped from showing the real truth of the transaction, we have authority in *Ram Saran Singh* v. *Musammat Ram Peary* (1) where the defendant, a widow, was allowed to prove, in answer to a claim brought by her brother on a deed of conditional sale, that the deed was concocted by her and her brother to defeat the claim of her husband's heirs. If the party to a deed is to be precluded from questioning his solemn act, much injustice would be wrought in this country. The strictness of the rule of estoppel has been in England relaxed. If it is to be used to promote justice, the degree of strictness with which it is to be enforced must be proportioned to the degree of care and intelligence which the natives of the country in practice bring to bear upon their transactions. What is ordinarily known in these provinces as a deed is an attested agreement prepared without any competent legal advice, and executed and delivered by parties who are unaware of any distinction between deeds and agreements. Under these circumstances, it appears to us that justice, equity and good conscience required no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument; **[411]** but where the question arises between parties, or the representatives in interest of parties, who, at time of the execution of the instrument, were aware of its intention and object, and who have not been induced to alter their position by its execution, who consider that justice, in this country, will be more surely obtained by allowing any party, whether he be plaintiff or defendant, to show the truth. We hold that the respondent is not estopped by the deed from showing the nature of the transaction.

In the precedent already cited, it was also ruled that a pleading by two defendants against the suit of another plaintiff cannot amount to an estoppel as between them, still less can it be held that a defendant is estopped by a plea which he does not raise, but which is raised by a co-defendant. The dismissal of the creditor's suit on the appellant's plea, does not then estop the respondent from questioning the truth of the plea.

Nor is the decree of 1861 a bar to the suit. The question now raised is whether or not the respondent suffered judgment to go by default in that suit on the understanding that the decree would not be executed without his consent, or, if executed, that the property would be restored to him. This neither was, nor could have been, determined in the former suit;

(1) 13 M. I. A. 551.

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consequently, the respondent is not estopped by the decree of 1861. But, if it be held that he is so far bound by the decree, that he cannot contend that the appellant was not entitled to possession in virtue of the mortgage and foreclosure, the respondent is, in our judgment, entitled to insist upon the agreement, and on the strength of it to recover back possession from the appellant, unless he is precluded by the plea which we have still to determine.

The doctrine that *in pari delicto potior est conditio possidentis*, or that the Court finding a man embarrassed by a deceit, to which he was himself a party, will not interfere to relieve him from the consequences, must not be accepted without qualification. The English Court of Exchequer in *Bowes* v. *Foster* (1) allowed a plaintiff to recover from the defendant goods which he had deposited with [412] the defendant, in order to defeat or hinder the claims of creditors who might sue out execution, although the plaintiff had, for the purpose of deceit, furnished the defendant with evidence of a sale by handing to him a priced invoice of the goods and a receipt for the price; the Court held that, inasmuch as in fact no sale had taken place, the plaintiff was entitled to recover. In the case before the Court, the respondent furnished the appellant with a deed of conditional sale which did not, by itself, operate to pass the property in the lands therein mentioned, the foreclosure made the sale absolute, the decree awarded possession, but had not the decree been executed, the property would have remained the property of the respondent; the parties *ex-hypothesi*, did not intend that the property should pass, but that by the deed, foreclosure, and decree, a semblance of title should be created in the appellant. If this be so, the case before us does not appear distinguishable from *Bowes* v. *Foster*(1); but, if it be distinguishable, on the ground that by the deed, foreclosure, or decree, or by all of them, the property passed, then, it appears to us the respondent is entitled to rely on the agreement. The respondent may then say, let it be granted that a conditional sale was executed in favour of the appellant, that a right of foreclosure was about to accrue to him, he promised me that if I consented to allow the foreclosure to proceed and a decree in the subsequent suit to pass by default, he would not execute the decree, or if he did execute it, he would deliver possession to me. I accordingly neither opposed foreclosure, nor pleaded to the suit, and I now claim re-delivery of the property. It appears to us that, under such circumstances, the parties could not be held to be *in pari delicto*, and the respondent would be entitled to succeed.

We have arrived at this conclusion, not without considerable hesitation, and if the value of the property is sufficient, and the appellant desires it, we consider that leave to appeal to the Privy Council should be granted. We affirm the decree of the Court below, but, under the circumstances, we direct each party to bear his own costs.

Decree affirmed.

(1) 27 L. J. N. S. 262.

1 A. 413 (F.B.).

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FULL BENCH.

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[413] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

THE EMPRESS OF INDIA *v.* KANCHAN SINGH.* [13th July, 1877.]

Act X of 1872, *ss.* 4, 296—*Definition of sessions case—Power of Session Court.*

The appellant after his discharge by the Assistant Magistrate, upon a charge under s. 457 of the Indian Penal Code, was committed to the Sessions Court by order of the Sessions Judge under the Criminal Procedure Code, 1872, s. 296, upon charges under ss. 380 and 457 of the Penal Code.

Held by the Full Bench (Spankie and Oldfield, JJ., *dissenting*) that the commitment was illegal, and that "session case" within the meaning of s. 296 of the Code of Criminal Procedure, is a case exclusively triable by the Court of Sessions.

[F., A.W.N. (1882) 105; 7 C.L.R. 168 (170); R., 2 A. 570 (573).]

KANCHAN SINGH, who was convicted of theft and lurking house-trespass in order to the commission of an offence, by the officiating Sessions Judge of Mainpuri, appealed to the High Court on the ground that the trial in the Sessions Court held upon the Sessions Judge's order to the Magistrate to commit the case to the Sessions Court, after the said Magistrate had discharged the prisoner, was invalid because the Court of Sessions had no power to order a commitment in the case of offences under ss. 380 and 457 of the Indian Penal Code, which are offences not exclusively triable by the Court of Sessions, and therefore do not come within the meaning of "session cases" in s. 296 of the Code of Criminal Procedure.

PEARSON, J., referred the question to a Full Bench for decision in the following order of reference:

It appears that in the case of Huria and others (1), Mr. Justice Spankie has ruled contrary to the ruling of the 26th May 1873 (2), and that in the case of Charles John Sibold (3), the learned Chief Justice has expressed an opinion that it is erroneous. It is, however, supported by the ruling of the Calcutta Court, dated 17th February 1874, *Joygaram Singh, and another (petitioners)* v. *Man Pathack*, and by the ruling of the Madras Court, dated the [414] 5th November 1873 (4). That the point in question may be definitively settled, and conflicting rulings be avoided in future, I refer it to a Full Bench.

Mr. *Leach* for appellant, the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), for the Crown.

JUDGMENTS.

The following judgments were delivered by the Court:—

STUART, C.J.—In this reference the question is whether the Sessions Judge of Mainpuri was justified in ordering a commitment to this Court on a charge under ss. 457 and 380 of the Indian Penal Code, as being a

* Criminal Appeal from an order of G.E. Watson, Esq., Sessions Judge of Mainpuri, dated the 9th March 1877.

(1) Unreported, decided on the 20th January 1877.
(2) H.C.R.N.W.P. 1873, p. 168.
(3) Unreported, decided on the 9th April 1875.
(4) M.H.C.R. 1871-74, p. 28 of Rulings.

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"session case" within the meaning of s. 296 of the Criminal Procedure Code, read in connection with s. 4 of the same Code, where the expression "session case" is defined. The procedure which gave rise to the appeal to this Court, and the question submitted by this reference, appear to be as follows:—The appellant, Kanchan Singh, and another accused person, named Mathri, were brought up before and tried by the Assistant Magistrate on a charge under s. 457 of the Indian Penal Code, with the result of Mathri's conviction and the appellant's discharge. The discharge of the appellant, Kanchan Singh, being unsatisfactory to the Sessions Judge, he ordered a commitment to the Sessions Court and the appellant was committed, tried and convicted there accordingly. The validity of such order of commitment is one of the pleas in appeal.

In s. 4 of the Criminal Procedure Code the following is the definition of a "session case." "Session case means and includes all cases specified in column seven of the fourth schedule to this Act as cases triable by a Court of Session, and all cases which Magistrates commit to a Court of Session, although they might have tried them themselves." Now if we had nothing else to consider than the true construction of this section itself, our task would be an easy one, and here I must say that we are not much assisted by some of the remarks made by Mr. Justice Jardine in the case mentioned in the present reference (1). In the report of his judgment he is made to say that the words "triable by a Court of Session in s. 4 must be read as if they had been printed in inverted [415] commas," but, in my opinion, it is not legitimate to interpret laws in this manner, whether by the importing of words of limitation, or extension, or fanciful punctuation. If the inverted commas had been used as suggested, the meaning and application of s. 4 would have been altogether changed from what it is in its present shape. I could understand the suggestion that these words "triable by a Court of Session" might, with advantage, have been imported into s. 296 immediately after the words "session case," but it is altogether beside the rules of legal construction to attempt to interpret such a section as s. 4 by such a device. Then, again, I must express my dissent where Mr. Justice Jardine says it is "on principle wrong that a Session Judge should have power to order a committal in spite of a discharge by a Magistrate, who had himself full power to try and acquit. Where the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Session Court should have power to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Session Court power to disturb this order, because it takes the form of a discharge." On the contrary, I do not only see nothing wrong on principle, but, judging from my own experience in criminal cases in this Court it would, I consider, be very convenient and advantageous if Sessions Judges had such a power of correction and control over their Magistrates. But all these speculations and fanciful views of legal interpretation are really beside the question of the true construction of s. 4, nor are they necessary to the elucidation of s. 296, the correct application of which, in my view, depends, at least so far as the present case is concerned, on a much simpler test, which I do not find noticed either in the judgment of Mr. Justice Jardine, or in any of the other authorities which have been referred to. As to s. 4 itself, anything more simple or more obvious in meaning than the language of that section I cannot imagine. It very plainly provides that "session

(1) H.C.R. N.W.P. 1873, p. 168.

case" means and includes all cases triable by a Court of Session itself, that is, if you prefer it, by a Court of Session only, or exclusively, and also all cases which Magistrates commit to a Court of Session for trial. These are the two classes of cases which by s. 4 are to be understood as session case, the one neither more nor less so, than the [416] other. Nor is the definition, given in this s. 4 of a Magistrate's case in the slightest degree inconsistent with such a definition of a session case. A Magistrate's case, the section says, means and includes all cases triable by Magistrates, and all cases which Magistrates try themselves, although they might have committed them for trial to a Court of Session, being the very cases which, when committed to a Court of Session, become *ipso facto* session cases. In fact it comes to this, that by s. 4 the term "session case" applies to cases triable by a Court of Session alone, and also all other cases (doubtful cases as Mr. Justice Jardine calls them, although why they should be so described I cannot see), in which the Court of Session has, by force of the commitment to it concurrent jurisdiction with the Magistrate.

Such are the observations suggested to me by the consideration of s. 4 taken by itself, and without reference to any other part of the Criminal Procedure Code. But when we come to s. 296, we find it necessary to understand a session case in a more limited sense. The second part of that section provides that "in session cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial upon the matter of such complaint, or of which the accused person has been, in the opinion of the Court or Magistrate, improperly discharged." Now there can be no doubt that this section strictly and literally applies to cases triable by the Court of Session itself, but does it apply to these cases exclusively and not to the second class of session cases which s. 4 defines? The answer to this question is supplied by the definition given in s. 4 of the other class of session cases, namely, those which Magistrates commit for trial to the Court of Session. The word "commit" is, I consider a governing word in this sentence, and everything depends upon its right construction. If it could be taken to mean "may commit," then unquestionably s. 296 would let in these Magistrates' cases where a commitment had not been made. But as I view this part of s. 4, the fact of the committal to the Court of Session is the essential quality of such session cases. On the other hand, the remedy provided by s. 296 assumes that there had been no previous [417] commitment to the Court of Session at all, and the Judge is simply empowered, in that state of things, to order a commitment. It follows, therefore, that such remedy cannot contemplate the second class of session cases defined by s. 4, for there, as I have pointed out, commitment to the Court of Session, as a fact and proceeding already completed, is assumed or taken for granted, and no other or further order of commitment is necessary, or, from the nature of the case, possible. Any other view would involve the absurdity of the Sessions Judge ordering a commitment which has already been made to the Sessions Court by the Magistrate himself. In fact in no view of it can s. 296 be read as applicable to a Magistrate's case, and the question of commitment or no commitment is immaterial, for if the Magistrate did not commit the present case to the Court of Sessions, and he in fact did not, then the case is not a session case within the meaning of s. 4, while if he did commit, there

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was no necessity and no reason for any other commitment, whether by the Judge's order or otherwise. The result, therefore, is that the session cases referred to in s. 296 are session cases triable by the Court of Session only, and the present case being a Magistrate's case, and not one triable by the Court of Session only, the Judge's order to commit it, was illegal.

I think it unnecessary to make any further remarks on the rulings referred to in the order of reference. In my own judgment in the case of *Sibold* (1) I do not appear to have entered into the question very fully, and I remark that the case in which Mr. Justice Jardine's ruling was made was different from the one then before me, and in the glance I then gave to the matter, I may not have sufficiently considered the phraseology of s. 4. As to the Calcutta (2) and Madras (3) cases, they appear to have been properly disposed of; although I observe that the Calcutta judgment (2) simply repeats Mr. Justice Jardine's argument, and the Madras ruling appears to have been made by the Court itself, on a reference to it, without any argument from the bar.

[418] PEARSON, J.—I concurred at the time in the ruling (on the 26th May 1873) by the late Mr. Justice Jardine in the case of the *Queen* v. *Sital Prasad* (4), and on further consideration I see no good ground for questioning its correctness. The reasons assigned by him in support of it are, in my opinion, as conclusive as they are well nigh exhaustive. Little has been left by him to be said on the subject. The terms used in the designation of a session case in s. 4 of Act X of 1872 "all cases specified in column seven of the fourth schedule to this Act as triable by a Court of Session," are not synonymous with all cases triable by a Court of Session. We find various specifications in the seventh column of the schedule; some cases are specified as triable by a Court of Session; others as triable by a Court of Session or by a Magistrate of the first class; others again as triable by a Magistrate of the first or second class; others as triable by any Magistrate, and so on. Evidently, as it seems to me, those simply specified as triable by a Court of Session, which are triable by that Court exclusively, are those indicated in the first part of the definition as session cases.

The definition of a session case is followed by the definition of a Magistrate's case for the purpose of distinguishing the one from the other. The two definitions comprehend all triable cases and, read together, explain one another.

There are many cases which a Magistrate may either try himself or commit for trial to a Court of Session; and the definitions declare such cases, if tried by the Magistrate, to be Magistrate's cases, and if committed to the Court of Session, to be session cases.

Session cases, therefore, include along with cases exclusively triable by a Court of Session, and Magistrate's cases include along with cases exclusively triable by Magistrates, cases triable by them or by a Court of Session, which they, in the exercise of their discretion, elect to try themselves.

The ruling gives full effect and meaning to every part of the definitions, and is perfectly consistent with, and agreeable to them. There is, too, much force and pertinence in the remark that "it seems, on principle,

(1) Unreported, decided on 9th April 1874.
(2) *Jay Karan Singh* v. *Man Pathack*, 17th February 1874.
(3) 7 M H C.R. 1871-74, p 28 of Rulings.
(4) H. C. R. N. W. P. 1873, p. 168.

to be wrong that a Sessions Judge should have power to order a committal in spite of a discharge by a Magistrate [419] who had himself powers to try and acquit. Where the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Session Court should have power to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Session Court power to disturb that order because it takes form of a discharge."

The case out of which the present reference has arisen is, according to the ruling in question, a Magistrate's case. It is not a case exclusively triable by a Court of Session, nor was it committed to that Court. It was triable by a Court of Session or by a Magistrate of the first or second class; and was tried and disposed of by a Magistrate. To rule that this is a sessions case on the ground that the terms before quoted in the definition of a session case do not mean cases exclusively triable by a Court of Session, but include cases triable by a Court of Session and a Magistrate, would lead to this result, that all cases triable by a Court of Session, or a Magistrate, are both sessions cases and Magistrate's case: and would thus confound what the definitions were carefully designed to distinguish.

TURNER, J.—It appears to me that the definitions of "sessions case" and "Magistrate's case," respectively, must be read together and that so read, all difficulty in their construction disappears.

There are some cases specified in the schedule as triable by a Court of Session, there are others specified in the schedule as triable by Magistrates, again, there are cases specified as triable either by a Magistrate, or a Court of Session, and lastly, there are cases in which, though ordinarily triable by a Magistrate, an accused person, if he be an habitual offender, may be committed to the Court of Session.

Now in order to bring all these classes under two heads, the definitions, as I understand them, declare that sessions cases mean and include all cases triable by a Court of Sessions exclusively, and all cases of the classes in which jurisdiction is given to the Sessions Court, or to the Magistrate if the Magistrate elects to commit them and that Magistrate's case means and includes all cases specified as triable by Magistrate exclusively, and also all cases of those classes [420] in which jurisdiction is given to the Court of Session or the Magistrate, if the Magistrate elects to try himself. If the other construction be adopted, and the term triable by a Court of Session in the first definition be held to include cases "triable by the Court" of Session or the Magistrate, a case of that class tried by a Magistrate will fall under both definitions and the anomaly will arise which was pointed out by Mr. Justice Jardine in *Regina* v. *Sital Prasad* (1) that a Sessions Judge may order a committal if the Magistrate discharges an accused person whom he had power to try and acquit, when the Sessions Judge cannot interfere to set aside an acquittal, except on the appeal of the Government. Seeing that the construction adopted by Mr. Justice Jardine has approved itself to the High Courts of Calcutta and Madras, I am the more confident in accepting it.

SPANKIE, J.—(after quotation of ss. 4 and 296 of Act X of 1872 continued):—

It is contended that a sessions case means a case triable by the Court of Session only.

The late Mr. Justice Jardine in this Court (1) held that the words "triable by a Court of Session in s. 4 must be read as if they had been

(1) H.C.R.N.W.P. 1873, p. 168.

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printed in inverted commas." This he considered would limit the meaning "of cases specified" as triable by a Court of Session alone. This view was supported by a consideration of the two definitions together. "We might expect," the learned Judge remarked, that "the two would just cover, all possible cases, and this upon the view above expressed is found to be the fact. Sessions cases include all those which the Court of Session alone can try, and such as are committed to the Court of Session. Magistrates' cases include all those which only Magistrates are to try, and so many of the doubtful cases as the Magistrates do, in fact, try themselves. It seems, moreover, on principle to be wrong that a Sessions Judge should have power to order a committal in spite of a discharge by a Magistrate who had himself full power to try and acquit; when the Magistrate's powers are restricted to preliminary enquiry, it is reasonable that the Sessions Court should have power [421] to control the result of that enquiry. But where the Magistrate could pass a final order of acquittal, I see no reason for giving the Sessions Court power to disturb his order, because it takes the form of discharge." It appears that Mr. Justice Pearson holds the same views, and that the Calcutta (1) and Madras (2) Courts have ruled to the same effect that the Sessions Court can only order committal in cases exclusively triable by itself.

Referring to s. 4 I find nothing to support the views that Sessions case means cases exclusively triable by a Court of Session. But I do find in the plainest language possible that a session case means and includes all cases specified in column seven of the fourth schedule as cases triable by a Court of Session, and all those cases which Magistrates commit to a Court of Session, although they might have tried them themselves.

It is true that on reading the definition of a Magistrate's case, it would at the first glance seem that until a Magistrate had actually committed a case which he could have tried himself, it would not become a sessions case. But this construction would only hold good for the purpose of defining what is a Magistrate's case and what a Sessions case, and of so far regulating the exercise of their concurrent jurisdiction. This construction, however, does not necessarily limit the power of revision given by s. 296 to the Sessions Judge and District Magistrate. These words "Sessions case" and "Magistrate's case" are only to be met with twice, respectively, in the Code, ss. 4, 296, and 74. In s. 74, which deals with offences committed by European British subjects, the words "a Magistrate's case" clearly refer to a case which is specified in column seven, sch. IV, as triable by a Magistrate, which might be sent to the Sessions, but which the Magistrate is *not* to send to the Sessions, if he thinks that he can adequately punish it by any sentence warranted by law, not exceeding three months' imprisonment or a fine up to one thousand rupees, or both. If he thinks that he cannot adequately punish it under s. 74, then he must commit to the Sessions Court, or High Court, as the case may be, under s. 73. This, it is true, is a special part of the Code applying [422] to European British subjects alone. But when we examine chapter XV and ss. 89, 195 and 196, we find in the first section that the procedure to be adopted refers to cases triable (not exclusively triable) by a Sessions Court or High Court. By s. 195, a Magistrate can discharge an accused person if he thinks there is no ground for committing him, and dispose of the case himself under chapters XV, XVII or XVIII, as the

(1) *Jay Karan Singh* v. *Man Pathak*, 7th February 1874.
(2) M. H. C. R., 1871-74, p. 28 of Rulings.

case may be. By s. 196 if the Magistrate considers that the evidence justifies commitment for an offence exclusively triable by the Court of Session or High Court, he is to make the commitment to such Court, and he is to do the same if he thinks that the case is one which ought to be tried by the Sessions Court, though it be not an offence exclusively triable by the Sessions Court. The section is mandatory where the case is exclusively triable by the Sessions Court, and permissory in other cases. But here we have *exclusively* used for a purpose; we shall find in s. 296, which deals with discharge under s. 196, no such use for the word at all. Section 296 refers to the superintendence of the subordinate Courts by the Sessions Judge and Magistrate of the district, and to the revision which they may exercise. The first para. provides for the report of cases of this Court in which the judgment or order is contrary to law, or the punishment too severe or inadequate. The second para. provides that in sessions cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial. Now here we go back to the definition of a sessions case, and find that there is no such limit in s. 4 as that contended for, *viz.*, that those cases only are sessions cases which can be tried by the Sessions Court alone. All those cases in fact are sessions cases which are specified in column seven of the fourth schedule as triable by the Court of Session, including all the cases which Magistrates commit to a Court of Session, though they might have tried them themselves. They are all cases specified in column seven, schedule four, and are triable by the Court of Session, though, if the Magistrate tries those himself which are within his jurisdiction to punish, they are not sent up to the Sessions. But they are not the less **[423]** sessions cases, though they are within certain limits jointly triable by the Sessions Court and Magistrate of the first class, and because they are so, both the Sessions Court and the Magistrate of the district have the power to revise improper dismissal of complaints and discharges ordered by the subordinate Magistrates.

This superintendence is part of their office. They are in a certain degree responsible for the proper discharge by their subordinates of their judicial duties. All the Magistrates are subordinate to the Magistrate of the district, but neither the Magistrate of the district nor the subordinate Magistrates are subordinate to the Sessions Judge, except to the extent and in the manner provided by the Act (s. 37). Under the old Act the subordination of the Magistrate to the Magistrate of the district was not clearly recognised, and 23 g. was added by s. 4 of the Act VIII of 1869. So by s. 435 of the old Act, the Sessions Judge only could order commitment of an accused person, if he was charged with an offence triable by the Sessions Court exclusively. But the section was altered by s. 4, Act VIII of 1869, and he has now the power of doing so in cases in column seven, schedule four, not only triable by himself, but also by the Magistrate of the district. The Magistrate of the district also had the power of directing commitment or inquiry when the Magistrate who had discharged the accused person or dismissed his complaint without any investigation, was a subordinate Magistrate. But under the old Act, subordinate Magistrates were of two classes only, one with powers up to six months, and the other up to one month, as provided by s. 22 of Act XXV of 1861. Under the present Act there are three classes of Magistrates, and all are subordinate to the Magistrate of the district. Thus, it became

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necessary, all Magistrates being subordinate to the Magistrate of the district, to enlarge the powers of that officer as a Court of superintendence and revision, and so both the Court of Session and the Magistrates of district were empowered by the second para., s. 296, to direct a committal where a complaint had been improperly dismissed or an accused person improperly discharged in sessions cases. If we are to accept the view contended for by the appellant, then the alterations as regards this power of revision, made since Act XXV of 1861 was passed, would have no meaning, and there would be no [424] reason for the omission of such words as exclusively triable by the Court of Session, which have no place in s. 4 and s. 296 of the present Code.

There is nothing opposed to principle in allowing this power of revision to the Court of Session and District Magistrate. A Magistrate of the first class may improperly discharge an accused person under s. 195, that is to say, in cases triable by a Court of Session, even though he may have, under the provisions of that section, proceeded under Chapters XV and XVII, or XVIII. If the Magistrate of the district or Court of Session considered that there were sufficient grounds for commitment, then the accused would have been improperly discharged. Where a Magistrate improperly discharges an accused person under s. 215, the High Court can order him to be tried, or committed for trial; a discharge is not equivalent to an acquittal under either section. The Sessions Court is empowered to guard against a miscarriage of justice in cases triable by itself. The High Court has plenary power in all cases of improper discharge. No question of acquittal is applicable to the point before us. An acquittal may be appealed against by the Government. This is an exclusive privilege of Government. But private prosecutors, so to speak, have no other remedy but that afforded by ss. 296 and 297 of the Code.

Being of opinion that it is not for us, who administer the law, to import into s. 4 and s. 296 of the Act the words "exclusively" triable, or by the Court of Session "alone" I would answer the reference by saying that the Sessions Judge had the power to order the committal.

OLDFIELD, J.—I agree in the view taken by Mr. Justice Spankie of the question referred.

ORDER.

In accordance with the ruling of the majority of the Full Bench Pearson, J., passed the following final order in the above case.

The second ground is sustained by the opinion of the majority of the Full Bench. The proceedings of the Sessions Court must, therefore, be set aside as illegal, and the sentence passed on the appellant is accordingly annulled and his release is ordered.

Conviction quashed.

1 A. 425=2 Ind. Jur. 115.

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[425] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

DAIA CHAND AND OTHERS (*Defendants*) v. SAFRAJ ALI AND OTHERS (*Plaintiffs*).* [19th April, 1877.]

Acknowledgment of subsisting right—Act XIV of 1859, *s.* 1, *cl.* 15; *Act IX of* 1871, *sch, ii, art.* 148—*Limitation—Mortgagor—Mortgagee—Suit for redemption*—Onus probandi—*Unnecessary proof of mortgage where acknowledgment was made prior to* 1859.

In a suit for redemption of landed property the plaintiffs, representatives of the mortgagors, relied on an acknowledgment of the mortgagors' title contained in an entry in the settlement records of the year 1841, which was attested by the representatives of the mortgagees, defendants in the suit; and the lower Courts having differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from date of the alleged mortgage, *held* that inasmuch as there was no limitation to suits for redemption of mortgage of landed property prior to Act XIV of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841 being an acknowledgment of a right still subsisting, and one which fulfilled the requirements of art. 148, sch. ii, Act IX of 1871.

[N. F., 32 P.L.R. 1903; R., 17 B. 173; 12 C. 267; 16 M. 220; 5 Ind. Cas. 77; U.B.R. Civil (1892—1896) 462; D., 9 C. 616.]

THE facts connected with the present case are fully reported in the appeal to the Full Bench of the High Court (1) which confirmed the decision of the Senior Judge of the Division Bench, remanding the case to the Court of first instance for decision on the merits.

The Senior Judge of the Division Bench, in the judgment delivered by him on the 8th April 1875, observed that whether the plaintiffs' ancestors were the mortgagors, and whether the mortgage was made by them in 1811 for a consideration of Rs. 241, were questions which would have to be determined before it could be decided whether the suit could be maintained, and that even if it were established that the plaintiffs' ancestors were the mortgagors, unless it were shown that the mortgage was not made before 1811, it might be found that the suit was barred by limitation. Relying on these observations, the Munsif who tried the case on the remand held that, notwithstanding the acknowledgment of 1841, the plaintiffs [426] were bound to prove that the mortgage was effected, as alleged in the plaint, in 1811, and that the acknowledgment of 1841 was, therefore, made within the period of sixty years allowed for redemption. Finding that the documentary evidence of settlement records in the case showed that the settlement of the lands in dispute along with other lands, had been made from 1211 Fasli (corresponding with the year 1802-1803) with the ancestors of the defendants who then held possession, the Munsif concluded that the plaintiffs' allegation that the mortgage had been effected in 1811 had failed of proof. He, therefore, dismissed the suit on the ground that the acknowledgment of 1841 was insufficient by itself to support the claim for redemption until it was shown to have been made within sixty years from the date of the alleged mortgage. The plaintiffs appealed from this decision, and

* Special Appeal No. 1471 of 1876, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 6th November 1876, reversing a decree of Rai Izzat Rai, Munsif of Muzaffarnagur, dated the 7th August 1876.

(1) 1 A. 117.

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the Subordinate Judge, holding that the burden of proof as to the acknowledgment of 1841 not having been made within the period of sixty years from the date of the mortgage rested upon the defendants, mortgagees, and finding that the said defendants had failed to prove when the said mortgage was effected, reversed the decision of the Munsif, and decreed the suit of redemption for the property, with costs and interest.

The defendants, in special appeal to the High Court, urged that the Subordinate Judge had wrongly placed the *onus* of proof as to the acknowledgment of 1841, it being incumbent upon the plaintiffs to show when the alleged mortgage was effected, and that the said acknowledgment was made within the statutory period and that it was not necessary for defendants to prove that such acknowledgment did not operate to renew the period of limitation, the finding of the Subordinate Judge as to the said acknowledgment having been made within sixty years from the date of the mortgage being purely conjectural, and without any evidence on the record to show when the mortgage was effected.

Mr. *Howard*, Babu *Jogendra Nath Chaudhuri*, and Lala *Ram Prasad*, for appellants.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The provisions of cl. 15, s. 1, Act XIV of 1859, relating to suits against a mortgagee for the recovery of immoveable [427] property mortgaged, were modified by art. 148, sch. ii, Act IX of 1871, principally in this respect, that the acknowledgment in writing in the mortgagor's title or right of redemption, from the date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage; the reason of the modification is, I conceive, discoverable by reference to s. 29 of the last-mentioned Act, which declares that at the determination of the period limited to any person for instituting a suit for possession of any land, his title to such land shall be extinguished. The intention of the Legislature was to allow a further period of limitation to run from the date of an acknowledgment, not of rights already extinct, but only of rights still subsisting.

Before the enactment of cl. 15, s. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. In 1841, therefore, when the acknowledgment found in the settlement record of that year, was made by the defendants in this suit, or their forefathers, that they held the property in suit as mortgagees, there was nothing in the law to preclude the mortgagors from suing for the redemption of the mortgage. In other words the right acknowledged was a right not extinguished by lapse of time, but still subsisting; the acknowledgment fulfils the intention and satisfies the requisition of the clause in art. 148, sch. ii, Act IX of 1871, modifying the provisions of cl. 15, s. 1, Act XIV of 1859, and renders it unnecessary to enquire and ascertain when the mortgage, acknowledged in 1841, was actually made.

From this point of view it is immaterial whether the first two pleas in the appeal now before us are good. The plea of *res judicata* set forth in the last ground of the appeal is certainly not established.

The only question remaining for trial was whether the property in suit was mortgaged to the defendants' ancestors by the ancestors of the plaintiffs. That question has been determined in the affirmative by the

lower appellate Court, whose finding on the point is not impugned by the special appellants. 1877 APRIL 19.

[428] I would affirm the lower appellate Court's decree, and dismiss the appeal with costs. APPEL-LATE CIVIL.

SPANKIE, J.—I am of the same opinion. 1 A. 425= 2 Ind. Jur. 115.

Appeal dismissed.

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1 A. 428=2 Ind. Jur. 146.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

NEHALO (*Appellant*) v. NAWAL AND OTHERS (*Respondents*).*
[8th May, 1877.]

Act IX of 1861, *ss.* 1, 6—*Fresh application—Guardian—Minor—Power to appoint—Previous orders not conclusive.*

A Court is not precluded from entertaining a fresh application for the guardianship of a minor under s. 1 of Act IX of 1861 by the circumstance that a previous application of the same sort has been refused.

IN the year 1872 one Ram Dyal applied to the Judge of Meerut, under Act IX of 1861, for the custody and guardianship of a female minor, alleging that the maternal uncle, with whom the minor then resided, was not a fit and proper person to have charge of her. The Judge refused to grant Ram Dyal's application, and Ram Dyal did not appeal from this order.

The present application to the Judge was made by Musammat Nehalo, wife of the minor's first cousin, praying that the Court would appoint the petitioner guardian of the minor, and remove the minor from the custody of persons who were arranging an improper marriage for her. The Judge rejected the petition, holding that he had no power to deal with the subject-matter of it, under Act IX of 1861, as that Act applied only to minors respecting whose custody or guardianship the Court had passed no order, whereas an order had been passed rejecting Ram Dyal's application in 1872, with respect to the guardianship of the minor in question. The Court considered that it was thus precluded, under the terms of s. 6, Act IX of 1861, from entertaining any fresh application whilst the order on Ram Dyal's application remained undisturbed.

[429] The petitioner appealed to the High Court.

Pandit *Nand Lal*, for appellant.

Babu *Aprokash Chander Mukerji*, for respondents.

ORDER.

We consider that this application can be entertained under the terms of s. 1, Act IX of 1861, and we reverse the Judge's order, and direct him to enquire into the application and pass an order according to law. The costs will abide the result.

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* Miscellaneous Regular Appeal No. 17 of 1877, from an order of H.W. Dashood, Esq., Judge of Meerut, dated the 4th December 1876.

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APPELLATE CIVIL.

1 A. 429.

1 A. 429.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

BALLABH DAS (*Plaintiff*) *v.* SUNDER DAS AND OTHERS (*Defendants*).*
[18th May, 1877.]

Hindu law—Destruction of character of joint undivided family property by introduction of stranger in blood as auction-purchaser—Assent of co-parceners no longer necessary to constitute valid gift.

The introduction of a stranger in blood as auction-purchaser of a portion of the rights and interests of an undivided Hindu family breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property; and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the auction-purchaser, is not invalid by reason of the principle of Hindu law, which requires the assent of co-parceners in an undivided Hindu family to give validity to such a gift.

[F., 2 A. 898; R., 21 B. 797; A.W.N. (1908) 200.]

THIS was a suit for partition and possession of half a garden with joint possession over half a well and for the maintenance of possession over eight biswas of *lakhraon* land (*i.e.*, planted with trees affording shade to roads). The whole of the above property belonged originally in equal shares to Brij Das and Brindaban Das (defendants Nos. 2 and 3) on the one side, and to Jumna Das and Har Gobind Das on the other, as their ancestral property. In April 1866, Sunder Das, defendant No. 1, became the purchaser at an auction-sale of the half share of Jumna Das and Har Gobind Das and obtained possession under the said sale of half the garden and well. In January 1874, Brij Das and Brindaban Das made a verbal gift of their share of the property to the **[430]** plaintiff who applied for a mutation of names in his favour; the Commissioner rejected this application, whereupon Sunder Das took possession of the whole garden, hence the suit. Among other defences set up by Sunder Das was this, *viz.*, that the gift was invalid, the property being ancestral and undivided. The Munsif gave the plaintiff a decree. On appeal by Sunder Das, defendant, the Officiating Judge, relying on Elberling on Inheritance, para. 281, p. 132, and Macnaghten's Principles of Hindu Law, Vol. 2, p. 224, ruled that a gift of any portion of joint ancestral property without prior division, and in the absence of the assent of all the co-sharers is invalid under Hindu law, and on this ground he dismissed the suit. The plaintiff appealed to the High Court, and the principal ground of his appeal was that by the auction-sale of a portion of the property to a stranger the joint and undivided character of the property ceased, and that accordingly the principle of Hindu law on which the Judge relied was inapplicable to the case.

The *Senior Government Pleader* (Lala *Juala Prasad*), for appellant.
Pandits *Bishambhar Nath* and *Nand Lal*, for respondents.

JUDGMENT.

The judgment of the High Court after stating the facts proceeded as follows:—

* Special Appeal No. 1129 of 1876, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 21st June 1876, reversing a decree of Babu Pramoda Charn Banerji, Munsif of Benares, dated the 21st December 1873.

We are of opinion that the Judge has not properly considered the effect of the auction-purchase of the respondent on the constitution of the joint family and the joint property; that purchase by introducing a stranger as owner of the rights and interests of two of the members of the original undivided Hindu family broke up the constitution of the family as an undivided Hindu family. The joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connection among its members by blood, relationship, adoption, and marriage. Property held in such co-parcenership will be joint family property, the introduction of strangers in blood by auction-purchase necessarily breaks up the family relation.

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Sir J. Strange, writing of the joint family, says " in the property *thus descended*, so long as they remain undivided, the family possesses a community of interest ;" and the context shows that a descent of heirs is meant.

[431] We may refer also to a passage in West and Bühler, Part II, ii, and the rules under which partition which operates in respect of the undivided family takes place, show that an undivided family is constituted in the sense indicated.

The gift to the plaintiff is therefore not invalid on the ground held by the Judge. (The Court then went on to remand the case for the trial of the other issues raised by the defence.)

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1 A. 431=2 Ind. Jur. 146.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

GIRDHARI AND OTHERS (*Plaintiffs*) v. SHEORAJ AND AOTHERS, (*Defendants*).* [28th May, 1877.]

Act VIII of 1859, *ss.* 5, 13—*Account of sums realized on collective mortgage of lands in separate districts—Decree for redemption of lands within jurisdiction not barred by Reg. VII of* 1825, *because based on such account.*

In a suit for redemption of lands lying within the district of Mirzapur, but included in the same mortgage with other lands lying within the domains of the Maharaja of Benares, the Subordinate Judge of Mirzapur took an account of the sums realized by the mortgagee from the lands mortgaged, and finding that these sums were sufficient to discharge the entire mortgage-debt gave the plaintiff the decree sought: the lower appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying *ultra vires* of the Mirzapur Court. *Held* that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for the redemption of the property lying within the local limits of its jurisdiction, notwithstanding that in doing so it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja.

THE facts of the case and the manner in which it was dealt with by the lower Courts are sufficiently stated in the judgment.

Munshi *Hanuman Prasad* and Pandit *Ajudhia Nath*, for appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Lala *Lalta Prasad*, for respondents.

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* Special Appeal No. 1342 of 1876, from a decree of J. W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 24th August 1876, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Mirzapur, dated the 5th May 1876.

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JUDGMENT.

The subject of the mortgage to which this suit refers is land situated in the district of Mirzapur, and land in par-[432]gana Bhadohi, in the family domains of the Maharaja of Benares, and Reg. VII of 1825 has provided a special jurisdiction for the trial of suits for land in these domains.

This suit was brought in the Court of the Subordinate Judge of Mirzapur by all the mortgagors, or rather the parties who now represent the original mortgagors, for redemption of the entire property mortgaged, and authority was asked, under s 13 of Act VIII of 1859, to try the suit in the civil Court of Mirzapur in respect of the property situated in the family domains, but this was refused, as the High Court found that such authority could not be given in the existing state of the law.

Two of the plaintiffs who were only interested in the mortgage to the extent of the property in the family domains then withdrew from the suit, and the others proceeded with their claim to redeem the portion of the mortgaged property situated in Mirzapur, and they have obtained a decree from the Subordinate Judge for possession of the mortgaged property in Mirzapur on the basis of the satisfaction of the entire debt charged on the two properties.

The Judge, in appeal, has reversed the decree and dismissed the suit, holding that the trial will raise questions affecting property in the family domains in respect of which he has no jurisdiction, instancing in this view, and in the way of objections, the question whether the mortgagees were in possession of certain lands in Katehri (in the domains), and without which the accounts cannot be made up.

We do not consider that this objection to the trial of the suit is valid.

The plaintiffs were at liberty to forego, as they have done, suing for possession of the property situated in the family domains, and the suit as now brought is only for immoveable property in the district of Mirzapur: the suit does not seek to recover land in the domains, nor is there any claim raised in this suit of a nature exclusively cognizable by Courts established under Reg. VII of 1825. Section 5 of Act VIII of 1859 gives the Mirzapur Court jurisdiction to entertain the suit in respect of the immoveable property in Mirzapur, and that jurisdiction could not be ousted be-[433]cause, in the course of the trial of the suit, it may be necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage so as to ascertain if the entire mortgage debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur.

We reverse the decree of the lower appellate Court and remand the case, under s. 351, Act VIII of 1859, for trial on the merits.

Decree reversed and cause remanded.

1 A. 433 = 2 Ind. Jur. 177.

1877 JAN. 12.

APPELLATE CIVIL.

1 A. 433 = 2 Ind. Jur. 177.

APPELLATE CIVIL.

(*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.*)

BALWANT SINGH (*Defendant*) v. GOKARAN PRASAD (*Plaintiff*).
[12th January, 1877.]

Charge against immoveable property—Auction purchaser's rights subject to Lease.

An obligee under a bond giving him a charge upon land who sues for and obtains only a money-decree, under which he himself purchases the land, the sale-proceeds being sufficient to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Semble* that even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not according to the principle laid down in *Khub Chand* v. *Kalian Das* (1) avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond.

THE plaintiff sued in 1873 to recover the amount due under a bond, dated the 26th June 1872, by which immoveable property was hypothecated to him, but did not seek to enforce his charge upon the land. In execution of the money-decree thus obtained, the plaintiff attached, brought to sale, and became the auction-purchaser of the said property. Between the date of the bond hypothecating the property and the institution of the suit thereon in 1873, the obligor gave a lease of a portion of the said property for a term of years to a third person. The lessee opposed the plaintiff's possession, and the plaintiff accordingly in 1875 brought the present suit against him and others.

[434] The Subordinate Judge gave the plaintiff a decree and the lessee appealed to the High Court on the grounds stated in the judgment below.

Pandit *Ajudhia Nath* and Munshi *Hanuman Prasad*, for appellant.

Pandits *Bishambar Nath* and *Nand Lal*, for respondent.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—On the 26th June 1872, one Daulat executed a bond for Rs. 6,000 in favour of Gokaran Prasad payable by instalments extending over thirty years, and he hypothecated his five-biswa share in the village of Bajua as security for the payment of the debt, any transfer, being prohibited until the money was repaid. In case of any default in the payment of the instalments, interest at the rate of one per cent. per mensem was payable. If two instalments remained unpaid, the obligee was entitled to recover the entire amount from the obligor and the property hypothecated. On the 12th May 1873, Paras Ram, Lambardar, and Lal Singh, Pattidar, sons of the obligor, Daulat, describing themselves as owners of two-thirds out of the five-biswa share hypothecated by the said Daulat, leased their two-thirds including sir lands and all other rights for a period of twelve years to Hukam Singh. This lease was registered on the 28th of August, and mutation of names was had in the Revenue Court. In the meantime default had occurred in the payment of instalment under the bond, and a suit was instituted by Gokaran Prasad on the 28th October 1873, for the money due on the bond against them, but he had not sought to enforce his lien against the property, as there was

* Regular Appeal, No. 83 of 1876, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Mainpuri, dated the 20th May 1875.

(1) 1 A. 240.

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no decree against it. On the 28th August 1874, the same plaintiff as decree-holder purchased the property, and after taking a receipt for the money due to the decree-holder, the judgment-debtors received the balance of the sale-proceeds, some Rs. 3,000. The plaintiff then found that the lessee under the lease of May 1873, opposed the possession in respect of a little more than three biswas, six biswansis, thirteen kachwansis, and six manwansis. He therefore brought this suit, making the lessee and lessors defendants in the case. He sues, as auction-purchaser and to set aside the lease as having been executed collusively and fraudulently without his knowledge with [435] the view of depriving him of his right, in spite of the hypothecation made in the bond of 1872. By a subsequent petition, the plaintiff was allowed to amend his plaint by the additional prayer that his lien under the bond of June 1872 might be enforced.

The facts are not denied. The defendant, Hukam Singh, the lessee, contends that as the plaintiff did not sue for the enforcement of the lien when he sued for the money due on the bond, the lien had become null and void after the passing of the money-decree, and plaintiff was not competent to sue for the cancelment of the lease which had been executed in good faith and for legal consideration. The defendant obtained possession prior to the purchase of plaintiff, with whose knowledge the lease was made and mutation of names effected under it, he being a co-partner and sharer in the estate. The suit had been instituted by collusion between plaintiff and the lessors.

The lessors do not appear to have defended the suit. The Subordinate Judge in a brief decision held that the plaintiff's omission to claim the enforcement of the lien was no bar to his present claim, and that the lease had been collusively executed by the lessors and lessee, that it was a transfer, and therefore an alienation prohibited by the conditions of the bond and must be set aside.

Substantially, the pleas in appeal on the part of the defendant are the same as those urged in the Court below.

The decree of the Subordinate Judge cannot, we think, be maintained. It has been held by this Court (1) that "nothing passes to the auction-purchaser at a sale in execution of a decree but the right, title, and interest of the judgment-debtor at the time of the sale." The case cited is not precisely similar to the one before us but the principle is the same. It was also ruled that when the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree and further, it was held that the holder of a money-decree in the particular case could not avail himself of a condition against alienation contained [436] in his bond to resist the foreclosure. Here, too, the principle would seem to apply. But in the case now before us, the auction-purchaser was the decree-holder, and the sale-proceeds were sufficient to discharge the debt and give a considerable surplus to the judgment-debtors. Under these circumstances, we fail to perceive how the auction-purchaser can fall back upon the collateral security for a debt which no longer exists. But, apart from this, if the lease of May 1873 was prohibited by the hypothecation and conditions of the bond, then plaintiff might have proceeded against the property so hypothecated when he first instituted his suit, and possibly

(1) In *Khub Chand* v. *Kalian Das*, 1 A. 240.

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might have impleaded the lessee successfully. He omitted to do so, and his debt having been satisfied, it seems that he has no title as auction-purchaser to question the lease. It was made before he had brought his suit and registered openly: mutation of names was had under it. It is not denied that the plaintiff is a co-partner and sharer in the estate. The lease is for twelve years only and for a portion only of the property hypothecated. There was no attachment of the property when the lease was made. It was for the plaintiff to have established that the lease was fraudulently prepared and executed with a view to injure him. This we do not find that he had been successful in proving. He has not lost the property. He is the proprietor of it. It has not been so alienated as to jeopardise his proprietary right. He has got under his auction-purchase all the rights that his judgment-debtor possessed, subject, however, to the lease which has placed the management of two-thirds of the five biswa share in the hands of a lessee for twelve years. But, as pointed out above, he could not fail to have been aware of the transaction, and deliberately he omitted to sue to enforce his lien, if he could do so, against the lessee, when he brought his claim for the money due under the bond. He has no one to blame but himself, and having satisfied his debt by the purchase of the property, it is too late now to say that the lease was an infringement of the hypothecation of the bond.

We decree the appeal, and reverse the decree of the Subordinate Judge, and dismiss the suit with cost.

Appeal allowed.

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1 A. 437=2 Ind. Jur. 179.

[437] APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

AMBIKA DAT (*Plaintiff*) v. SUKHMANI KHAR AND ANOTHER (*Defendants*).* [25th May, 1877.]

Hindu Law—Joint and Undivided Ancestral Property—Definement of Shares—Insufficient Evidence of Partition—Enjoyment of profits.

Definement of shares in joint ancestral property recorded as separate estate in the revenue records in pursuance of an alleged intended separation between the members of a joint and undivided Hindu family does not necessarily amount to such separation, which must be shown by the best evidence, *viz.*, separate enjoyment of profits, or an unmistakable intention to separate interests which was carried into effect.

[R., 4 B. 157; 12 C. 96; 17 C.W.N. 1085=(1913) M.W.N. 658; **Cons.**, 10 A. 490= A.W.N. (1888) 203.]

THE plaintiff in 1874 sued the defendants, widows of the plaintiff's deceased cousin, Debi Prasad, for possession of certain landed property, ancestral and acquired with other estate, of which the defendants were in possession, the plaintiff alleging that his deceased cousin and himself were members of a joint and undivided Hindu family, and that the plaintiff as nephew of Debi Prasad was entitled to succeed to Debi Prasad's estate. The defendants pleaded in answer to the suit that they held possession of the bulk of the estate under a compromise entered into in 1872 between

* Regular Appeal, No. 19 of 1876, from a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 13th December 1875.

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the plaintiff and the defendants after the death of Debi Prasad; and, with respect to the claim set up by the plaintiff to a half share of certain landed property in mauza Sandhi, the defendant asserted that it was held by them under a partition effected in 1854, when the plaintiff was a minor, between the plaintiff's father, Dhaneshar Ram, and Debi Prasad's father, Maneshar Ram.

The Subordinate Judge found that the compromise of 1872, asserted by the plaintiff to have been only a nominal proceeding, really took effect, and, so far as it related to all the property held thereunder, dismissed the suit, but with respect to the half share of mauza Sandhi, the Subordinate Judge gave the plaintiff a decree, holding that, notwithstanding the definement of shares in the property, which occurred in 1854 owing to a temporary rupture in the family, the enjoyment of the profits of the said property [438] remained joint. The plaintiff appealed to the High Court with respect to the portion of the claim dismissed, and the respondents filed objections under s. 348 of Act VIII of 1859 to the finding of the Subordinate Judge that the partition of 1854 was not completed by the mere definement of shares recorded as separate property in the revenue records. The portion of the High Court's decision relating to the said property as joint and undivided, notwithstanding the definement of shares, will be found below.

Munshi *Hanuman Prasad*, Pandit *Bishambhar Nath* and *Chotey Tiwari*, for appellant.

Pandit *Ajudhia Nath*, for respondents.

JUDGMENT.

TURNER, J. (after stating the facts continued).—On the question of the character of the family whether in union or divided there is not much reliable evidence either way. It is for the defendants to make out a sufficient case showing partition, but with the exception of the facts that there was a quarrel between Maneshar Ram and Dhaneshar Ram in 1854, and that they then defined their interests in the property which they then held, and which at their deaths came to be recorded in the same way in their sons' names, there is really no reliable evidence. There is nothing definite to show the very important fact that the definement of shares was ever followed by separate enjoyment of profits (1).

The fact that there was a definement of shares followed by entries of separate interests in the revenue records in some estate only is an important piece of evidence towards proving separation of title and interest, but it will not necessarily amount to such separation; it must be shown that there was an unmistakeable intention on the part of the shareholders to separate their interests, and that the intention was carried into effect. The best evidence is separate enjoyment of profits and dealings with the property; and if we find through a long course of years nothing to show that the definement of shares which took place in 1854 has been acted on, and that the parties continued to enjoy the property on the same [439] same footing as before, it is but reasonable to suppose that, although they may have taken some steps towards separation, from some cause or other—it may be a reconciliation—the intention to separate was abandoned.

(1) See *Appovier's case*, 11 M.I.A. 75 (89), and 3 B.L.R. (P.C.) 41; *Raja Suraneni Venkata Gopala Narasinha Roy Bahadur* v. *Raja Suraneni Lakshmi Venkama Roy.*

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It appears to be the fact that Dhaneshar Ram, who was devoted to religion, never managed his own affairs; the management was in the hands of Maneshar Ram, apparently both before and after 1854, and until Maneshar's death. Maneshar was succeeded in the management by Debi Prasad, who continued to be sole manager during and after the cessation of plaintiff's minority and until he died in 1872. Had what occurred in 1854 operated as a separation, we think it probable that something would have been done to relieve Maneshar of the management, and it would not have been continued in Debi Prasad while Dhaneshar was alive, nor is there any satisfactory evidence to show any separate enjoyment of profits or separate dealings with the property. There are no accounts which show it; such as there are point the other way, the oral evidence is indefinite and contradicted by oral evidence on the side of defendants, and the documents which show purchases, &c., in Debi Prasad's sole name cannot be relied on to show either separation or union of interest, for he was manager of the entire property and head of the family, and the plaintiff was a minor, and transactions might have been done in his name in his capacity as a manager.

On the other hand we have the statement of Debi Prasad himself, made on the 5th July 1871, to the effect that there was no kind of separation, and the profits of the villages were without any specification considered by him to be the common property of himself and Ambika Dat. We do not see any reason why this statement should be distrusted because it was given for the purpose of the income-tax assessment. We consider the last plea in appeal as to costs is so far valid, that each party should pay their own costs, and with this modification we shall affirm the judgment of the lower Court and dismiss the appeal, each party paying their own costs.

Appeal dismissed.

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1 A. 440 = 2 Ind. Jur. 216.

[440] APPELLATE CIVIL.

(*Before Mr. Justice Pearson and Mr. Justice Turner.*)

LACHMAN RAI AND OTHERS (*Defendants*) v. AKBAR KHAN AND OTHERS (*Plaintiffs*).* [5th June, 1877.]

Memorial Dues and Cesses—Feudal System—Immemorial Custom—What is best proof thereof—Custom must be definite to be good—Parol and Documentary Evidence.

The plaintiffs, zamindars, sued for a declaration of their ancient right as against all the tenants of a certain village to appropriate all trees of spontaneous growth and the fruits of other trees planted by the tenants; also to receive as manorial tribute a certain number of ploughs annually and a certain offering of poppy-seed and other farm produce on the occasion of the marriage of persons of the lower caste of tenants, with a further right to levy a certain proportion of the produce of the sugarcane manufactories and fields in the village. The lower Courts having decreed the suit on vague and general parol evidence as to the existence of the said customs *held*, (*a*) that where a custom regarding several cesses is alleged, the existence of the custom regarding each cess should be tried as a separate issue; (*b*) that parol evidence as to the existence of such customs should be tested by ascertaining the grounds of the witness's opinion; (*c*) that

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* Special Appeal, No. 188 of 1877, from a decree of R. F. Saunders, Esq., Judge of Azamgarh, dated the 21st November 1876, affirming a decree of Maulvi Mahammad Hasan Khan, Munsif of Azamgarh, dated the 16th August 1876.

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the best proof of custom is instances in which it has been acted on and documentary evidence that it has been enforced; (*d*) that a custom to be good must be definite.

[F., 8 Ind. Cas. 897 (904) = 4 S.L.R. 88 (106); Ap., 10 A. 585 (586).]

THE plaintiffs, as zamindars, sued all the tenants of mauza Harirampur for a declaration of their manorial rights as against all the tenants collectively to the appropriation by the plaintiffs of all trees of spontaneous growth, the fruit of mango, mahua and other trees planted by the defendants, and of their right to receive a tribute of two ploughs annually, as also an offering of a certain quantity of poppy-seed, hemp, bhusa, cowdung cakes, and other farm-produce, on the occasion of the marriage of the lower caste tenants, with a further right to levy as dues from the said tenants a proportionate quantity of sugarcane juice prepared by each sugar manufactory, and the presentation of a certain number of sticks of sugarcane on a certain day in each year to the plaintiffs. The cause of action alleged was an order of the settlement officer in the recent settlement amending the wajib- ul-arz or record-of-rights, on the objections preferred by the tenants challenging the existence of the rights which had **[441]** been inserted in the said record. The defendants contested the suit on grounds of limitation and long disuse of such customary dues, if they ever existed, which they also denied. The Munsif, upon parol evidence of the former existence of the alleged village customs, although no record of rights to such cesses was to be found in any settlement records after 1857, decreed the plaintiff's claim.

The defendants in appeal before the Judge urged that a single suit against various classes of tenants and comprising the various claims set forth in the plaint could not be maintained, and that there being no documentary evidence adduced by the plaintiffs in support of the alleged dues, the parol evidence offered by the plaintiffs was not reliable. The Judge dismissed the appeal, holding that the claims were of the same character, and that the existence of the customs as immemorial was proved by sufficiently reliable parol evidence in the absence of revenue records destroyed during the Mutiny.

Babu *Beni Prasad*, for appellants.

Mr. *Colvin* and Shah *Asad Ali*, for respondents.

ORDER.

The order of the High Court remanding the case for a proper trial was delivered by

TURNER, J.—It is to be regretted that the Courts below have not inquired more fully before affirming the existence of customs of which some, although no doubt they at one time obtained in certain parts of the country, appertained to the fedual system and are disappearing with that system.

In such cases it is peculiarly incumbent on the Courts to try the existence of the custom regarding each cess as a separate issue, and to test the parol evidence given generally as to the existence of the custom by ascertaining on what grounds the opinion of each witness is based. The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced.

[442] It should also have been specifically determined on what castes or classes of tenants custom imposes a cess claimed if the existence of the custom is proved. Again, a custom to be good must be definite, the size of the pot of sugar and the basket of cowdung is left uncertain, as are also the times of rendering these alleged dues.

That the claims may be more thoroughly tried, we set aside the decrees of both Courts, and direct the Court of first instance after framing specific issues to re-try the suit. The costs incurred hitherto will abide and follow the result.

Decree reversed and cause remanded.

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1 A. 442.

APPELLATE CIVIL.

(*Before Mr. Justice Pearson and Mr. Justice Turner.*)

DALIP SINGH (*Plaintiff*) *v.* DURGA PRASAD (*Defendant*).*
[7th June, 1877.]

Act I *of* 1872 (*Evidence Act*), *s.* 91 (*e*)—*Act* VIII *of* 1871 (*Registration Act*), *ss.* 17, 49—*Receipt for sums paid in part of Mortgage-debt—Inadmissibility of Unregistered Receipt—Parol evidence admissible.*

A receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of s. 17 of Act VIII of 1871 to render it admissible as evidence under s. 49 of the said Act. Under illustration (*e*), s. 91 of Act I of 1872, such payments may nevertheless be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence.

[**Diss.**, 9 A. 108 (F.B); 3 M. 53; **N. F.**, 4 B. 235, **F.**, 6 A. 335; **Rel. on**, 34 A. 528 (529)=10 A.L.J. 25 (26)=16 Ind. Cas. 179 (180); **R.**, 24 B. 609; 100 P.R. 1902.]

THE plaintiff sued the defendant to recover a sum of money alleged to be due on a bond hypothecating immoveable property by sale of the said property. The defendant produced a receipt for a portion of the amount alleged to have been signed by the plaintiff, and claimed credit to that extent. The plaintiff denied the genuineness of the receipt, and pleaded that under ss. 17 and 49 of Act VIII of 1871 the receipt being unregistered was inadmissible as evidence.

[443] The Munsif found that the receipt was genuine, and held that registration of it was not compulsory; the Munsif therefore allowed the set-off claimed by the defendant, and decreed the plaintiff's suit for the balance.

On appeal by the plaintiff against the portion of the claim disallowed by the Munsif, the Subordinate Judge ruled that, under s. 17 of Act VIII of 1871, registration of the receipt was compulsory, and under s. 49 of the said Act, that the receipt being unregistered was inadmissible as evidence. The Subordinate Judge further ruled that the parol evidence of payment of the money to plaintiff adduced by defendant was also inadmissible under the circumstances, and the Subordinate Judge, reversing the Munsif's decision, decreed the suit in full.

In special appeal before the High Court the defendant contended that registration of the receipt was not necessary under the Registration Act,

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* Special Appeal. No. 231 of 1877, from a decree of Maulvi Wajih-ul-la Khan, Subordinate Judge of Moradabad, dated the 18th May 1877, modifying a decree of Rai Kanhya Lal, Munsif of the Environs of Moradabad, dated the 14th December 1875.

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and that even the receipt were inadmissible as evidence of payment without being registered, the fact of payment could nevertheless be proved by parol evidence.

Munshis *Hanuman Prasad* and *Sukh Ram*, for appellant.

Mr. *Conlan* and Pandit *Bishamber Nath*, for respondent.

ORDER.

The order of the Court remanding the case for decision on the parol evidence was delivered by

PEARSON, J.—We are compelled to concur in the ruling of the lower appellate Court that the receipt for Rs. 477 should have been registered, and not having been registered, is inadmissible as evidence of the payment. But the lower appellate Court's further ruling that the oral evidence of the payment adduced by the defendant is inadmissible is opposed to illustration (*e*), s. 91 of the Indian Evidence Act. We therefore direct the lower appellate Court, under s. 351 of Act VIII of 1850, to find upon the oral evidence whether the alleged payment is proved to have been made, and to submit its finding when the parties may take objections within a week.

The Subordinate Judge having returned a finding against the defendant on the parol evidence, the Court passed the following final judgment.

JUDGMENT.

[444] No objection being taken to the finding of the lower appellate Court on the point referred to it, we accept that finding and dismiss the appeal with costs.

Appeal dismissed.

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1 A. 444 (F.B.).

FULL BENCH.

(*Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.*)

NANKU AND ANOTHER (*Defendants*) *v.* THE BOARD OF REVENUE FOR THE N. W. P. IN THE CAPACITY OF THE COURT OF WARDS, FOR THE MINOR RAJA OF KANTIT (*Plaintiff*).* [14th June, 1877.]

Suit cognizable by Courts of Small Causes—Act XXIII *of* 1861, s. 27—*Zamindari dues and cesses not coming within the classes of such suits—Joinder of causes of action between same parties.*

The plaintiff claimed from the defendants, as joint decree-holders, a fourth share of the proceeds realised by auction-sale through the Court of the Munsif of certain houses, situate on land subject to a village-custom whereby a proprietary due of the above amount was recognized and payable to the zamindar of the said land. The Division Bench of the High Court having referred to the Full Bench the question whether claims for such zamindari dues or cesses were in the nature of suits cognizable by a Court of Small Causes, *held* by the Full Bench that the claim as brought does not fall within any of the classes of suits cognizable by the Courts of Small Causes; *aliter* if the due is payable in virtue of a contract.

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* Special Appeal. No. 1452 of 1876, from a decree of J. W. Sherer, Esq. C. S. I. Judge of Mirzapur, dated the 16th September 1876, affirming a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 15th May 1876.

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FULL BENCH.

1 A. 444 (F.B.).

Held by the Division Bench that the claim is not bad for misjoinder, as the due was payable out of the sale proceeds taken out of Court by the decree-holders.

[F., 2 A. 905; 18 A. 430=A.W.N. (1896) 140; R., 2 A. 358.]

THE Board of Revenue, North-Western Provinces, representing the Court of Wards as Manager of the estate of the Raja of Kantit (a minor), sued in 1875 to recover from the defendants a sum of Rs. 115-8-0, a fourth share of the sale-proceeds of certain houses belonging to one Jokhu Misr situate on the estate of the said Raja of Kantit, which the defendants, as decree-holders against the said Jokhu Misr, had attached and sold by auction in 1873, through the Court of the Munsif of Mirzapur, and of which the defendants had realised the sale-proceeds. The suit was based on an alleged village custom obtaining in the Kantit estate by which the Raja [445] as zamindar was entitled to receive as "huq-i-chaharum" one-fourth share of the sale-proceeds of property situate on the said estate as a proprietary due. The defendants pleaded among other matters that as auction-purchasers under their joint money-decree of distinct houses sold at different times the suit was bad for misjoinder.

The Munsif found that the suit was not bad for misjoinder, as against the defendants because they were sued as joint decree-holders who had realised the sale-proceeds of the property, and not as auction-purchasers thereof. The defendants in appeal before the Judge of Mirzapur repeated the pleas contained in their reply to the suit, and the Judge finding the pleas untenable affirmed the decision of the Munsif and dismissed the appeal with costs.

In special appeal to the High Court a question having been raised as to whether suits for "huq-i-chaharum," or other zamindari cesses were in the nature of suits cognizable by a Court of Small Causes, the Court (PEARSON and TURNER, JJ.) made the following order :—

It appearing that there are conflicting rulings, we refer to the Full Bench the following question :—

Are suits for "huq-i-chaharum" or other zamindari cesses of the nature cognizable by a Court of Small Causes.

Munshi *Sukh Ram* and Maulvi *Mehdi Hasan*, for appellant.

The Senior Government Pleader, Lala *Juala Prasad*), for respondent.

OPINION OF THE FULL BENCH.

STUART, C. J., PEARSON, TURNER, and SPANKIE, JJ., *concurring* :—We have considered the language of the Small Cause Court Act, and hold that the claim brought in this suit does not fall within any of the classes of suits made cognizable by those Courts. The claim is for a zamindari due customarily payable : it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages. The opinion at which we have arrived is in accordance with the more numerous rulings of this Court, and with the practice of the Court to allow special appeals in such cases although the sum in dispute is of less amount than Rs. 500. It must not be understood that we impugn the [446] ruling that, where "chaharum" is payable in virtue of a contract, the claim is of a nature triable by a Court of Small Causes.

JUDGMENT OF THE DIVISION BENCH.

The Division Bench, upon the return of the case with the above finding, dismissed the appeal on the grounds detailed in the judgment of the Court delivered by—

1877 JUNE 14. — FULL BENCH. — 1 A. 444 (F.B.).

TURNER, J.—The Full Bench being of opinion that a claim for "huq-i-chaharum" is not cognizable by a Court of Small Causes we may entertain the appeal.

The first plea alone is urged that the claim is bad for misjoinder. This plea has for sufficient reasons been overruled by the Courts below. The sale-monies, although the produce of the sale of more than one lot, have been taken out of Court by the decree-holders, the appellants, and they must give up to the respondent, the zamindar, his due in respect of each sale. The causes of action though several are between the same parties. The appeal fails and is dismissed with costs.

Appeal dismissed.

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1 A. 446.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

GANPAT RAI AND ANOTHER (*Defendants*) *v.* SARUPI (*Plaintiff*).*
[21st June, 1877.]

Money-decree passed on Mortgage-bonds—Mortgage-rights not conveyed by Sale of Money-decree.

The purchaser of a single money-decree passed on a bond hypothecating property does not merely by his purchase acquire a lien upon the property.

[D., 78 P.R. 1905=135 P.L.R. 1905.]

ONE Badri Das, the mortgagee of certain lands and houses, obtained in 1868 a money-decree on his mortgage bonds. The plaintiff's husband, one Narayan Das, together with one Jamna Das, purchased in 1871 the said decree. The said Narayan Das having died, the plaintiff brought this suit as his widow and guardian of his minor sons, alleging that the said Narayan Das by the purchase of the said money-decree acquired with his co-vendee the mortgage-rights of Badri against the said property, and seeking to [447] enforce a moiety of these rights by sale of the said property. The defendants were the original mortgagors and certain auction-purchasers of the said property under sales effected in execution of money-decrees obtained by other persons against the said mortgagors. The co-vendee having declined to join in the suit, was made a *pro forma* defendant.

The defendants set up a number of pleas in the Subordinate Judge's Court, but the Subordinate Judge overruled them and gave a decree to the plaintiff.

The defendants in appeal to the High Court, in addition to the pleas urged in the Court of first instance, relied on the further ground that under the deed of sale conveying the rights conferred by the money-decree of 21st December, 1868, no hypothecation rights against the property passed to the purchasers of the said decree.

Pandit *Bishambhar Nath* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for appellants.

Munshi *Hanuman Prasad* and Babu *Barodka Prasad*, for respondent.

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* Regular Appeal, No. 21 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 4th December 1876.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—The sale in this case extended not to the original debt but to the decree, and in the sale-deed no reference is made to any securities held by the original creditor. In our judgment then the sale-deed conveyed to the purchaser no title to the securities.

We do not say that if the debt itself had been sold, the purchaser might not have been entitled to call upon the seller to assign the securities. That question when it arises will be determined in reference to the terms of the contract, but in the case before us it is clear all that was sold was the money-decree.

Instances may be suggested in which the holder of such a decree would be unwilling to part with the lien though willing to sell the decree. He may, for instance, have a second mortgage of the same property, and it would in our judgment lead to injustice to hold that the sale of the decree carried with it necessarily the right to an assignment of all securities held by the original creditor.

[448] Whether this be so or not the lien in the present instance has not been assigned to the plaintiffs, and, therefore, they cannot claim the benefit of it. The decree of the Court below must be reversed and suit dismissed with costs.

Appeal allowed.

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1 A. 448 = 2 Ind. Jur. 320.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

BAKHAT RAM AND ANOTHER (*Plaintiffs*) v. WAZIR ALI AND OTHERS (*Defendants*).* [29th June, 1877.]

Act XVIII of 1873 *(North-Western Provinces Rent Act, ss.* 7, 95*—Sir land—Ex-proprietary Tenant—Mortgage of proprietary rights in a Mahal followed by sale—Ejectment—Mesne Profits—Trespasser—Jurisdiction—Civil Court—Revenue Court.*

A suit to eject a person from land as a trespasser, a person who has entered upon such land asserting his claim to the status of an ex-proprietary tenant, and to recover from him mesne profits, is a suit cognizable by the Civil Court (1).

The possession of sir-land by conditional mortgagees must be treated as the possession of the mortgagors; *held* accordingly that where the mortgagees of certain proprietary rights in a mahal, being in possession of such rights, purchased the same at an auction sale, the sir-land included in the proprietary rights was held by the mortgagors at the time of the auction sale, within the meaning of s. 7 of Act XVIII of 1873, and that after the sale, in virtue of the provisions of that section, they become entitled to a right of occupancy in the sir-land.

Inasmuch the mortgagors had a right of occupancy in the sir-land, they could not be treated as trespassers for ejecting the mortgagees' tenant and taking possession; but inasmuch as instead of giving notice to the mortgagees of their intention to avail themselves of such right and to enter on the sir-land as tenants, at the same time, offering to pay such rent as might, having regard to the provisions of s. 7, be properly payable by them, they entered on the sir-land and ousted the mortgagees' tenant, they rendered themselves liable for mesne profits,

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* Special Appeal, No. 899 of 1876, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 11th January, 1876, reversing a decree of Maulvi Ezid Baksh, Munsiff of Muhammadabad, dated the 20th August, 1875.

(1) See also *Ghisa* v. *Didari*, H.C.R., N.W.P. 1875, p. 257; *Rughobar Misser* v. *Sital*, p. 228; and *Mata Para Parshad* v. *Janki*, p. 226.

1877 JUNE 29. — APPELLATE CIVIL. — 1 A. 448= 2 Ind. Jur. 320.

THIS was a suit to eject the defendants as trespassers from certain sir-land and to recover mesne profits. The plaintiffs held [449] possession of the share which included the *sir* land as conditional mortgagees. The *sir* land was sub-let by them to a tenant. The rights in the share remaining in the mortgagors, who were the defendants in this suit, were sold at auction and purchased by the plaintiffs, who thus became possessed of the share and the sir-land in full proprietary right. The defendants, the plaintiffs alleged, had ousted the plaintiffs' tenant from the *sir* land. The defendants set up as a defence to the suit that, having lost their proprietary rights, they were entitled, in virtue of s. 7 of Act XVIII of 1873, to a right of occupancy in the *sir* land. The Court of first instance, holding that, as at the time of the auction-sale the plaintiffs were already in possession as mortgagees, they did not lose their right to possession by purchasing the rights remaining in the mortgagors, gave the plaintiffs the decree which they sought, without determining what was the amount of mesne profits they were entitled to recover, although an issue had been fixed as to this point. On appeal by the defendants, the lower appellate Court held that the plaintiffs' rights as mortgagees merged in the higher title acquired by the auction-sale, and remanded the suit to the Court of first instance, under s. 351 of Act VIII of 1859, in order that it might take evidence as to the produce of the land, and then determine whether or not the suit was cognizable by the Civil Court.

The plaintiffs appealed to the High Court, taking exception to the lower appellate Court's procedure, and contending that the suit was cognizable by the Civil Court, that if the defendants had any right in the land, they could enforce it according to law, but could not eject the plaintiffs' tenant, that the only questions in the suit were whether the plaintiffs' tenant had been dispossessed, and what damages the plaintiffs were entitled to; and that, when the defendants adduced no evidence as to the damages, although an issue was framed on that point, they could not fairly complain of the decree of the High Court of first instance in that respect.

Lala *Lalta Prasad*, for the appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Shah *Asad Ali*, for the respondents.

[450] The suit was remanded to the lower appellate Court, under s. 354 of Act VIII of 1859; the Court (after stating the facts of the case and the manner in which it was dealt with by the lower Courts) making the following

ORDER OF REMAND.

It was the duty of the lower appellate Court to determine for itself whether or not the suit was cognizable by the Civil Court, and if it held the suit to be cognizable to proceed to determine it, remitting an issue under s. 354 touching damages, or if it found the suit was not cognizable to dismiss it forthwith. That the suit as brought was cognizable by a Civil Court, we see no reason to doubt. The plaintiffs contend that the defendants ousted their tenant and took possession as trespassers. Such a suit may be instituted in the Civil Court.

The question then arises whether the defendants are to be regarded as trespassers or not.

1877 JUNE 29. APPELLATE CIVIL. 1 A. 448 = 2 Ind. Jur. 320.

In our judgment the Munsiff was in error in holding that the plaintiffs, after the auction-sale, retained their position of conditional mortgagees. The lower appellate Court properly held that, having acquired the rights of the mortgagors, they thenceforward retained possession in full proprietary right ; and inasmuch as up to the time of the auction-sale their possession of the *sir* as mortgagees must be treated as possession of mortgagors, it appears to us the defendants are entitled to contend that the *sir* was held by them at the time of the sale, and that after the sale, in virtue of the provisions of s. 7 of the Rent Act, they became entitled to a right of occupancy in the *sir* as tenants at favourable rates ; and if, in the assertion of this right at the proper season of the agricultural year, they took possession, offering to pay the proper rent due from them, the plaintiffs have no right to treat them as trespassers, but can only claim rent in the proper Court.

In order to enable us to determine the suit and to avoid the necessity for any further remand or remission of issues, we order the lower appellate Court to try the following issues :—(1) Under what circumstances did the defendants take possession of the land in suit, and did they or did they not inform the plaintiffs of their intention to take possession of it as tenants, and of their readiness to pay [451] rent. (2) If at the time the land was in the possession of the tenant, had the tenancy for the year in which the tenant was ousted commenced prior or subsequently to the auction-sale. (3) At what rent did the tenant hold the land in suit, and what proportion, if any, of that rent had he paid for the year in which he was ousted.

On the first issue the lower appellate Court found that the defendants had ousted the plaintiffs' tenant, and that they did not inform the plaintiffs of their intention to take possession of the *sir* land as tenants, and of their readiness to pay rent. On the second issue it found that the tenancy for the year in which the tenant was ousted commenced subsequently to the auction-sale. On the third issue it found that the tenant paid an annual rent of Rs. 7-2-0 and that he had paid no portion of that rent for the year in which he was ousted. The lower appellate Court having returned its findings, the High Court delivered the following

JUDGMENT.

When the plaintiffs obtained the rights of the conditional vendors, their rights as conditional vendees merged, and they became possessed of the entire proprietary interest in the estate. Thereupon, by virtue of a provision of the rent law recently introduced, the defendants became entitled to hold their *sir* as tenants with rights of occupancy. Their proper course was to have given notice to the purchasers of their intention to avail themselves of their rights and to enter on the land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of the Rent Act, be properly payable by them. It would then have been incumbent on them, or on the purchasers, if they were unable to agree to the amount of rent payable, to apply to the Revenue Court to determine the rent. The defendants, without communicating with the plaintiffs or taking any steps to have a rent assessed on the land, entered and ousted the tenant. They cannot, nevertheless, be deemed trespassers, for they have a right to the occupancy of the land, but the plaintiffs are entitled to recover damages for the use and occupation of the land, and we assess those damages at twenty-five per cent. less than the sum payable by the tenant.

1877 JUNE 29. — APPELLATE CIVIL. — 1 A. 448 = 2 Ind. Jur. 320.

The decree of the lower appellate Court, so far as it reversed the claim for ejectment, is affirmed, so far as it dismissed the claim for [452] damages it is in part affirmed and in part reversed, and the plaintiffs will obtain a decree for the sum above-mentioned. Under the circumstances, we order each party to bear their own costs in all Courts.

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1 A. 452.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

PHULMAN RAI (*Defendant*) *v.* DANI KUARI (*Plaintiff*).* [12th July, 1877.]

Pre-emption—Hindu Widow—Wajib-ul-arz.

A Hindu widow holding by inheritance her deceased husband's share in a village fully represents his estate as regards such share, and is entitled to prefer a claim to pre-emption as a share-holder in such village.

THIS was a suit to establish the plaintiff's right of pre-emption to a share in a certain village, under a condition in the village administration-paper by which, on the sale of a share, share-holders were entitled to purchase in preference to strangers. The plaintiff was the widow of a deceased share-holder. Phulman Rai, a defendant in the suit, who also claimed the right of pre-emption, set up as a defence to the suit, that the plaintiff was not a share-holder, being in possession of her deceased husband's share by way of maintenance, and not by inheritance, and that she could not maintain the suit. The Court of first instance dismissed the suit on the ground that the sale impugned by the plaintiff was only made on her refusing to purchase. The lower appellate Court gave her a conditional decree, being of opinion that she did not refuse to purchase. It did not enter into the question raised by the defence of Phulman Rai.

Phulman Rai appealed to the High Court, raising the same defence to the suit as he had raised in the Courts below. The High Court (Pearson and Turner, JJ.) remanded the suit to the lower appellate Court to determine whether the plaintiff was a sharer in the estate or only entitled to maintenance. The lower appellate Court did not distinctly determine this issue, but found that the share in the plaintiff's possession was joint and undivided ancestral property. To this finding, the plaintiff took exception on the evidence.

[453] The *Senior Government Pleader* (*Lala Juala Prasad*) and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The following judgment was delivered by the High Court:—

TURNER, J.—(After finding on the evidence that the property was the separate property of the plaintiff's husband to which she succeeded by inheritance).—We must admit the objection taken to the finding on the issue remitted, and it remains for us to determine whether a widow, holding her husband's share by inheritance, is entitled to pre-emption. In

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* Special Appeal No. 266 of 1877, from a decree of Maulvi Sustan Hasan, Subordinate Judge of Gorakhpur, dated the 16th December, 1876, reversing a decree of Maulvi Hafiz Rahim, Munsif of Bansgaon, dated the 27th October, 1876.

our judgment so long as she enjoys the estate she fully represents the estate and can claim to exercise all rights which would attach to it in the hands of a male owner. The circumstance that the widow lived with the vendors would not deprive her of her right, it being found that the claim is not collusive.

Appeal dismissed.

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1 A. 453.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

DULAR CHAND (*Plaintiff*) v. BALRAM DASS AND OTHERS (*Defendants*).*
[16th July, 1877.]

Non-joinder of parties—Rejection of Plaint.

A suit was instituted by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. Notwithstanding that objection to the non-joinder of the other partners was duly taken, the plaintiff contented himself with putting in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the plaintiff, instead of applying to the Court to add the other partners as plaintiffs. In appeal the High Court admitted the objection, and refused, under the circumstances, to add the other partners as plaintiffs.

[**App.**, 14 A. 524=A.W.N. (1892) 104 ; **R.**, 7 B. 217 (219) ; 17 B. 6 (8) ; 18 M. 33 (37) ; 156 P.R. 1889 (**F.B.**) ; 159 P.R. 1889 (**F.B.**); **D.**, 9 B. 311 (315).]

AS to the nature of this suit it is sufficient, for the purposes of this report, to state that the suit was brought on the 30th March, 1876, by one of the five partners composing a firm in his own name, on a cause of action which he had in common with the other partners of the firm. In the written statement filed by one of the defendants on the 15th May, 1876, objection was taken to the non-joinder of the other partners. On the 7th June, 1876, on **[454]** behalf of the other partners, the plaintiff presented a petition to the Court of first instance in which was stated as follows :—"As Dular Chand (the plaintiff) has always been the head of the family suits have always been instituted in the name of Dular Chand, and he manages the firm. We obey him as our superior, and have no objection to the suit which has been instituted on his part against the defendants; it may be decided solely with reference to him." The Court directed the petition to be filed with the record. An issue was fixed as to whether the plaintiff could sue alone. This issue the Court, observing that "it is clear that the partners are entirely at one in their interest and proceedings, that the suit has been laid with the knowledge of all, and that Dular Chand takes a leading part in business," decided in favour of the plaintiff. On the other issues in the suit it decided against him and dismissed the suit.

In appeal to the High Court by the plaintiff, application was made on his behalf for leave to amend the plaint by adding the other partners of the firm as plaintiffs.

Munshi *Hanuman Prasad* and Pandit *Ajodhia Nath*, for the appellant.

Messrs. *Colvin* and *Howard*, for the respondents.

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* Regular Appeal, No. 110 of 1876, from a decree of J.W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 7th November, 1876.

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JULY 16.

APPELLATE CIVIL.

1 A. 453.

JUDGMENT.

The judgment of the Court, so far as it related to this application, was as follows :—

The appellant was badly advised by his pleaders in the Court below to file his plaint in his sole name and not also in the name of the other partners in the firm, for he had no sole cause of action against the respondents. When the objection was taken by the respondents in the Court below, the Court should either have made the other partners parties, or, on this ground, have dismissed the suit. Even when the defect was pointed out, the appellant, instead of praying the Court to amend the plaint, put in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the appellant. The Judge was in error in holding that a defect of which the respondents complained and which, if it affected any party to the suit, affected them could be thus cured.

[455] The appellant's pleaders in this Court at once recognised the position in which their client was placed, and have preferred a petition praying that the other partners may now be made parties. Although in some instances parties have been added by this Court in the stage of appeal, yet, seeing that the appellant elected to go to trial and the case was decided in the Court below without amendment of the proceedings, we are of opinion that in this instance we ought to refuse the application and allow the objection.

We shall therefore dismiss the appeal, affirming the decree of the Court below, not on the grounds on which that decree was passed, but on the preliminary ground that all the necessary parties were not joined as plaintiffs, and that the appellant has shown no sole cause of action. The appellant and his partners may of course bring a fresh suit.

Appeal dismissed.

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1 A. 455.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

HIRA CHAND (*Defendant*) v. ABDAL (*Plaintiff*).* [20th July, 1877.]

Redemption of Mortgage—Suit for Contribution—Misjoinder.

The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt, in order to save the estate from foreclosure, can claim from each of the other mortgagors a contribution proportionate to his interest in the property, but he cannot claim from the other mortgagors collectively the whole amount paid by him (1).

[**Appl.**, 16 C.L.J. 148 (151) = 17 Ind. Cas. 45 (46); **D.**, 12 A. 110 = 10 A.W.N. 31.]

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* Special Appeal No. 618 of 1877, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 6th March 1877, affirming a decree of Maulvi Hafix Rahim, Munsif of Bansgaon, dated the 22nd December, 1876.

(1) In *Rujaput Rai* v. *Ali Khan*, H C. R., N.-W.P., 1873, p. 215, where a person, who had been compelled to satisfy a decree obtained against him and other persons jointly, sued such other persons for contribution, seeking a joint decree against them for the money he had paid after deducting his own share, the High Court, instead of dismissing his suit, remanded the case that the Court below might determine and separately decree the respective shares of the other persons.

THE plaintiff in this suit purchased at auction-sale the rights and interests in a certain village of one Rameshar Chand. He subsequently discovered that those rights and interests had been mortgaged jointly with those of Hira Chand and another person. To save a foreclosure of the mortgage the plaintiff was compelled to discharge the mortgage-debt. He sued to recover the amount [456] of this debt from the mortgagors. The Court of first instance gave him a decree against all the defendants for the sum claimed, which decree was affirmed by the lower appellate Court on appeal by Hira Chand.

1877 JULY 20. APPELLATE CIVIL. 1 A. 455.

Hira Chand then appealed to the High Court, contending that the suit as brought was unmaintainable.

Lala *Lalta Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Shah *Asad Ali*, for the respondent.

JUDGMENT.

The judgment of the High Court was delivered by

TURNER, J.—The suit cannot be maintained as brought. The plaintiff, respondent, the purchaser of a mortgagor's share, paid off the mortgage to save the property from foreclosure. He thereby became entitled to call upon each of the other mortgagors to contribute, that is to say, he could claim from each a contribution proportionate to his interest in the property. He has now claimed in the lump sum the whole amount paid by him from the other co-sharers collectively, not even excluding his own quota.

The appeal is decreed, and as the ground is common to all the defendants, and it would be inequitable to allow the decree to stand against any of them; we reverse the decrees of the Courts below as against the defendants who did not appeal as well as against the defendant who has appealed. Hira Chand will recover his costs in all Courts. The other defendants must pay their own costs.

Appeal allowed.

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1 A. 456 (F.B.)=2 Ind. Jur. 260

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

UDAI SINGH (*Judgment debtor*) v. BHARAT SINGH AND OTHERS (*Decree-holders*).* [23rd July 1877.]

Rival Decrees—Decree of Her Majesty in Council—Decree of the High Court—Execution of Decree.

On appeal by *U*, the High Court set aside a decree which the sons of *K* had obtained in the Court of first instance against *U* and certain other persons [457] in a suit brought by them for possession of one-third of certain real property. At the same time on appeal by two of the other persons aforesaid, it affirmed a decree which *U* had obtained against these persons and the sons of *K* for possession of two-thirds of the same property, in a suit in which he had claimed possession of the whole. It subsequently, on appeal by *U* against that portion of the decree made in the suit brought by him which dismissed his claim in respect to

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* Miscellaneous Regular Appeal No. 60 of 1876, from an order of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 31st July, 1876.

1877
JULY 23.

FULL BENCH.

1 A. 456 (F.B.) = 2 Ind. Jur. 260.

one-third of the property, reversed that portion and gave him a decree for the whole. The sons of *K* appealed to Her Majesty in Council only from the decree of the High Court setting aside the decree obtained by them in the Court of first instance for one third of the property. Her Majesty in Council set aside this decree of the High Court and restored the decree of the Court of first instance. In the meantime *U* was put into possession of the whole property in execution of the decree of the High Court which he had obtained in the suit brought by him. When the sons of *K*, in execution of the decree of Her Majesty in Council, applied for possession of one-third of the property, *U* opposed the application on the ground that he was in possession under a decree of the High Court which had become final:

Held, by a Full Bench of the High Court that a decree of Her Majesty in Council must be executed, notwithstanding that its execution involved the disturbance of the possession obtained by *U* under the decree of the High Court which had become final.

ONE Pem Singh died possessed of certain real property situated in the district of Bulandshahr. On his death his widow succeeded to the same. On her death it came into the possession of Padam Singh said to be the adopted son of Pem Singh. One Mohar Singh sued to set aside the alleged adoption, and to obtain possession of the property as the sole heir of Pem Singh. The suit went up to Her Majesty in Council. It was there determined that Mohar Singh was only one of the heirs and not the sole heir of Pem Singh. In order that it might be determined who were the other heirs and what the extent of Mohar Sigh's right of inheritance in the property was, Her Majesty in Council, remanded the suit to the High Court. While the suit was before Her Majesty in Council, Mohar Singh died, and his son, Udai Singh, entered into an agreement with Phul Singh and Nathi Singh, the surviving sons of Dharajit, one of the heirs of Pem Singh, by which Phul Singh and Nathi Singh surrendered their rights of inheritance in the property to Udai Singh. The High Court determined on remand that Mohar Singh and Dharajit were entitled to succeed to the property in equal shares. A decree was therefore given to Udai Singh for possession of a moiety of the property, and in execution of that decree he obtained possession of such moiety. Subsequently Bharat Singh, Ranjit Singh and Bhola Singh, the [458] sons of Kundan Singh, a third son of Dharajit, who had died in his father's lifetime, sued Phul Singh, Nathi Singh, and the heirs of Padam Singh to obtain possession of one-third of the moiety of the property which had remained in the possession of Padam Singh. Udai Singh was added as a defendant in this suit on his own application. At the same time he brought a suit against the sons of Kundan Singh, the heirs of Padam Singh, Phul Singh, and Nathi Singh, in which he claimed the moiety in virtue of the agreement with him entered into by Phul Singh and Nathi Singh. These suits were tried together. In the first suit it was held by the Court of first instance that the sons of Kundan Singh were entitled to a third share of the moiety and a decree to that effect was given them. In the second suit Udai Singh obtained a decree for two-thirds of the moiety, his claim to one-third being dismissed. The heirs of Padam Singh did not appeal from either of these decrees. Udai Singh appealed to the High Court from the decree in the first suit, but not from the decree in the second. Phul Singh and Nathi Singh appealed to the High Court from the decree in the second. The decree in the first suit was reversed by the High Court, that in the second affirmed. Subsequently Udai Singh appealed from the decree in the second suit, and obtained a decree for the whole moiety. The sons of Kundan Singh appealed to Her Majesty in Council only from the decree of the High Court in the first suit, and the decree of the High Court was

reversed, and that of the Court of first instance restored. In the meantime Udai Singh, in execution of the decree of the High Court in the second suit, obtained possession of the whole moiety. 1877 JULY 23.

The sons of Kundan Singh applied to the Court of first instance to obtain possession of one-third of the moiety in execution of the decree which they had obtained from Her Majesty in Council. Udai Singh objected that that decree could not be enforced against him. The Court of first instance disallowed this objection, whereupon Udai Singh appealed to the High Court from the order disallowing the same, contending that, having obtained possession of the moiety under a decree of the High Court which had become final, he could not now be dispossessed under the decree of Her Majesty in Council. FULL BENCH. 1 A. 456 (F.B.)= 2 Ind. Jur. 260.

[459] The case came on for hearing before Stuart, C.J., and Oldfield, J., by whom the question whether the application for the execution of the decree of Her Majesty in Council might be granted was referred to a Full Bench.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and the Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondents.

ORDER.

PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., concurring: The decree of the Privy Council must be executed, notwithstanding its execution involves the disturbance of the possession obtained by Udai Singh under the decree of this Court which has become final. The decree of the Privy Council is the later in date, and had Udai Singh desired to secure his possession, he should have pleaded the decree of this Court in the cross-suit when the suit in which the decree of the Privy Council has been passed was before that tribunal in appeal.

STUART, C.J.—Under the peculiar circumstances of this case, I do not think that I ought to withhold my assent to the order agreed to by my colleagues, although I desire to guard myself against the opinion, as matter of law, that the decree of the Privy Council is as such a better decree than the decree of any other Court of a prior date and which has become final.

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1 A. 459=2 Ind. Jur. 283.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

BHAGWAN SINGH AND ANOTHER (*Plaintiffs*) *v.* MURLI SINGH AND ANOTHER (*Defendants*).* [27th July 1877.]

Act XVIII of 1873 *(North-Western Provinces Rent Act), s.* 7—*Ex-proprietary Tenant*—Sir *land—Mortgage of Proprietary rights in a Mahal.*

Where a person mortgaged his proprietary rights in a mahal, which rights consisted of certain lands occupied by him, covenanting to give the [460] mortgagee possession for the purpose of cultivation and the payment of Government revenue, and being at liberty to redeem the lands at any time at the end of the month Jaith, such person could not resist a claim on the part of the mortgagee

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* Special Appeal, No. 656 of 1877, from a decree of Maulvi Muhammad Abdul Kaum Khan, Subordinate Judge of Agra, dated the 28th April 1877, modifying a decree of Muhammad Muhi-ud-din Khan, Munsif of Jalesar, dated the 5th January, 1877.

1877
JULY 27.

APPELLATE CIVIL.

1 A. 459 = 2 Ind. Jur. 283.

for possession of the lands on the ground that he had a right of occupancy in the lands under s. 7 of Act XVIII of 1873 such section not being applicable, and contemplating something more than a mere temporary transfer of proprietary rights.

[Diss., 7 A.553 (F.B.); R., 16 A. 337.]

THIS was a suit in which the plaintiffs claimed from the defendants possession of 32 bighas 9 biswas of land which comprised the proprietary rights of the defendants in a certain mahal. These lands, which the defendants themselves cultivated, were mortgaged by them to the plaintiffs, on the understanding that the plaintiffs were to occupy the same, that they should pay the Government revenue, and that the defendants might redeem the lands at any time at the end of the month Jaith.

The defendants failed to give the plaintiffs possession, and the latter consequently brought this suit. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court held that they had a right of occupancy in the lands, under the provisions of s. 7 of Act XVIII of 1873, and modified the decree of the Court of first instance, giving the plaintiffs a decree "for declaration of right and possession as mortgagees by preservation of the defendants' tenancy-rights."

On special appeal by the plaintiffs to the High Court, it was contended by them that s. 7 of Act XVIII of 1873 was not applicable, and that they were entitled to the possession of the lands.

Munshi *Hanuman Prasad*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and *Mir Zahur Husain*, for the respondents.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows:

SPANKIE, J.—We understand that the share of the defendants is expressed in bighas, of which they are in possession and which they cultivate. These they have mortgaged to the plaintiffs, covenanting to give possession of the same for the purpose of cultivation and the payment of Government revenue. They can redeem the land in any year in Jaith. Section 7 of the Rent Act does not appear [461] to apply to this case. The defendants have not lost or parted with their proprietary rights, attached to which is a certain proportion of *sir* land, of which they might claim, under s. 7 of Act XVIII of 1873, a right of occupancy as ex-proprietary tenants. The section not only contemplates something more than a mere temporary transfer of proprietary rights, but in the particular case before us the lands in the occupation of the share-holders are the measure of each man's share, and the lands of the defendants are the subject of the mortgage. The plaintiffs are entitled to a decree as claimed.

Appeal allowed.

1 A. 461 (F.B.)=2 Ind. Jur. 322.

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FULL BENCH.

1 A. 461 (F.B.)= 2 Ind. Jur. 322.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

THE EMPRESS OF INDIA *v.* DARBA AND OTHERS. [3rd August, 1877.]

Act VIII of 1873 *(Northern Indian Canal and Drainage Act)*, *s.* 70—*Act XLV of* 1860 *(Indian Penal Code)*, *s.* 65—*Act X of* 1872 *(Criminal Procedure Code)*, *s.* 309—*Act I of* 1868 *(General Clauses Act)*, *s.* 5.

Section 309 of the Criminal Procedure Code does not extend the period of imprisonment which may be awarded by a magistrate under s. 65 of the Indian Penal Code; it only regulates the proceedings of magistrates whose powers are limited (1).

[F., 10 M. 165 (167)=2 Weir 30; 10 M. 166-n=2 Weir 26; R., L.B.R. (1893–1900), 494 (496).]

THIS was a reference to the High Court by Mr. H. M. Chase, District Judge of Sahranpur, under s. 296 of Act X of 1872, of the cases of nine persons convicted under s. 70 of Act VIII of 1873 of various offences under that section. These persons were only fined. The sentences of imprisonment awarded in default of payment of the fines inflicted were all in excess of one-fourth of the maximum period of imprisonment allowed by s. 70. The reference was made on the ground that these sentences were illegal in view of s. 65 of the Indian Penal Code. Turner, J., having held on a former occasion that such sentences were illegal in view of that section, Spankie, J., before whom the reference was laid, referred to a Full Bench the question whether the sentences in the cases referred were legal or illegal, thinking that s. 309 of Act X of 1872 left the matter in some doubt.

UDGMENTS.

[462] The following judgments were delivered by the Full Bench:

STUART, C. J.—The question referred to us relates to the legality or illegality of sentences passed by two Canal Deputy Magistrates on conviction before them in nine cases for offences under s. 70 of the Northern Indian Canal and Drainage Act VIII of 1873, in respect of the sentences of imprisonment awarded in default of the fines imposed, for there is no question as to the legality of the fines themselves. (The learned Chief Justice then stated the convictions and sentences and continued:) Section 70 of Act VIII of 1873 provides that for such offences as these convicted persons "shall be liable on conviction before a Magistrate of such class as the Local Government directs in this behalf to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month, or to both." There can therefore be no doubt of the legality of the fines imposed in the cases mentioned, but the sentences of imprisonment awarded respectively in default of payment of the fines are clearly illegal, as will presently appear. The Canal Act VIII of 1873 does not appear to contain any other provision for convictions under s. 70 than that I have just quoted, and it must be interpreted by reference to the general law relating to sentences in criminal cases.

That law will be found in the first place in s. 309 of the Criminal Procedure Code, the last clause of which provides that " when a person is

(1) Contrast *Reg.* v. *Muhammad Saib*, 1 M. 277.

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sentenced to fine only, the Magistrate may award such term of imprisonment in default of payment of fine *as is allowed by law*, provided the amount does not exceed the Magistrate's powers under this Act." Then by the General Clauses Act I of 1868, s. 5, it is enacted that "the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such shall contain an express provision to the contrary." Act VIII of 1873 contains no express provision to the contrary of the section of the Act last quoted, and we are therefore to find the law relating to sentences of imprisonment in default of fines within the provisions of ss. 63 to 70, both inclusive, of the Indian Penal Code, and of these 64 and 65 appear to be the sections applicable to the sentences under consideration. I do not see that s. 67 has anything to do with the question, for that section deals [463] solely with offences "punishable with fine only," whereas the offences contemplated by s. 70 of Act VIII of 1873 involve liability "to a fine not exceeding Rs. 50, or to imprisonment not exceeding one month *or to both*," or, as it is otherwise put in s. 65 of the Indian Penal Code, offences "punishable with imprisonment *as well as* fine." Section 64 provides: "In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence:" and by s. 65 "the term for which the Court directs the offender to be imprisoned in default of payment of a fine *shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence*, if the offence be punishable with imprisonment *as well as* fine."

Thus, at last we arrive at the rule to be applied to sentences such as are now before us, and under which the imprisonment to be awarded in default of a fine, when the offence is punishable by both penalties, is one-fourth of the term of imprisonment which is the maximum fixed for the offence. In all these canal convictions the maximum imprisonment is one month, and, therefore, the Deputy Magistrates here were not competent to award more than one-fourth of the month, or say one week, and this, of course, under the General Clauses Act I of 1868, s. 2, cl. 18, applies to either description of imprisonment, simple or rigorous.

From all this it is very clear that the sentences of imprisonment in default of the fines passed by these Canal Deputy Magistrates were illegal, and to that extent they ought to be quashed. It is otherwise, as I have already remarked, as to the fines, which, however, we are informed have all been paid.

Pearson, Turner and Spankie, JJ., concurring: Offences under the Canal Act may be punished by fine not exceeding Rs. 50, or imprisonment not exceeding one month, or both. The 64th section of the Indian Penal Code enables the Court, in every case in which an offender is sentenced to fine, to direct that in default of payment of the fine the offender shall suffer imprisonment. The 65th and [464] 67th sections of the Indian Penal Code declare what shall be the limit of this imprisonment. When an offence is punishable with imprisonment as well as fine, the imprisonment which can be awarded in default of payment of fine is limited, by s. 65, Indian Penal Code, to one-fourth the maximum fixed for the offence; but if the offence be punishable with fine only, it was necessary to set up another standard, and accordingly by s. 67, Indian

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Penal Code, a scale was fixed varying with the amount of fine which could be imposed.

It may be admitted that in some few instances these sections work an anomaly in that when fine alone is imposed as the punishment for an offence punishable with fine, or imprisonment, or both, the term of imprisonment to which an offender may be sentenced in default of payment of the fine is less than could be awarded in default of payment of a fine of equal amount imposed for an offence punishable with fine only. Thus, if for affray, an offence punishable with imprisonment, or fine, or both, an offender be sentenced under s. 160 of the Indian Penal Code to a fine of Rs. 50, the imprisonment which can be awarded in default is limited to one-fourth of a month, while if an owner of land be convicted under s. 154 of the Indian Penal Code for omitting to give information of a riot, an offence punishable with fine only, and be sentenced to pay a fine of Rs. 50, he can be sentenced in default of payment of the fine to imprisonment for two months. This anomaly can occur but in few instances, and it is not very important, because the Court is not confined, in sentencing an offender for an offence punishable by fine, or imprisonment, or both, to inflict a fine only, but may also impose a substantive sentence of imprisonment. Moreover, the imprisonment imposed in default of payment of fine does not if suffered satisfy the fine, but the fine may, nevertheless, be levied on the property of the offender if any can be found.

The 309th section of the Code of Criminal Procedure makes ss. 64 and 65 of the Indian Penal Code applicable not only to offences punishable under the Penal Code, but to offences punishable under any law in force for the time being, and therefore applicable to offences punishable under the Canal Act. The provisos to that section do not extend the period of imprisonment which may be awarded under the provisions of s. 65 of the Indian Penal Code [465] otherwise they would not be confined to Magistrates, but would be extended to all Criminal Courts. They were enacted then to regulate the proceedings of Magistrates whose powers are limited. Thus, although a Court of Session, in sentencing an offender for criminal breach of trust, may, in addition to imprisonment and fine, sentence the offender, in default of payment of the fine, to undergo imprisonment for nine months, or one-fourth the maximum of imprisonment which may be awarded for the offence, a Magistrate of the second class, whose powers are limited to six months, convicting an offender of the same offence, and punishing him with fine and imprisonment, can only sentence him, in default of payment of fine, to undergo imprisonment for one-fourth of six-months, although if he punishes the offender with fine only, he may, under the second proviso to s. 309 of the Code of Criminal Procedure, award, six months as the period of imprisonment to be undergone in default of payment of fine, the term allowed by law being nine months. These observations may serve to explain the object of the provisos, which it has been suggested may extend the powers of Magistrates so as to authorise the imposition of a longer term of imprisonment than could be awarded under s. 65 of the Indian Penal Code.

In the case of a canal offence, which is punishable with fine and imprisonment, the maximum period of imprisonment in default of payment of fine allowed by law is one-fourth of one month, and if the Magistrate punishes an offender for such an offence with fine only, he can award, in default of payment of the fine, no longer term.

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PRIVY COUNCIL.

PRESENT:

Sir James W. Colvin, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

[*On appeal from the High Court of Judicature, North-Western Provinces.*]

MUHAMMAD EWAZ AND OTHERS (*Plaintiffs*) *v.* BIRJ LAL AND ANOTHER (*Defendants*). [13th June, 1877.]

The Indian Registration Act VIII of 1871—*Construction of* s. 35—*Non-compliance with provisions of.*

The words of s. 35 of the Indian Registration Act, VIII of 1871, which provide that "if all or any of the persons by whom the document [*i e.*, the document presented for registration] purports to be executed deny its [466] execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document," taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor, an idiot, or a lunatic.

Since such a construction would cause great difficulty and injustice, and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned.

The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Registration Act.

Sah Mukhun Lal Panday v. *Sah Koondun Lal* (1) referred to and approved.

[**Rel. on.**, 11 Ind. Cas. 925 (926)=14 O C. 207; **Appr.** 20 Ind. Cas. 385 (390)=14 M.L.T. 237; **Appl**, 5 A. 599=A.W.N. (1883) 155; 13 B. 449 (457); 18 C. 556 (563) (**F B.**); 23 M. 580 (582); **R.**, 4 A. 384; 11 A. 319; 21 A. 281 (284) (**F B.**)=A.W.N. (1899) 59; 26 A. 57 (59)=A.W.N. (1903) 195; 34 A. 253 (258)=9 A.L J. 188=13 Ind. Cas. 531; 34 A. 331 (337)=9 A.L.J. 420=15 Ind. Cas. 881(883); 24 M.L.J. 664 (671, 672)=1913 M.W.N. 525; 6 B. 96 (100); 8 C. 597 (602) (**F.B.**); 41 C. 972 (**P.C.**)=16 Bom. L.R. 400=12 A.L.J. 774=16 M.L.T. 6=(1914) M.W.N. 462=23 Ind. Cas. 637=27 M.L.J. 80=18 M. 364 (366); 1 C.P.L.R. 11 (12); 6 C W.N. 329; 18 C.W.N. 817=19 C.L J. 484; **Expl.**, 35 A. 34 (35)=10 A.L.J. 440; **D.**, 7 A. 590; 23 A. 233 (**P.C.**)=3 Bom. L.R. 114=5 C.W.N. 177=28 I.A. 15=11 M.L.J. 58=7 Sar. P.C.J. 829; 5 C.L.J. 188.]

THIS was an appeal from a decree of the High Court at Allahabad, dated the 16th March, 1875, reversing decrees of the Judge and Subordinate Judge of Bareilly in favour of the appellants (2).

The question of law involved in the case was as to the admissibility in evidence and the effect of a deed of a sale of shares in certain villages purporting to be executed by three persons, which had been admitted to registration by the registering officer, although only two of the persons purporting to execute attended before him and admitted execution, and execution was denied on behalf of the third.

The High Court in the judgment under appeal held that the registration of the deed was wholly invalid, and that it consequently could not be received in evidence even against the parties admitting execution.

(1) 15 B.L.R. 228; 2 I.A. 210=24 W.R. 75.
(2) See H.C.R. N.W.P. 1875. p. 185. (7 N.W.P.H.C.R. 185.)

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The facts of the case and the material issues arising therein are fully disclosed in their Lordships' judgment.

Mr. *Cowie*, Q. C., and Mr. *Graham*, for the appellants, contended that there had been a full compliance with the provisions of the Registration Act, and that, at any rate, the registration was good as against the two vendors who appeared before the Registrar [467] and admitted execution. *Futteh Chand Sahoo* v. *Leelumber Singh Dass* (1) and *Sah Mukhun Lall Panday* v. *Sah Koondun Lall* (2) were cited.

Mr. *Doyne* for the respondents: The appellants' instrument of sale had not been registered in accordance with the Registration Act, s. 35, and, therefore, under s. 49 of that Act, did not affect any of the properties comprised therein, and was not receivable in evidence.

Mr. *Cowie* replied.

JUDGMENT.

At the close of the argument their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH: This is a suit brought by the appellants, the sons and heirs of Shere Muhammad, the vendee under a deed of sale which on the face of it purports to have been made by three persons, Mubarak Jan, and her two sons, Hayat Muhammad and Salamatulla. The sale was of certain shares in two mauzas, the shares which each held not being specified. It must be taken, however, on this appeal, that although the amount of the shares to which each of the parties was entitled is not yet ascertained, the shares were held in such a manner that each might separately dispose of his own shares. The respondents, who are purchasers under a subsequent deed of sale, and who impeach the deed of sale to Shere Muhammad, contend that the last mentioned deed cannot be read in evidence because it was not properly registered. The deed has been in point of fact registered, and it lies upon the respondents, who impeach that registration, to show the facts which invalidate it. They have not proved that the shares were held jointly, nor does it appear that that point was made in either of the appeals below.

The Subordinate Judge of Bareilly and the Judge of Bareilly, to whom the case went from the Subordinate Judge on appeal, found that the mother had not executed the deed, but that the two sons had done so, and a decree was given by the Subordinate Judge, which was affirmed by the Judge, in these terms: "That a decree be given to the plaintiff for the completion of the sale [468] deed, dated 14th January, 1874, to the extent of the rights of Hyat Muhammad and Salamatulla, defendants, in the shares of mauzas Tah and Kashinpur Maupur against the said defendants and the vendees, and the claim for possession of the said shares, and for the rights of Musammat Mubarak Jan, be dismissed." That decree may be taken to be a declaration that the appellants, as the heirs of the vendee, are entitled to the rights, whatever they were, of Hyat Muhammad and Salamatulla in these mauzas. The decree goes no further, it refuses to decree possession; and, from the reasons given by the Judge for his decree, it would seem that the amount of the shares to which each was entitled had not been proved before him.

From these judgments there was a special appeal to the High Court, and the only question upon which the High Court decided, and which alone their Lordships think it material to consider, is that of registration.

(1) 14 M.I.A. 129.

(2) 15 B.L.R. 228 = 2 I.A. 210 = 24 W.R. 75.

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The High Court came to the conclusion that the registration of the deed of sale to Shere Muhammad was null, because the requisites of the Registration Act had not been complied with.

It appears that the deed was brought to the Registrar on the 15th January; the vendors did not attend, and it became necessary to summon them. The two sons appeared on the following day, and admitted their own execution, but denied that of their mother. The deed purports to have been executed by the two sons, each in his own handwriting, and by the mother, Musammat Mubarak Jan, by the hand of Hyat Muhammad. The sons admitted their own signatures and execution, but stated that their mother had not assented to the sale. The Sub-Registrar made the endorsements which are found upon the deed, and which consist of three separate paragraphs. The first endorsement was made on the 15th January, the day on which the deed was presented for registration, and is to the effect that the deed between the hours of 10 and 11 was presented for registration in the office of the Officiating Sub-Registrar by Chotay Lal, the agent of the vendee, who also applied for the compulsory attendance of the vendors.

The two sons having attended on the following day, and made the admissions and statement above referred to, the Sub-Registrar [469] made this endorsement: "Hyat Muhammad and Salamatulla, sons of Amirulla (sect Shaikh Panjabi, occupation zamindari), and residents of Pilibhit, in the district of Bareilly, two of the three vendors named in this sale-deed, were indentified," and so on, stating the identity, and their written depositions were taken down on separate papers, according to the application of the manager of the vendee for the compulsory attendance of the vendors. The said vendors admitted before me, in their written deposition, that they had executed the sale-deed now in the office, including therein the name of their mother, and completed it by having it duly signed and witnessed, but that they had this sale-deed drawn up without consulting their mother, and she was not a consenting party to it; that they had not received any money from this vendee, and they, having received a larger amount of consideration from Baijnath, etc., executed a sale-deed in their favour, and had it registered, and that they had no mind to have this sale-deed registered." The last statement, that they had no mind to have the deed registered, appears to have been treated as a refusal on their part to endorse the document; but the Act gives power to the Registrar to register, notwithstanding such a refusal, and accordingly the Registrar did register the deed in the formal manner required by the Act, and made this formal endorsement of registration upon the instrument: "This document is registered at No. 40, page 299, vol. 11, Register No. 1, on 16th January, 1874."

The deed of sale to the respondents, which also bears date on the 14th January, 1874, had been brought to the Registry on the 15th; and all the vendors having admitted, either by themselves or their agent, that that deed had been executed, it was registered on that day. Nothing, however, turns upon the priority of the registration of this deed, because by the provisions of the Act a deed operates not from the time of its registration, but from the time when it would have commenced to operate if no registration had been required. If, therefore, a deed is tendered for registration within the time prescribed by the Act, and registered, it is immaterial thta another deed has obtained priority of registration.

These being the facts of the case, the High Court have decided that the execution of the deed not having been admitted by the [470] mother

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and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. The decision is founded mainly on the 35th section of the last Registration Act, VIII of 1871. Before coming to that section it will be right to call attention to the scheme of the Act, with a view to see whether the general provisions do not furnish a context, by which to construe the language used in the 35th section.

The 17th section describes the documents required to be registered. The 23rd prescribes the time within which deeds are to be presented for registration, *viz.*, a period of four months after their execution ; and there is a proviso to that section to which it is material to call attention. It is this : "Provided that where there are several persons executing a document at different times, such document may be presented for registration and re-registration within four months from the date of each execution." It is plain that under that proviso a deed, say, by several vendors, may be registered as to one or two of them when one or two have executed the deed, and may be again registered when others have at a later period executed it. Then come the 34th and 35th sections, which are the most important sections to be considered. The 34th enacts that, " subject to the provisions contained in this part and in sections 41, 43, 45, 69, 76 and 86, no document shall be registered under this Act, unless the persons executing such document or their representatives, assigns, or agents authorised as aforesaid appear before the registering officer within the time allowed for presentation." There the persons described are the persons executing the document;—not those who on the face of the deed are parties to it or by whom it purports to have been executed, but those who have actually executed it. Then there is power to enlarge the time, and a provision that the appearances may be simultaneous or at different times. Then "the registering officer shall thereupon inquire whether or not such document was executed by the persons by whom it purports to have been executed," and "satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear." The 35th section is : " If all the persons executing [471] the document "—again, not " purporting to execute it, "—but " if all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or, in the case of any person appearing by a representative, assign, or agent, if such representative, assign, or agent admits the execution, or if the person executing the document is dead and his representative or assign appears before the registering officer and admits the execution, the registering officer shall register the document as directed in sections 58 to 61 inclusive. " Then comes the enactment which occasions the difficulty : " If all or any of the persons by whom the document purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document. " These words, taken literally, undoubtedly seem to require the registering officer to refuse to register a deed which purports to be executed by several persons if any one of those persons deny the execution. Such a construction, however, would cause great difficulty and injustice, which it cannot be supposed

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the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act; their Lordships, therefore, think the words should be read distributively, and be construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* any person who appears to be a minor, an idiot, or a lunatic. There appears to be no reason for extending the clause further than this, so as to destroy the operation of the deed as regards those who admit the execution, and who are under no disability, which would be the practical effect of a refusal to register at all. The proviso in the 23rd section to which allusion has already been made shows that the Legislature contemplated a partial registration of a deed, that is, partial as to the persons executing it. Now it would be extremely difficult to give effect to this enactment in the 35th clause in its literal meaning, and at the same time to give effect to the proviso in the 23rd clause. To do [472] so would certainly create an anomaly. Supposing three vendors live in different places, and are called upon at different times to execute the deed of sale, in that case there undoubtedly may be three several registrations. Supposing No. 1 and No. 2 attend the Registrar and admit the execution of the deed, and it is registered, but No. 3 afterwards comes and denies the execution of the deed, what is to be the consequence? Is the previous registration of the two to be rendered invalid? If so, effect could not be given to the proviso. And if that registration is not to be invalid, what difference in principle can there be between the case where three vendors appear at different times to admit or deny the execution, and where they appear at the same time to admit or deny the same fact? That which is required of them is precisely the same in both cases, and the admission and denial ought in reason to have the same effect in both.

Their Lordships cannot but think that considerable light is thrown upon the intention of the Legislature by the provision that there may be under the circumstances mentioned a registration and re-registration of the same document.

Again, the registering officer is to refuse to register, not only in the case of persons who deny the execution of the deed, but in the case of persons who appear—that is, who appear to him—to be minors, or idiots, or lunatics. Suppose a deed executed by three persons, two of whom were under no disability, and who admit their execution, but the third had become a lunatic, it would follow if the construction contended for by the respondents were to prevail, that that deed could not be registered against the persons who admitted their execution, and who were under no disability. The consequences of such a construction would be so injurious that it cannot be supposed that the Legislature intended to produce them. The consequences of non-registration are pointed out in the 49th section, and are of the most stringent description:—" No document required by section 17 to be registered shall affect any immovable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." The effect, therefore, in the case [473] which has just been supposed, would be that the deed could not be given in evidence against those who had executed it, and who were under no disability, because some other person interested in the property, and made a party to it, had become lunatic (it may be after the execution), or appeared to the Registrar to be lunatic. No injustice is done by admitting a deed to registration, because the effect is no more than to

satisfy an onerous condition before the deed can be given in evidence; and when in evidence, it is subject to every objection that can be made to it precisely as if no registration had taken place; whereas when registration is refused, the effect may be to deprive the party altogether of perfectly good rights which he might have under the deed but for the Registration Act.

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The Act gives little discretion to the Sub-Registrar. He is bound either to register or not to register when he is satisfied by the admission or denial of the parties that the deed has been executed, and no discretion is given to him to inquire further into the matter. He can only obtain from the parties or their agents the admission or the denial. But provision is made for an appeal from his refusal to register to the District Court, and that Court is empowered to go into evidence, and if the District Judge is satisfied that the deed was executed by the parties, he is then to order the registration. The power of that Court, however, does not and could not arise in this case, because in point of fact the Sub-Registrar did register the deed.

Their Lordships do not think it necessary to refer specifically to the other sections in the Act. They have referred to those which furnish, in their view, a context to explain and cut down the generality of the words used in the 35th section.

This point will of course dispose of the appeal. But there is another part of the judgment of the High Court which their Lordships think requires consideration. The High Court say: "It has been held by this Court more than once that unless a deed be registered in accordance with the substantial provisions of the law, it must be regarded as unregistered, though it may in fact have been improperly admitted to registration." Their Lordships think this is too broadly stated, if the High Court is to be understood to mean that in all cases were a registered deed is produced, it is open to the party objecting to the deed to contend that there [474] was an improper registration,—that the terms of the Registration Act in some substantial respects have not been complied with. Undoubtedly it would be a most inconvenient rule if it were to be laid down generally that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed, and it is required under the penalty that the deed shall not be given in evidence unless it be registered. If it be registered, the party who has presented it for registration is then under the Act in a position which *prima facie* at least entitles him to give the deed in evidence. If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal; but if he has registered, there is nothing more to be done. Supposing, indeed, the registration to be obtained by fraud, then the act of registration, like all other acts which have been so arrived at, might be set aside by a proper proceeding. The 60th section is: "After such of the provisions of sections 34, 35, 58 and 59 as apply to any documents presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered'" together with the number and page of the book in which the document has been copied. Such certificate

1877 JUNE 13. — PRIVY COUNCIL. — 1 A 465 (P.C.)= 4 I.A. 166= 3 Sar. P.C.J. 735=3 Suth. P C.J. 438.

shall be signed, sealed, and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned." The certificate is that which gives the document the character of a registered instrument, and the Act expressly says that that certificate shall be sufficient to allow of its admissibility in evidence. Then by the 85th clause it is enacted that "Nothing done in good faith pursuant to this Act, or any Act hereby repealed, by any registering officer, shall be deemed invalid merely by reason of any defect in his appointment or procedure." No doubt, in this case [475] the fact of the non-admission of the mother's execution appears upon the endorsement made on the deed itself, and did not require to be proved *aliunde*; but the observations in the judgment go beyond the particular case.

This point does not come before their Lordships for the first time. It was a good deal considered in the case to which Mr. Cowie has referred, *Sah Makhun Lall Panday* v. *Sah Koondun Lall* (1); and although it was not there necessary to decide the point,—indeed the point did not arise, and the appeal was decided upon another ground,—yet the considerations to which their Lordships have just adverted were discussed in the judgment in this way:—

"Now considering that the registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of ss. 19, 21, or 36, or other similar provisions." It may be observed that s. 36 in the former Act is the equivalent of s. 35 in the present Act. "It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure in s. 88 of the Act"—which is the same as s. 85 in the present Act,—"so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance. If the registering officer refuses to register, the mistake may be rectified upon appeal under s. 83, or upon petition under section 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled, and may not discover until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights."

It is to be observed, with regard to the inconvenience which it is suggested may arise from a deed being registered when some [476] only of the parties to it have executed it, that provision is made for disclosing the parties who have really executed the deed. A copy of the deed is to be made in a book, and there are to be indexes, and it is directed that "Index No. 1 shall contain the names and additions of all persons executing, and of all persons claiming under, every document copied into or memorandum filed in book No. 1 or book No. 3." So that any one consulting the register would find a copy of this deed, and that the two sons only had executed it, and that the mother had not.

(1) 15 B. L. R. 228=2 I A 220=24 W. R. 75.

On these grounds their Lordships think that the decree of the High Court cannot be sustained, and they will humbly advise Her Majesty to reverse it, and to order that the appeal from the decree of the Judge of Bareilly to the High Court be dismissed with costs, and that the last-mentioned decree be affirmed. The appellant, will have the costs of this appeal.

1877 JUNE 13.

PRIVY COUNCIL.

1 A. 468 (P.C.) = 4 I.A. 166 = 3 Sar. P.C.J. 735 = 3 Suth. P.C.J. 438.

Agents for the appellants: Messrs. *Watkins & Lattey.*

Agents for the respondents: Messrs. *W. & A. Ranken Ford.*

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1 A.476 = 2 Ind. Jur. 354.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

MANOHAR LAL (*Defendant*) v. GAURI SHANKAR (*Plaintiff*).*
[10th August, 1877.]

Act XXXV of 1858, *s.* 9, *Act XIX of* 1873 (*North-Western Provinces Land Revenue Act*), *ss.* 194, 195—*Lunatic—Court of Wards.*

S. 9 of Act XXXV of 1858 and s. 195 of Act XIX of 1873 do not render it imperative on the Court of Wards to take charge of the estate of a person adjudged by a Civil Court, under Act XXXV of 1858, to be of unsound mind, but merely confer on that Court a power so to do. Until the Court of Wards exercises that power, the appointment by the Civil Court of a manager of the lunatic's property under s. 9 of Act XXXV of 1858, is valid.

[F., 15 Ind. Cas. 265 (266).]

THIS was a suit for possession of a six-anna share in mauza Mahewapura, pargana Arail, zilla Allahabad. This mauza was the joint and undivided property in equal shares of Gauri Shankar and his brother Har Shankar. Har Shankar sold a twelve-anna share to Manohar Lal. One Dalthamman Singh brought the present suit on behalf of Gauri Shankar, alleged to have become a lunatic, to [477] set aside the sale so far as Gauri Shankar was concerned. The circumstances under which Dalthamman Singh came to sue were as follows:

On the 23rd June, 1874, a petition was presented to the District Judge of Allahabad by Narain Kuar, representing herself to be the aunt of Gauri Shankar, in which, after alleging that Gauri Shankar had become insane and incapable of managing his affairs, and that his brother Har Shankar was dissipating the joint estate, she prayed that the Court would hold an inquiry under Act XXXV of 1858, and would appoint a manager of the estate of the lunatic. An inquiry was accordingly made, and on the 14th August, 1874, Gauri Shankar was pronounced by the District Judge to be a lunatic, and Dalthamman Singh was appointed as manager of Gauri Shankar's estate.

The Court of first instance gave the plaintiff a decree.

On appeal by the defendant to the High Court it was contended by him that, inasmuch as the estate of the lunatic included property which subjected the proprietor, if disqualified, to the superintendence of the Court of Wards, charge of the estate devolved on the Court of Wards, and the District Judge had no power to appoint a manager, and Dalthamman Singh was not competent to bring the suit.

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* Regular Appeal, No. 34 of 1877, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 18th December, 1876.

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APPELLATE CIVIL.

1 A. 476 = 2 Ind. Jur. 354.

Babu *Oprokash Chandar Mukarji* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellant.

Mr. *Colvin*, Munshis *Sukh Ram* and *Ram Prasad*, for the respondent.

JUDGMENT.

The judgment of the High Court, so far as it related to this contention was as follows :—

The Act (XXXV of 1858) declares that when a person possessing such property is adjudged to be of unsound mind and incapable of managing his affairs, the Court of Wards "shall be authorised to take charge of the estate," and that "in all other cases" except as otherwise thereinafter provided, the Civil Court shall appoint a manager of the estate. The Act it will be observed does not render it imperative on the Court of Wards to take charge of the estate, but merely confers on the Court of Wards authority to do so. Similarly, the 194th section of Act XIX of 1873 includes lunatic [478] landholders among disqualified persons, and 195th section of the same Act declares the Court of Wards competent in its discretion to assume or refrain from assuming the superintendence of the person or property of any disqualified person. If, as has been contended, we are to construe the 9th section of Act XXXV of 1858 as conferring on the District Court no authority to appoint a manager of the estate of a lunatic landholder, it follows that,where the Court of Wards abstains from exercising the authority conferred on it and taking charge of the estate, the property of the lunatic will be left unprotected. In our judgment this could not have been the intention of the Legislature, and the language of the Act admits of a reasonable construction which would avoid the anomaly. We consider that the term "in all other cases" applies not only to cases in which no part of the estate would subject the lunatic to the superintendence of the Court of Wards, but also to cases in which the Court of Wards, having authority to assume the superintendence of the property, has not exercised that power. Ordinarily, before appointing a manager in such cases, the District Judge should allow the Court of Wards an opportunity to declare its election, but we can conceive cases in which it may be essential for the protection of the estate that a manager should be at once appointed, and if subsequently the Court of Wards assumed superintendence, the appointment made by the Judge would thereupon be annulled.

In the case before us it is not suggested that the Court of Wards has assumed charge of the estate, and we hold that the appointment by the Judge remains valid and entitles the manager to maintain this suit and to verify the plaint.

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APPELLATE CIVIL.

1 A. 478=
2 Ind. Jur.
356.

1 A. 478=2 Ind. Jur. 356.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

MAN KUAR (*Plaintiff*) *v.* JASODHA KUAR (*Defendant*).*
[13th August, 1877.]

Contract—Consideration—Immoral Consideration—Void Agreement—Act IX *of* 1872 (*Contract Act*), *ss.* 23, 25.

M had for many years lived with *G* as his concubine. In consideration of such past cohabitation, G, by an agreement in writing, dated the 28th March, [479] 1869, and duly registered, settled an annuity on *M*, charging a portion of his real estate with the payment of such annuity : *Held* in a suit by *M* against *G's* heir, his married wife, to enforce the agreement, that the consideration for the agreement was not, under the law then in force, immoral, nor was the agreement, under the same law, void for want of consideration : *Held* also that before *M* could recover from the defendant on the agreement, it was necessary to show that the defendant had received funds available to meet the claim from the profits of the estate charged with the payment of the annuity or other property of *G*.

[R., 27 A. 266 (268)=1 A.L.J. 632 ; A.W.N. (1904) 238 ; 13 M.L.J. 7 (13).]

THIS was a suit to establish the validity of an agreement in writing, dated the 28th March, 1869, and duly registered, and to recover from the defendant Rs. 442, principal and interest, under the agreement.

The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Sukh Ram* and Babu *Jogindra Nath Chaudhri*, for the appellant.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The material portion of the High Court's judgment was as follows :

The appellant sued to enforce the provisions of a contract whereby one Gajadhar Singh, now deceased, had settled on her an annuity of Rs. 800 secured by a charge on his estate mauza Lakhnaura. The appellant had lived for many years with the settlor as his concubine, and there seems no reason to doubt he was attached to her and desired to make a suitable provision for her. The respondent, the married wife of the deceased, pleaded that the deed was void under the provisions of the Indian Contract Act, s. 23, having been executed for an immoral consideration, and if not, that it was void under the provisions of s. 25 of the same Act, it having been executed without consideration,.............................. and that the ancestral estate was so much encumbered that its profits were insufficient to defray the charges for interest. The Indian Contract Act had not been passed on the 28th March, 1869, when the deed on which suit is brought was executed. We need not therefore consider whether under the provisions of that Act it would be void. But if the consideration was immoral, as the Court below has held, it would be void under the law administered [480] by the Courts of this country before the Act was passed. In our judgment the consideration was not immoral. The annuity was created not in consideration of future cohabitation, which would be an immoral consideration, but to make provision for a woman for whom it was incumbent on the honour of the settlor to make some provision. Nor, as the law stood when the deed was executed, would it

* Regular Appeal, No. 90 of 1876, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 10th July, 1876.

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have been held that such a contract was void for want of consideration ....There remains, however, a plea which has not formed the subject of an issue in the Court below. Before the appellant can recover from the respondent, it must be shown that the respondent has received funds available to meet the claim from the profits of Lakhnaura or other property of the deceased. We remand this issue for trial under s. 354.

Cause remanded.

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1 A, 480=2 Ind. Jur. 387.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

MAN SINGH (*Defendant*) *v.* NARAYAN DAS AND OTHERS (*Plaintiffs*).*
[3rd August, 1877.]

Res judicata—Act VIII of 1859 (*Civil Procedure Code*), *ss.* 2, 139—*Trial and Determination of Issue.*

A Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal:

Held that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit.

[R., 7 A. 606 (614)=A.W.N. (1885) 89; 17 A. 174 (184).]

THIS was a suit on a bond for money charged on immoveable property. The bond was given on the 10th January, 1864, to one Tula Ram, and charged certain immoveable property. On the 28th January, 1864, the obligees of the bond sold the property [481] to Man Singh, defendant in this suit. On the 17th September 1864, Tula Ram obtained a decree on the bond against the obligees, which declared the property liable to be sold in execution of the decree. On the property being attached in execution of this decree, Man Singh objected that it was not liable to be sold. His objection being disallowed, he brought a suit against Tula Ram and the obligees of the bond to establish that the property was not liable to be sold. On the allegations of the parties to this suit the Munsif fixed as issues whether the property was liable to be sold in execution of Tula Ram's decree or not, and whether the bond was collusive or not. On the first issue he determined that the property was not liable to be sold in execution of Tula Ram's decree, as that decree, so far as it affected the property, was passed without jurisdiction. On the second he observed as follows: "I am of opinion that, though an *ex parte* decree was given in favour of Tula Ram on the bond, still as Tula Ram, defendant, could not prove the validity of the bond in this Court, the bond must be considered collusive. Had the bond been genuine, the answering defendant would not have failed to prove it." He accordingly, on the 12th December, 1873, gave Man Singh a decree. Tula Ram

* Special Appeal, No. 681 of 1877, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 25th April, 1877, affirming a decree of Maulvi Abdul Razaq, Munsif of Bisauli, dated the 27th May, 1876.

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1 A. 480= 2 Ind. Jur. 387.

appealed against this decree to the Judge, and against the Judge's decree, which affirmed the Munsif's, to the High Court, which affirmed the Judge's decree; but neither before the Judge nor the High Court did he take any exception to the determination on the issue respecting the bond. The present suit on the bond was brought against Man Singh by the heirs of Tula Ram. Man Singh relied on the finding respecting the bond in the first suit as a defence to the second suit. The Court of first instance gave the plaintiffs a decree which the lower appellate Court affirmed, both Courts overruling the defendant's contention that the suit was barred by the finding in the former suit that the bond was collusive. On special appeal to the High Court by the defendant, it was again contended that the suit was barred by the finding in the former suit in respect of the bond.

Babu *Oprokash Chandar Mukarji* and Mir *Zahur Husain*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondents.

JUDGMENT.

[482] The judgment of the Court was delivered by

PEARSON, J.—The question whether the bond on which the claim in the present suit is founded was collusive or not was distinctly raised by the pleadings in the suit formerly brought by Man Singh against Tula Ram (now represented by the present plaintiffs), was made an issue for trial, and was determined in that suit adversely to Tula Ram. The lower appellate Court is of opinion that the finding on that issue in that suit does not preclude a re-adjudication of it in the present suit for two reasons: first, because the determination of the issue in that suit was not required for its disposal; and, secondly, because the finding by which it was determined was imperfect. We are unable to concur in the opinion. It is true that the Munsif might have disposed of the former suit without adjudicating on that issue on the basis of his findings on the other issues tried by him; but it is also true that he was perfectly justified in laying down that particular issue for trial, as it arose out of the pleadings and an adjudication on it might have been necessary, and as his finding thereon rendered his decision in the case more firm and complete. We are not prepared to hold that he was bound to refrain from adjudicating upon it under the circumstances, or that his adjudication thereon can be treated as a nullity. His finding is regarded as imperfect by the lower appellate Court, because it proceeded on the ground that Tula Ram had failed to prove the authenticity of the bond, rather than on any absolute proof of fraud. But, if the finding were open to objection either on the score of irrelevancy or error, the objection might have been taken in the appeal preferred by Tula Ram against the decree passed by the Munsif on the 12th December, 1873, in Man Singh's favour. Tula Ram appealed to the Zilla Judge and to this Court, but never took any such objection, and the finding remained undisturbed. This being so, the question determined by it must in our judgment be deemed to be a *res judicata* not open to re-adjudication. Allowing then the validity of the plea in appeal, we decree the appeal, reverse the decrees of the lower Courts, and dismiss the suit with cost in all Courts.

Appeal allowed.

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APPELLATE CIVIL.

1 A. 483= 2 Ind. Jur. 389.

1 A. 483=2 Ind. Jur. 389.

[483] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

EIDAN (*Defendant*) *v.* MAZHAR HUSAIN (*Plaintiff*). *
[14th August, 1877.]

Muhammadan Law—Dower—Conjugal rights—Act VI of 1871 (*Bengal Civil Courts, Act*), s. 24.

When a Muhammadan sues his wife for restitution of conjugal rights, such suit is to be determined with reference to Muhammadan law(1), and not with reference to the general law of contract. Under Muhammadan law, if a wife's dower is "prompt," she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already cohabited with consent since their marriage. *Abdool Shukkoor* v. *Raheemoonnissa* (2), followed.

When, at the time of marriage, the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.

Where a Court, following this rule, determined that one-fifth only of a dower of Rs. 5,000 not stipulated to be "deferred" must be considered "prompt," inasmuch as the wife had been a prostitute and came of a family of prostitutes it exercised its discretion soundly.

[Overr., 8 A. 149 (170) (F.B.); N.F., 11 M. 327 (328); F., 1 A. 506 (507); 8 A. 149 (161) =A.W.N. (1886) 53; 33 A. 291 (292)=8 A.L.J. 27=9 Ind. Cas. 200; Rel. on, 15 Ind. Cas. 747 (752)=15 O.C. 127.]

THIS was a suit by a Muhammadan for restitution of conjugal rights. The defendant pleaded that until her dower was paid the plaintiff was not, under the Muhammadan law, entitled to such restitution. This plea raised the question whether her dower was prompt or deferred. The dower had been fixed at Rs. 5,000, but [484] at the time of marriage it was not specified whether the dower was prompt or deferred. The Court of first instance dismissed the suit. Relying on the doctrine set forth in Baillie's Digest of Muhammadan Law, the lower appellate Court held that, where at the time of marriage it was not specified whether dower was prompt or deferred, a portion of it must be considered prompt, that the amount of such portion was to be determined with reference to custom, and that, in the absence of custom, such amount was to be determined by the Court with reference to the position of the wife and the amount of dower. It overruled the contention of the defendant based on a passage in Macnaghten's Principles of Muhammadan Law, that where there was no specification, the entire dower was prompt. In order that an inquiry might be made as to whether any, and, if any, what custom existed

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* Special Appeal, No. 444 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 8th February, 1877, modifying a decree of Kazi Muhammad Imdad Ali, Munsif of Saharanpur, dated the 4th November, 1876.

(1) See also *Buzloor Raheome* v. *Shumsoonnissa*, 8 W.R., P.C. 3=11 M.I.A. 551; in which the Privy Council held, under the law corresponding to s. 24 of Act VI of 1871, that suit by a Muhammadan for restitution of conjugal rights must be determined with reference to Muhammadan law.

(2) H.C.R.N.W.P. 1874, p. 94. As to the general power of a wife to refuse herself, see *Jaun Beebee* v. *Bepareer*, 3 W.R. 93, where presumably the wife's dower was prompt.

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as to the amount of dower exigible when it was not specified whether the dower was prompt or deferred, the lower appellate Court remanded the suit to the Court of first instance under s. 354 of Act VIII of 1859. The Court of first instance found that there was no custom in existence. The lower appellate Court therefore proceeded to determine the amount of dower exigible with reference to the defendant's position and the amount of dower. As it was admitted that the defendant had been a prostitute and came of a family of prostitutes, the lower appellate Court decided that it was sufficient to exact one-fifth of the dower. It accordingly gave the plaintiff a decree for restitution of conjugal rights conditional on the payment of Rs. 1,000 (1).

The defendant appealed to the High Court, again contending that in the absence of any stipulation that the dower was deferred, it should be considered prompt, and that under the circumstances the amount of dower awarded was too small. The plaintiff took certain objections under s. 348 of Act VIII of 1859, the first being that, as the defendant had not demanded her dower, the decree of the lower appellate Court should not have been conditional on the payment of dower.

Mr. *Conlan*, the Junior Government Pleader (Babu *Dwarka Nath Banarji*) and *Mir Zahur Husain*, for the appellant.

[485] Mr. *Mahmood* and Maulvi *Mehdi Hasan*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the High Court:

PEARSON, J.—The view that dower, when the payment of it has not been stipulated to be deferred, should be deemed to be payable on demand, appears to me to be most reasonable and most in accordance with the dictates of common sense; but although it is stated by Macnaghten to be the rule of the Muhammadan law, I am constrained to hold in concurrence with the lower Courts that the greater weight of authority is in favour of the doctrine set forth in Baillie's Digest, p. 126 (2). The inquiry into the custom with the view of determining the portion of the dower-debt payable promptly was therefore proper; and when the question could not be decided by reference to custom, it was proper to determine it with reference to the status of the woman and the amount of the fixed dower. I see no reason to think that the lower appellate Court has not exercised a sound discretion in awarding one-fifth of the total amount of that dower as the portion of which the appellant may fairly claim prompt payment......
...I would disallow the objections taken by the respondent under s. 348 of the Procedure Code.........The first is also bad, for the circumstance that the appellant did not demand her dower before leaving the respondent's house does not preclude her from demanding it when restitution of conjugal rights is claimed; and the circumstance that they have already cohabited with consent since their marriage does not preclude her from refusing further cohabitation until the portion of her dower payable to her has been paid (see *Abdoo Shukkoor* v. *Raheemoonnissa* (3). The case

(1) *Abdool Shukkoor* v. *Raheemoonnissa*, H.C.R., N.W.P. 1874, p. 94, instead of a conditional decree being given the suit was dismissed as unmaintainable.

(2) See also *Fatima Bibi* v. *Sadruddin*, 2 B. H.C.R. 307, where the law stated in Baillie's Digest was followed, on the other hand, see *Jumeela* v. *Muleeka*, W. R. 1864, p. 252, where the law stated in Macnaghten's principles was followed; and *Tadiya* v. *Hosanebiyari*, 6 M.H.C.R. 9, where apparently the same law was followed.

(3) H.C.R.N.W.P. 1874, p. 94.

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is one governed by the Muhammadan law, and not by the general law of contract. The appeal should in my judgment be dismissed with costs.

STUART, C.J.—The question of dower in this case arises under peculiar circumstances, and appears to demonstrate another anomaly in the Muhammadan law on this subject. The claim to dower is not [486] made directly by the wife, but by way of answer to a suit at the instance of her husband the plaintiff for restitution of his conjugal rights. She on the other hand, while admitting her intimacy with the plaintiff and that she lived in his house, denies that she was ever married to him, and although thus contending that she is not his wife, she nevertheless claims the rights of one. The Subordinate Judge finds as a fact (agreeing in this respect with the Munsif) that a marriage between the parties did take place. Any contract, however, between them as to dower is, from the very nature of the case, and especially having regard to the defendant's plea, necessarily excluded, and her claim to dower, therefore, must rest entirely on the Muhammadan law applicable to a woman in her position. She claims in the way explained Rs. 5,000, and that she is entitled to demand it as prompt dower, and to have it paid before she returns to the plaintiff's house. The plaintiff, the husband, admits the amount, but says that as there was no agreement as to the nature of it, it must be presumed to be deferred dower. It might be supposed reasonable that before a woman could put forward her claim to the dower at all, she ought in the first place to put herself in the right position for asking it by doing her duty as a wife by her husband, and by returning to cohabitation with him, especially as it cannot be said that she left his house because of his refusing her dower. But this reasonable and natural state of things does not appear to find a place in Muhammadan law, according to the principles of which system, on the contrary, a wife can refuse herself to her husband till her dower, being prompt, has been satisfied. But in the present case, although the amount is admitted, and, in the absence of proof to the contrary, must be regarded as prompt, yet the Subordinate Judge considers Rs. 5,000 to be excessive, basing the opinion apparently on his estimate of the defendant's character, whom he describes as a prostitute "belonging to a like family," and he considers that one-fifth of the amount claimed as prompt dower is sufficient. I am not disposed to quarrel with this conclusion, nor with his order as to costs. I would therefore dismiss the special appeal, and, as to costs of this Court, I would direct that both parties should bear their own.

Appeal dismissed.

1 A. 487=2 Ind. Jur. 420.

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APPELLATE CIVIL.

1 A. 487= 2 Ind. Jur. 420.

[487] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

NANAK RAM (*Plaintiff*) *v.* MEHIN LAL (*Defendant*).*
[10th April, 1877.]

Act IX of 1872 (*Indian Contract Act*), *s.* 127, *illustration* (*c*)—*Surety Bond—Void Contract—Want of consideration.*

Where *N* advanced money to *K* on a bond hypothecating *K's* property, and mentioning *M* as surety for any balance that might remain due after realization of *K's* property, *M* being no party to *K's* bond but having signed a separate surety-bond two days subsequent to the advance of the money, *held* that the subsequent surety-bond was void for want of consideration under s. 127 of the Indian Contract Act (IX of 1872).

Per STUART, C. J.—The legal position of the surety considered and determined.

Per STUART, C. J.—Remarks on the legal character of the "illustrations" attached to Acts of the Indian Legislature, and opinion expressed that they form no part of these Acts.

[R., 34 C. 941 (950)=6 C.L.J. 237=11 C.W.N. 959 ; 20 M. 481 (483).]

THE plaintiff in the above case, Nanak Ram, advanced to one Kalka Prasad a sum of money upon a bond dated 14th November, 1872, which hypothecated certain property of Kalka Prasad as security for the repayment of the amount, and recited that the defendant in the present suit was surety for any balance of the debt which might remain unsatisfied after realization of the said property. The bond of 14th November, 1872, although reciting therein that the defendant Mehin Lal was surety for the advance and repayment of the money, did not bear the said surety's signature, but two days later, *viz.*, on the 16th November, 1872, Mehin Lal executed a separate surety-bond reciting the provisions of the bond of 14th November, 1872, and undertaking the liability mentioned therein.

Nanak Ram filed a suit against Kalka Prasad and Mehin Lal in the year 1875 to recover the amount advanced on the bond dated 14th November, 1872. Mehin Lal pleaded in answer to this suit that he was no party to the bond of 14th November, 1872, and that having executed a separate surety-bond on the 16th November, 1872, which was not referred to in the plaint, he could not be made liable on [488] the previous bond which was the basis of the existing suit. The Munsif of Chibramau on the 2nd December, 1875, accordingly decreed the suit against the principal debtor, Kalka Prasad, and his property, but dismissed it as against Mehin Lal, the surety. This decision of the Munsif was, on appeal, upheld by the District Judge on the 15th March, 1876, and became final. Thereafter Nanak Ram, the above plaintiff, filed a second suit (out of which the present appeal special arises) against Mehin Lal, the surety, on the bond dated 16th November, 1872. The defendant, amongst other pleas in answer to the second suit, pleaded want of consideration for the subsequent surety-bond. The Munsif of Chibramau held that, under s. 127 of the Indian Contract Act (IX of 1872), the contract of guarantee dated 16th November, 1872, was void for want of consideration and dismissed the suit. The Subordinate Judge of the district, to whom the appeal from

* Special Appeal, No. 1337 of 1876, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 23rd August, 1876, affirming a decree of Munshi Lalta Prasad, Munsif of Chibramau, dated the 20th May, 1876.

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the Munsif's judgment was transferred by the District Judge, confirmed the Munsif's decree.

The plaintiff Nanak Ram filed a special appeal in the High Court impugning the decisions of the lower Courts, on the ground that the lower Courts had misconstrued the deed of the 16th November, 1872, and that it was a valid instrument under the Indian Contract Act, having been executed on account of the bond debt, which was good consideration for the guarantee.

Munshi *Sukh Ram* and Shah *Asad Ali*, for appellant.

Lala *Lalta Prasad*, for respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C.J.—This is a special appeal from Farukhabad in a suit against a surety in a bond transaction which was dismissed by the Munsif of Chibramau in that district, his judgment having in regular appeal been confirmed by the Subordinate Judge. There had been a previous suit by the same plaintiff against his principal debtor and the same surety, in which a decree was made against the principal debtor alone, but which decree was not brought by appeal to this Court. The present suit, on the other hand, claims to enforce the surety's liability without showing that the previous decree against the principal debtor had been executed and was [489] unproductive of recovery to any extent and quite unavailing, and it is not easy to understand what could have been the real motives of the parties and their own true belief as to their relative position in the transaction, in all respects.

The present appeal is a disagreeable illustration of the crude, meagre, and unsatisfactory manner in which special appeals are, I regret to say, usually brought before us. The paper books supplied to us, the Judges, in the present case contain nothing but the very loose although not erroneous judgments of the two lower Courts, the record itself is scanty of facts and of law, and at the hearing I failed to get any sufficient information from the pleaders on either side on the one question on which the whole case depends, *viz.*, the real position of the surety. For although this is a special appeal raising only, according to the theory of the procedure, a question of law, my difficulty was not a legal one, but simply a doubt as to a plain and simple matter of fact, *viz.*, whether Mehin Lal the surety in point of fact interposed in the transaction between Nanak Ram and Kalka Prasad the debtor for the benefit of the latter or otherwise. Under these circumstances, before disposing of the case, I thought it necessary to send for the record in the first suit between Nanak Ram and Kalka Prasad, and thus obtained some additional information. The case was also again put on the cause-list that the pleaders for the parties might have an opportunity, with this additional record before us, of throwing further light on the still somewhat obscure position of the surety, but with little success, the pleaders for the defendant, respondent, verbally and simply contending that Mehin Lal was the surety for the benefit of the plaintiff, and that, therefore, his surety-bond had been without consideration, while the pleader for the appellant unintelligibly suggested that he was really the surety for both parties, and that as the friend of both he had come forward to remove any dissatisfaction on the part of the lender, who had in the meantime parted with his money, and that that was a state of things which could not but be agreeable to the borrower. The case

was thus left for our judgment in a condition far from satisfactory, and I am not sure that I yet quite understand the real truth of the matter, but it would I am convinced be idle to attempt any further investigation of the facts by a remand or otherwise.

[490] From all the materials now before us the facts would appear to be these. One Kalka Prasad borrowed and received the sum of Rs. 95 from the plaintiff Nanak Ram, and gave a bond for the same, the material parts of which are as follows :

"I, Kalka Prasad, son of, &c., do hereby declare that I have borrowed Rs. 95 of the Queen's coin, half of which is Rs. 47-8-0, from Nanak Ram, son of, &c., Mehin Lal, son of &c., being my surety, that I hereby promise that the said money together with interest at two per cent. per mensem shall be paid up in the course of three years without any objection whatever; that until the money is paid one kachhá house and a field, No. 489, called Barnawala, measuring 20 bighas kham, and situated in Harballahpur, also called Uddhanpur, in pargana Chibramau, the boundaries of which are noted at foot, and also four bullocks, one of which is dark blue and the other three white coloured, and two she-buffaloes of black colour, all of which belong to me, shall remain hypothecated in this bond, and that I shall not be competent to sell or give them in gift to any one."

As to the surety, although he did not sign this bond, it purported to determine his liability as follows:

"I, Mehin Lal, surety, do hereby declare that if the money due to the creditor should not be recovered from the property of Kalka Prasad, the principal party who borrowed the money, I, the surety, shall pay the money out of my pocket to the creditor."

This bond was duly executed by Kalka Prasad the borrower and is dated the 14th November, 1872, and duly registered, it having been presented for registration by him alone, but as I have stated it was not signed by the surety. But Nanak Ram the lender, or according to the theory of the plaintiff's pleader, both parties, the lender as well as the borrower, being content to leave things in the position just described, Mehin Lal the surety again came forward with a new guarantee or surety-bond in his own name alone, and that document is in the following terms :

"I, Mehin Lal, surety, son of, &c., do hereby declare that whereas a bond for Rs. 95 has been executed on the 14th November, 1872, by Kalka Prasad, son of, &c., agreeing to repay within three years with interest at two per cent. per mensem in favour of Nanak Ram, son of, &c., but that the said Nanak Ram notwithstanding the hypothecation of the property of Kalka Prasad in the said bond is not fully satisfied, I, the surety for Kalka Prasad, therefore, agree and give it in writing that if Nanak Ram fails to recover the amount of the bond with interest from the property of Kalka Prasad, the principal debtor, I, the surety, shall pay from my own pocket the amount of the bond executed by Kalka Prasad with interest entered therein to Nanak Ram. I have therefore executed these few presents by way of a security-bond to be a document."

[491] This instrument was duly executed by Mohin Lal and it is dated the 16th November, 1872, that is two days after the execution of the first bond by Kalka Prasad the borrower, and it is admitted to be a contract of guarantee within the meaning of s. 126 of the Contract Act. Such being the state of the transaction in November 1872, the plaintiff appears to have waited till the three years had expired and then to have resolved on taking proceedings for the recovery of his money. It is, however, difficult to understand the course he adopted. He brought a suit,

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the first suit, against his debtor and the surety, but claiming therein solely on the basis of the first bond which had not been signed by the surety, and passing by the additional guarantee which had been given by the surety two days after the date of the first bond. Why this should have been appears to me to be inexplicable, for the plaint in the first suit was filed on the 23rd November, 1875, the plaintiff and his pleader therefore must have had full knowledge of all that the surety had done, and that in their view the two instruments formed but one security. But so it was. It is not therefore to be wondered at that this first suit was, in the Munsif's Court, dismissed as against the surety, the claim having been decreed against Kalka Prasad alone, and this decision was on appeal affirmed by the Subordinate Judge on the 15th March 1876. The decree, however, so made against Kalka Prasad has not been executed, but on the 29th April following Nanak Ram instituted a second suit against Mehin Lal the surety alone, and now before us in special appeal, basing his claim on the separate guarantee or surety-bond executed by Mehin Lal, the surety, on the 16th November, 1872. No explanation appears to have been offered why the surety had not been made a defendant in the first suit on this liability, and at the hearing of this appeal no objection on that score was taken, and it is unnecessary to say more on the subject at present, confining our attention to, as matter of law, Mehin Lal's liability as surety under the document now sued on.

The Munsif in his judgment describes the surety-bond as "apparently without consideration" and he then proceeds as follows: "Consideration as defined in s. 127 of the Contract Act (IX of 1872) means 'anything done or any promise made for the benefit [492] of the principal debtor.' In the present instance, the execution of the new contract or the promise made therein was not so made for the benefit of the principal debtor (Kalka Prasad), he having received the consideration money and thus satisfied his appetite for and the final cause of his loan, two days previously. The execution of this new contract and the promise made therein can rather be said to have been made for the benefit of the creditor than that of the principal debtor. This new contract of guarantee being thus proved to be without consideration, under the provisions of the aforesaid section of the Contract Act, is void and hence not enforceable." The lower appellate Court upheld this judgment in the following words: "I find that the Munsif's finding is correct, undoubtedly the bond sued on was a nullity under clause (*c*), s. 127 of Act IX of 1872; and previous to the institution of this suit the defendant does not appear to have denied the bond which forms the basis of the claim. The objections urged in appeal are not worthy of consideration."

In special appeal to this Court it is now in substance argued that the judgments of the lower Courts are wrong, that their reading of the Contract Act is erroneous, and that the consideration for the defendant's engagement as surety and his liability in that behalf to the plaintiff are clear. S. 127 of the Contract Act is expressed in these terms: "Anything done, or any promise made for benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee." Now having regard to the wording of the two instruments under consideration, the first bond and the subsequent additional security by the surety, and to the circumstance that the position of a surety in such a pecuniary transaction is ordinarily that he interposes in behalf of and for the benefit of the debtor, such a contention in special appeal would appear to be not unreasonable. There are other circumstances, however, which weigh against it. In the

first place it must not be forgotten that on the 16th November, 1872, when the surety executed and delivered his separate engagement, the money had already passed from the hands of the lender to Kalka Prasad his borrower, and on a contract which made the latter safe for at least three years, and he had therefore nothing to fear from any dissatisfaction or objection that might subsequently have occurred to [493] his creditor Nanak Ram, so far as he, the borrower, was concerned, therefore any additional engagement on his behalf by a surety was legally unnecessary. On the other hand, Nanak Ram, feeling dissatisfied with the security he had obtained from his debtor, and knowing that his hands were tied for three years, must naturally have desired some further security: and with this feeling he appears to have had some communication with Mehin Lal, the result being the document now under consideration. Again having, in the absence of any sufficient information from the pleaders in this appeal, looked into the evidence in the first suit (and I consider I am not only entitled but bound to do that for the sake of explanation and the possible clearing up of any doubts as to the true position of the surety), it appears to me to favour the suggestion I have just offered against the appellant's argument. The plaintiff himself was examined in that suit, and he stated on oath as follows: "I have got another document executed by Mehin Lal. I know this bond (the bond executed by Kalka Prasad and formerly sued upon) to be the principal and not that bond (the bond now sued upon), and therefore I did not sue on the basis of the latter. I had the other bond executed to secure my debt, the other bond has been executed with the consent of Mehin Lal and myself. After the execution of the said other bond I and the security were satisfied. It was recorded in the other bond that it has been executed as a security for Kalka Prasad for the sum of Rs. 95 borrowed by him." Two other witnesses were examined; one Nabi Baksh, the person employed to write both documents, states in regard to the first bond that "Mehin Lal stood as security of his own accord," and again this witness states that "on the 16th November, 1872, both parties came to me, and that Mehin Lal asked me to write another deed of security which I accordingly did, and Mehin Lal made it over to Nanak Ram," and he adds that Nanak Ram himself joined in the request to him to write the additional document as he did not look upon the first bond as sufficient. And this evidence is in substance corroborated by that of another witness, Ram Ghulam. Now although to my mind the real truth of the case is not without doubts and difficulties, I think the fair construction to be put on these disclosures, including as they do the plaintiff's own account of his and Mehin Lal's relative position in the [494] transaction, and remembering also, I again say, that the original debt had been irrevocably paid over to Kalka Prasad on a bond for three years, I say the fair conclusion is that Mehin Lal acted as surety not on behalf of the principal debtor who needed no assistance of the kind, but as surety for the benefit of Nanak Ram the lender alone, and, if so, there was undoubtedly no consideration within the meaning of s. 127 of the Contract Act. Against the conclusion, indeed, there appears to be nothing in the case excepting the language of the two documents themselves and any general inference to be deduced from the ordinary position of a surety in transactions of this kind. The original bond of the 14th November, 1872, was not signed by Mehin Lal, but I think its terms may fairly be referred to as *pro tanto* indicating the person on whose behalf he engaged as surety, and in that instrument Kalka Prasad describes, or is made to describe, Mehin Lal as "*my* surety."

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And again in the additional document deliberately executed by Mehin Lal himself, he on the recital of the first bond and of Nanak Ram's dissatisfaction, describes himself as "I, the surety, *for Kalka Prasad.*" All this it is perfectly fair to notice in the way of argument, although too much importance should not be attached to the terms of vernacular instruments of such a nature. Their language is very much under the control of the person who is employed to write them, and he no doubt chooses his words without particular regard to any peculiar or occult legal meaning of his own. In the present case we have seen that the writer of these instruments was examined as a witness, and the gloss suggested by his evidence is somewhat different from, if it does not go to contradict, the terms in which he wrote the bonds. He says that the money was paid into the hands of Mehin Lal and was by him delivered to Kalka Prasad, and that afterwards both parties came to him and asked him to write the second document, the meaning of which appears to me to be that notwithstanding the phraseology of the two deeds, Mehin Lal was not only the mere go-between, but the actual messenger and representative of Nanak Ram in the business. He, Mehin Lal, therefore cannot be regarded as having been surety for the benefit of the principal debtor but really for the satisfaction and benefit of Nanak Ram the lender. His suretyship, therefore, was without consideration, and in fact a mere *nudum pactum.*

[495] I must not conclude this judgment without offering a few remarks on a subject which has been much dwelt upon in this case, I allude to those "illustrations" which the Government of India in its Legislative capacity have thought fit of late years, and no doubt with the best and most considerate motives, to add to its Legislative enactments. These illustrations, although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct. In this country, where the administration of the law is for the most part conducted by persons who are not only not professional lawyers, but who have had no legal education or training in any proper or rational sense of the term, the Legislature acts with wisdom and salutary consideration for the interests of justice by putting into the hands of judicial officers appliances such as the illustrations in question for their guidance and direction in the performance of their duties. But, for myself, I can truly say I have never experienced their utility, and I fear they sometimes mislead, and I observe they are more regarded in the Subordinate Courts in these provinces, and even by the pleaders of this High Court, than is the paramount language of the Act itself, of which, however, as I have remarked they, strictly speaking, form no part. With respect to the present case, plainer language than that used in s. 127 of the Contract Act it would be difficult to imagine, and why it should have been thought proper to illustrate it at all I do not very well comprehend. Appended, however, to s. 127, are three illustrations (*a*), (*b*) and (*c*); and illustration (*c*) is as follows: "A sells and delivers goods to B. C, afterwards, without consideration, agrees to pay for them in default of B. The agreement is void." This illustration appears to have received much more attention in the lower Courts than s. 127 itself. In fact the lower appellate Court goes entirely upon it, and at the hearing of this appeal it was almost entirely relied on notwithstanding repeated attempts on my part to point out that it was the meaning of s. 127 itself and not the illustration that was material. The illustrations (*a*) and (*b*) appear to be

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correct enough, although I do not think they were wanted for the elucidation of the section; but this illustration (*c*) is so vague and bald as to be open to [496] misapprehension. Brevity and succinctness are no doubt very desirable qualities in the expression of a law, but they do not necessarily argue distinctness, and in my experience I know of nothing more dangerous than unnecessary brevity in the statement of a proposition in the law of contracts. Now this illustration (*c*), as it stands, may be either good or bad law, if it means that the party C without any privity, and in fact merely as a volunteer, agreed to pay for the goods in default of B and no other act or fact in the way of consideration appearing, then no doubt the agreement would be void, and the illustration would be right. But it does not of itself show that. It assumes the absence of consideration, without any definition of the term other than that given in s. 127 itself, and so far it is calculated to mislead. To be of real service to those for whose assistance these illustrations are intended, they ought to be pellucidly clear in their phraseology and, if possible, I had almost said infallibly sound in their law. But for the purposes of the High Courts of this country these illustrations are not only not required in any sense, but they are frequently the cause of embarrassment, and I would infinitely prefer to have the bare and simple language of the Act itself, without any appendages of the kind. I am afraid, too, that they are open to the objection of being opposed to the canons of construction which prevail in the English Courts for the interpretation of statutes. Thus it has been ruled in England that "the intention of the legislature must be ascertained from the words of a statute and not from any general inferences to be drawn from the nature of the objects dealt with by the statute"—*Fordyce* v. *Bridges* (1); and "the Court knows nothing of the intention of an Act, except from the words in which it is expressed applied to the facts existing at the time"—*Logan* v. *Courtoun (Earl)* (2); "the language of a statute taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments"—*Philpott* v. *St. George's Hospital* (3).

In the present case it is satisfactory to know that any ambiguity that this illustration (*c*) may fairly, or unfairly, be considered to be characterised by, has not prevented us from applying the [497] plain language and the very clear meaning of s. 127 of the Contract Act and we now do that by dismissing the present special appeal with costs.

SPANKIE, J.—Both parties admit that the instrument on which the suit is based is a contract of guarantee as defined in s. 126 of the Indian Contract Act of 1872. The first plea will not hold, as it has been found that the money was not advanced to the obligor of the bond executed two days before the guarantee on the strength of such contract of guarantee. Both instruments (and this circumstance disposes of the second plea) show that there was no consideration in respect of the contract of guarantee. The creditor did not promise to do anything, and did not do anything, for the benefit of the principal debtor, whereby there was a consideration for the surety's giving the guarantee. It is clear that two days after the bond has been executed, and the money advanced to the principal debtor, the creditor feeling anxious about the sufficiency of the security, took the contract of guarantee from the surety. In this deed the surety simply promises to make good any deficiency if the property hypothecated by the obligor of the bond does not satisfy the debt. But the creditor agreed

(1) 1 H.L.Cas. 1 = 11 Jur. 157.
(2) 13 Beav. 22 = 20 L. J. Chanc. 347.
(3) 6 H. L. Cas. 338 = 3 Jur. N. S. 1269.

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to do nothing, and promised nothing, in return. I therefore think that the suit could not be maintained, and hold that the decision of the lower appellate Court should be affirmed.

Decree affirmed and suit dismissed.

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1 A. 497=2 Ind. Jur. 463.

CRIMINAL JURISDICTION.

Before Mr. Justice Turner and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* ABUL HASAN. [9th November, 1877.]

Act XLV of 1860 (*Penal Code*), s. 211—*False charge.*

To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made though no prosecution is instituted thereon. *The Queen* v. *Subbanna Gaundan* (1) followed; *The Queen* v. *Bishoo Barik* (2) distinguished.

[F., 1 A. 527; 4 A. 182 (183); 6 C. 582=8 C.L.R. 255; 7 M. 292 (293)=1 Weir 186; R., 22 B. 596; 6 C. 496=7 C.L.R. 467; 14 C. 707 (711) (F.B.).]

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal passed by G. E. Watson, Esq., **[498]** Sessions Judge of Aligarh, dated the 26th July, 1877, which reversed a judgment of conviction passed by J. B. Fuller, Esq., Assistant Magistrate of the first class, dated the 3rd July, 1877.

The facts of the case are sufficiently stated in the judgment of the High Court.

The Junior Government Pleader (Babu *Dwarka Banarji*), for the Local Government, appellant.

Mr. *L. Dillon*, for the respondent.

The High Court delivered the following

JUDGMENT.

In this case Abul Hasan went to the police-station and accused Ser Mal of having stolen certain surgical instruments from the dispensary at Atrauli. This complaint was made with the intention that it should be reported to the Magistrate and that thereon proceedings should be taken against Ser Mal. At the suggestion of Abul Hasan, the police immediately searched the premises occupied by Ser Mal, and there found, in a place which could be readily reached from the outside of the house, the articles alleged to have been stolen. The police, finding that Abul Hasan had recently a quarrel with Ser Mal about the non-payment of some fees for medical attendance, and seeing that the articles were placed in a spot unlikely to have been selected by the owner of the premises, but in which they might have been deposited by any person outside the house without attracting the attention of the inmates, in forwarding a report to the Magistrate intimated that the charge made was false. The Magistrate, after making a second inquiry through the tahsildar, came to the same conclusion and refrained from instituting any proceedings against Ser Mal. Abul Hasan was, however, summoned to answer the charge of having instituted a false complaint of a criminal offence, and on this charge he was convicted. On appeal the Judge acquitted him, holding that the charge of false complaint could not be sustained because the Magistrate had not

(1) 1 M. H. C.R. 30. (2) 16 W.R.Cr. 77.

inquired into the charge of theft, and in support of his judgment the Judge relied on the ruling of a Bench of the High Court, Calcutta—*The Queen* v. *Bishoo Barik* (1). We may point out that in that case proceedings on the original charge were actually pending when the charge of false complaint was instituted and determined, whereas in the case before us no proceedings were pending on the [499] original charge when proceedings were instituted against Abul Hasan. Whether it would be a sufficient answer to a charge of false complaint that the complaint had not been determined and that proceedings were still pending, we need not now determine, for in this case no proceedings had been instituted. The offence consists not in the prosecution of a false complaint but in the making of it. The case of *The Queen* v. *Subbanna Gaundan* (2) is precisely in point. We concur in the ruling of Chief Justice Scotland in that case and in the grounds on which that ruling proceeds. The ground therefore on which the judgment of the Sessions Judge proceeds is bad in law. The evidence adduced by the prosecution satisfies us that the original charge was made and that it was false, and warrants the inference that Abul Hasan knew it was false, and made it with the intention of injuring Ser Mal. The conviction was therefore proper, and the sentence is certainly not too severe. The appeal is allowed, the judgment of acquittal passed by the Sessions Judge is set aside, and the conviction and sentence affirmed.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

DIRGAJ SINGH AND OTHERS (*Plaintiffs*) v. DEBI SINGH AND ANOTHER (*Defendants*).* [14th November, 1877.]

Conditional sale—Mortgage—Foreclosure—Reg. XVII of 1806, *s.* 8.

Where land which has been conditionally sold is subsequently mortgaged, the second mortgagee, being the mortgagor's "legal representative," within the meaning of that term in s. 8 of Regulation XVII of 1806, is entitled on foreclosure proceedings being taken by the conditional vendee to the notice required by that section, and cannot be deprived by the conditional vendee of the possession of the land notwithstanding foreclosure, where no such notice has been given to him.

[F., 2 N.L.R. 113.]

THIS was a suit for possession of a share in the village of Khushalpur and of a share in the village of Jithupur. These shares had been conditionally sold to the plaintiffs in 1864 by Gurdhan Singh, the proprietor, defendant in this suit. In 1870 they were mortgaged by him to Debi Singh, also a defendant in this suit. The mortgage to the plaintiffs having been [500] foreclosed, they brought the present suit for possession of the shares. The Munsif gave the plaintiffs a decree, holding that the mortgage to Debi Singh was not a genuine mortgage but made to defraud the plaintiffs of their rights under the conditional sale. Debi Singh appealed to the Subordinate Judge, who reversed the decree of the Munsif, and dismissed the suit as brought, on the ground that the plaintiffs

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* Special Appeal, No. 441 of 1877, from a decree of Maulvi Sultan Hasan Khan, Subordinate Judge of Gorakhpur, dated the 3rd February, 1877, reversing a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 9th December 1876.

(1) 16 W.R. Cr. 77. (2) 1 M.H.C.R. 30.

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1 A. 499 = 2 Ind. Jur. 464.

could not obtain possession of the shares without redeeming the mortgage to Debi Singh, which he held was a genuine mortgage.

The plaintiffs appealed to the High Court contending that they were entitled to take the shares free of incumbrance, and that the respondents, having failed to redeem them within the time allowed by law, had lost all right or interest in them.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellants.

Munshis *Hanuman Prasad* and *Sukh Ram*, for respondents.

The High Court made the following

ORDER OF REMAND.

The pleas set out in the memorandum of appeal show valid grounds of objection to the decree of the lower appellate Court. The appellants' deed of conditional sale was executed in 1864, the respondent's deed of mortgage in 1870. Now the mortgagor could only convey to the respondent such a title as he himself had, namely, a title subject to the conditional sale and the legal consequences of the sale. Consequently the appellants were entitled to take proceedings for foreclosure without discharging the alleged mortgage-debt due to the respondent. Such proceedings have been taken, but the respondent now alleges that he had no notice of them. If the mortgage made to the respondent was merely colourable and the original mortgagor remained solely interested in the property subject of course to the conditional sale, this notice to the respondent was not necessary, but if the mortgage made to the respondent did in fact create an interest in the property in his favour he was entitled to notice, and it must be ascertained whether he received such notice. The lower appellate Court must try the following issues: Had the respondent at the time the foreclosure proceedings were commenced a *bona fide* interest [501] in the property? If so, was notice of foreclosure served on him? The lower appellate Court will return its finding on these issues, when ten days will be allowed for objections.

The Subordinate Judge determined on these issues that at the time the foreclosure proceedings commenced Debi Singh was in possession of the shares as mortgagee, and was still in possession as such, and that no notice of foreclosure was served on him.

On the return of these findings, the High Court delivered the following

JUDGMENT.

The facts found by the Court below are no longer disputed, and we accept the findings. We entirely concur in the more recent rulings (1) that the term mortgagor's "legal representative" used in the Regulation (XVII of 1806) was intended to apply to all or any persons who at the date of the notice possess a title to the equity of redemption whether absolute or defeasible under the mortgage. The respondents were as mortgagees entitled to notice, and the foreclosure proceedings as against them are invalid They were entitled to have the opportunity of coming in to redeem the mortgage held by the appellants so as to preserve their own security, and the issue of notice to them was indispensable to bar them by foreclosure. The appeal is dismissed with costs.

Appeal dismissed.

(1) See 3 W. R. 230, *per* Phear, J., = 6 W. R. 230.

1 A. 501.

1877 Nov. 14. — APPELLATE CIVIL. — 1 A. 501.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

AJNASI KUAR (*Judgment-debtor*) v. SURAJ PRASAD (*Decree-holder*).*
[14th November, 1877.]

Decree for the Performance of a particular Act—Execution of Decree—Act VIII of 1859 *(Civil Procedure Code)*, s. 200.

A, who had been directed by a decree to refrain from preventing her daughter returning to her husband, after the date of the decree permitted her daughter, who was of age, to reside in her house. *Held* that such conduct on the part of *A* was no such evidence of interference with her daughter's return as would justify the execution of the decree against her, under the provisions of s. 200 of Act VIII of 1859.

[D., 23 Ind. Cas. 828.]

[502] THE decree-holder in this case applied for the execution of a decree of the Munsif dated the 25th May, 1874, which he had obtained against his wife Deo Kuar for restitution of conjugal rights and against his wife's mother, Ajnasi Kuar, directing her to refrain from preventing his wife returning to him. He prayed in his application for execution that his wife should be sent back to him from the house of Ajnasi Kuar, and in the event of this not being done that certain property belonging to the judgment-debtors should be attached, and that the judgment-debtors should be arrested and imprisoned under s. 200 of Act VIII of 1859.

Ajnasi Kuar objected to the execution of the decree against her, stating that it was her wish that Deo Kuar should live with her husband, but that Deo Kuar was desirous of living in some house near her house, and that her servants should attend on her (Deo Kuar) in order that she might not be harshly treated by her husband, and that the decree-holder would consent to this arrangement she (Ajnasi Kuar) would give him and his wife food and clothing and provide servants for them, or the matter might be submitted to arbitration.

The Munsif directed execution to issue, observing with reference to Ajnasi Kuar that she did not give her unqualified assent to her daughter living with her husband, and therefore it could not be held that she had not opposed her daughter's return to her husband. On appeal by Ajnasi Kuar to the Judge the order of the Munsif was affirmed.

Ajnasi Kuar appealed to the High Court contending that she did not prevent Deo Kuar, who was of age, returning to her husband, and that it was not shown that she in any way obstructed the satisfaction of the decree.

Mr. *Mahmood* and Munshi *Hanuman Prasad*, for the appellant.

Mr. *Colvin*, for the respondent.

JUDGMENT.

The judgment of the High Court was delivered by

TURNER, J.—There is no evidence that there has been any interference on the part of the appellant with the return of her daughter to the respondent since the date of the decree. Something [503] more must we

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* Miscellaneous Special Appeal, No. 46 of 1877, from an order of M. Brodhurst, Esq., Judge of Benares, dated the 8th June, 1877, affirming an order of Babu Promoda Charn Banarji, Munsif of Benares, dated the 17th May, 1877.

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think be shown than that the daughter who is of age is still permitted to reside in the appellant's house. We must therefore allow the appeal and order the release from attachment of the appellant's property. No costs will be allowed to either party to this appeal either in the Court below or in this Court.

Appeal allowed.

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1 A. 503=2 Ind. Jur. 465.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

PRAG DAS (*Plaintiff*) *v.* HARI KISHN AND ANOTHER (*Defendants*).*
[19th November, 1877.]

Hindu Law—Hindu Widow—Forfeiture—Reversioner.

A Hindu widow does not forfeit her interest in her deceased husband's separate estate merely by divesting herself of such interest. Such an act does not entitle the person claiming to be the next reversioner to sue for possession of the estate, or for a declaration of his right as such reversioner to succeed to the estate after the widow's death.

[F., A.W.N. (1882) 11.]

THIS was a suit for possession of a moiety of the separate estate of one Lalji, deceased, brought by one of the two next reversioners, against the widow of Lalji and the other reversioner. The facts of the case are sufficiently stated in the judgment of the High Court to which the plaintiff appealed against the decree of the Court of first instance dismissing his suit.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondents.

JUDGMENT.

The judgment of the High Court was delivered by

OLDFIELD, J.—Ram Din, who died in 1872, left three sons surviving him, Lalji, Prag Das, and Hari Kishn. The first died in September, 1874, leaving a childless widow, Gopal Dai. The subject of this suit is the property left by Lalji. The plaintiff, Prag Das, sues his surviving brother Hari Kishn and Gopal Dai, the widow, to establish his right and to recover possession of half Lalji's property, on the averment that the three brothers held separate [504] property, and that the widow had colluded with Hari Kishn and allowed him to take possession in his own right of all the property of the deceased by which act she had forfeited her interest. Hari Kishn pleaded that he is the heir of the deceased, as deceased and he had lived in union. He allows that a partition had taken place at their father's death, but it was only plaintiff's share which was divided off, and the widow supports him in his allegation that he and deceased had lived in union, and avers that no alteration has taken place in the nature of the possession exercised on the property since Lalji's death, and adds that

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* Regular Appeal, No. 48 of 1877, from a decree of Maulvi Farid-ud-din Ahmed, Subordinate Judge of Mirzapur, dated the 8th December 1876.

1877 Nov. 19. APPELLATE CIVIL. 1 A. 503 = 2 Ind. Jur. 465.

Hari Kishn's son was considered to be his heir by deceased, but she makes no specific mention of any title as heir by adoption to deceased. The Subordinate Judge found that the deceased held a separate estate and that in consequence his widow, Gopal Dai, is his heir, and that no act has been shown on her part to divest her of the estate and give plaintiff, the reversioner, immediate possession. It appears that at the death of Lalji there were disputes as to the succession, and Hari Kishn obtained mutation of names of the whole estate in his favour and possession also, but the Subordinate Judge seems to think that he had only formal possession, that there has been nothing done by the widow injurious to his reversionary interest, and that this is not the time to decide on any right in future to which the plaintiff may become entitled and he dismisses the suit.

The pleas in appeal on the plaintiff's part amount to this, that on the facts proved the plaintiff is entitled to a decree for the whole claim, and at any rate that his reversionary right in the property should have been protected by giving him a declaration of it, and by restraining the defendant from dealing with the property in a manner injurious to the plaintiff's title.

The respondents have filed objections under s. 348 to the finding that the deceased held a separate estate. It will be convenient first to dispose of their objections, and on this point we agree with the Subordinate Judge. There is ample evidence that the shares of all three brothers were separated from each other after their father's death. The evidence alluded to by the Subordinate Judge appears to us conclusive on the point. There are admissions by the brothers of division, proceedings such as mutation of names in the revenue records only consistent with the fact that such division [505] had taken place, and separate bankers' accounts, and separate dealings with the property, all pointing to a division of Lalji's estate from both his brothers. On the other side all that the respondents' evidence necessarily shows is commensality between Lalji and Hari Kishn; while some of their witnesses admit ignorance as to their monetary transactions. There is no doubt that there was a partition effected at Ram Din's death, and there is no evidence of any re-union, nor indeed is re-union alleged.

With reference to the plaintiff's appeal, looking to the facts and allegations of the respondents, it seems clear that Hari Kishn asserted his own title as heir of Lalji, and that he was supported in doing so by the widow, who recognised him as the heir, and that he has obtained possession of the estate; and it does not appear that this is a mere formal possession but one which has given him the exercise of all the rights of an owner. Anything short of this is opposed to the allegations of the widow, who distinctly states in her written statement that Hari Kishn is in undivided possession of all the property in the same manner as he was in conjunction with her husband, and that there has been no change or alteration whatever since her husband's death; all this amounts to a possession as owner and one that would count adversely to the widow.

However, accepting such to be the case, the act of the widow divesting herself of her interest in the estate in favour of Hari Kishn will not operate as a forfeiture, so as to bring in the reversionary heirs. Hari Kishn's possession cannot on this ground be interfered with while she lives, and no other ground for interference has been alleged or made out, and therefore the claim fails and has been properly dismissed, for it is one asking for a declaration of a present right and possession in the property, nor can the Court declare that plaintiff will have a right of succession

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after the widow's death, but we may say that any reversionary rights which he may hereafter succeed in establishing are not affected by the widow's divesting herself of her interest in Hari Kishn's favour. We affirm the decree of the lower Court and dismiss the appeal. Each party will pay their own costs of this appeal.

Appeal dismissed.

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1 A. 506.

[506] APPELLATE CIVIL.

Before Mr Justice Pearson and Mr. Justice Oldfield.

TAUFIK-UN-NISSA (*Plaintiff*) *v.* GHULAM KAMBAR (*Defendant*).*
[21st November, 1877.]

Muhammadan Law—Dower.

Under Muhammadan law, when on marriage it is not specified whether a wife's dower is prompt or deferred, the nature of the dower is not to be determined with reference to custom, but a portion of it must be considered prompt. The amount to be considered prompt must be determined with reference to the position of the wife and the amount of the dower, what is customary being at the same time taken into consideration. *Eidan* v. *Mazhar Husain* (1) followed.

[R., 33 A. 291 (293)=8 A.L.J. 27=9 Ind. Cas. 200.]

THIS was a suit to recover Rs. 25,000 out of Rs. 51,000 due to the plaintiff as dower, the suit being based on Muhammadan law. The plaintiff stated in her plaint that according to that law her dower must be considered prompt, because at the time of marriage it was not specified that the dower was deferred dower. The defendant alleged that for that reason it could not, under Mahammadan law, be considered prompt, that, under that law, where it was not specified whether dower was prompt or deferred, it was necessary to refer to custom to determine whether it should be considered prompt or deferred, and that according to the custom obtaining in such a case in Budaun, where the parties to the suit resided, the dower must be considered deferred dower. The Court of first instance held that, in the absence of any specification whether the dower was prompt or deferred, it was necessary to refer to custom to determine the nature of the dower, and that, according to the custom obtaining in such cases in Budaun, the dower must be considered deferred dower, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court contending that, under Muhammadan law, where at the time of marriage it was not specified whether dower was prompt or deferred, it must be considered prompt, that the custom on which the lower Court relied was opposed to this law and could not therefore be recognized, and that such custom was not proved by the evidence on record.

Mr. *Mahmood* and Maulvi *Obeidul Rahman*, for the appellant.

[507] Munshi *Hanuman Prasad* and Shah *Asad Ali*, for the respondent.

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* Regular Appeal, No 44 of 1877, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Shahjahanpur, dated the 1st September, 1876.

(1) 1 A. 483.

1877 Nov. 21.

APPELLATE CIVIL.

1 A. 506.

JUDGMENT.

The judgment of the High Court was delivered by

OLDFIELD, J.—This is a claim to recover Rs. 25,000 as prompt dower. It is not disputed that the amount of dower stipulated for at marriage was Rs. 51,000, and it is admitted that it was not specified at the time whether the dower was prompt or deferred. The plaintiff contends that, under such circumstances, the entire amount is exigible as prompt dower on demand, though she only claims in this suit a portion. The defendant contends that in such a case the custom of the place should be referred to, and by the custon of Budaun the entire dower is to be considered as deferred. The lower Court has dismissed the claim, with reference to what it holds to be the custom. It considers that when there has been no specification of dower, the law requires that a reference should be made to custom to determine not only the proportion of the dower which shall be considered to be prompt, but whether any at all shall be so considered, and it holds that in Budaun it is the custom to consider the whole as deferred. This judgment cannot be supported. The law on the point is that stated in Baillie's Digest from the *Fatawa Kazee Khan*, which has been followed by this Court in recent decisions—*Eidan* v. *Mazhar Husain* (1); *Habib-un-nissa* v. *Nizam-ud-din*, decided the 31st July, 1877 (2). When nothing has been said as to the character of dower, the Court may determine the amount to be considered prompt with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. The reference to custom appears to be in respect of the proportion to be held as prompt, and it does not appear to have been contemplated to refer to custom to decide whether or not the entire dower should be deferred. We have been shown a translation of an extract from Jami ur-rumuz, a commentary on Mukhtasar Vakaya, which will, however, bear another construction. However this may be, we do not concur with the Subordinate Judge in holding that any custom is proved by which the entire dower is considered deferred. (After considering the evidence as to the custom the judgment proceeded [508] as follows :) We hold that neither by law or custom is the plaintiff debarred from obtaining prompt dower, and we consider Rs. 17,000, or one-third of the total dower, a reasonable sum to award. We reverse the decree of the lower Court and decree accordingly with all costs.

Appeal allowed.

(1) 1 A. 483. (2) Unreported.

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APPELLATE CIVIL.

1 A. 508.

1 A. 508.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

IMAM ALI AND OTHERS (*Decree-holders*) *v.* DASAUNDHI RAM (*Judgment-debtor*).* [22nd November, 1877.]

Execution of Decree—Special Appeal—" Final Decree of Appellate Court"—Limitation—Act IX of 1871 (*Indian Limitation Act*), *sch. ii, art.* 167.

The Munsif gave the plaintiffs in a suit for possession of land and for mesne profits a decree for possession but dismissed the claim for mesne profits. An appeal was preferred to the Judge, who affirmed the decree for possession and remanded the case to the Munsif, under s. 351 of Act VIII of 1859, to determine the mesne profits due to the plaintiffs. The Munsif gave the plaintiffs a decree for certain mesne profits. Subseuqently a special appeal was preferred to the High Court against the Judge's decree. While this was pending an appeal was preferred to the Judge against the decree of the Munsif for mesne profits, and on the 7th June, 1873, the plaintiff again obtained a decree for mesne profits. Finally, on the 6th March, 1874, the High Court modified the Judge's decree for possession but did not interfere with the order of remand. *Held*, on the plaintiffs applying for execution of the Judge's decree, dated the 7th June, 1873, that the limitation for the execution of such decree ran not from the date of such decree but from the date of the High Court's decree, which was " the final decree of the appellate Court, " and the only " final decree, " within the meaning of art. 167, sch. ii of Act IX of 1871.

THIS was an application for the execution of a decree of a District Court, dated the 7th June, 1873. The facts of the case are sufficiently stated in the judgment of the High Court to which the decree-holders appealed against the order of the Judge, affirming the order of the Munsif, which decided that execution of the decree was barred by limitation.

The decree-holders appealed to the High Court on the ground that limitation began to run from the date of the decree of the High [509] Court dated the 6th March, 1874, and not from the date of the decree of which execution was sought.

Babu *Barodha Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The High Court delivered the following

The question before us is whether the appellant's decree is incapable of execution by limitation. He sued in the Munsif's Court for possession of certain land and to recover damages. The Munsif decreed possession but dismissed the claim for damages. An appeal was preferred to the Judge, who (28th February 1873) affirmed the decree giving possession and remanded the case, under section 351 of Act VIII of 1859, for adjudication as to the amount of damages due. An appeal was preferred from the Judge's decision to the High Court on the 23rd May, 1873, and was pending till 6th March, 1874, when the decision as to possession was modified and the Court did not interfere with the order of remand made by the Judge. In the meantime the Munsif on the 25th April, 1873, decreed damages, and an appeal was preferred to the Judge who decided it on the 7th June, 1873. It will be seen that the Judge's order is prior to the date of the High

*Miscellaneous Special Appeal, No. 62 of 1877, from an order of H.M. Chase, Esq., Judge of Saharanpur, dated the 18th May, 1877, affirming an order of Maulvi Muhammad Imdad Ali, Munsif of Saharanpur, dated the 24th March, 1877.

Court's decision in the appeal before them. Appellant now takes out execution of the Judge's decree of the 7th June, 1873. If the three years' limitation is to run from the former date, the application is barred, and this is the view taken by the lower Courts. But this view is erroneous. Where there has been an appeal, the limitation will run from the date of the final decree of the appellate Court. We hold this to be the decree of the High Court and not that of the Judge, the 7th June, 1873; the former was passed after the Judge's decree of the 7th June, 1873, and must be held to be the final decree of the appellate Court and to have finally determined the entire claim. The lower Courts seem to consider that there may be several final decrees of an appellate Court in one and the same case, given separate periods of limitation for separate portions of a claim in one and the same suit, and they refer to the High Court's decree as final on the point of possession and so affording a period of limitation for that portion, and the Judge's decree as final on the point of damages and [510] affording another period of limitation for that portion of the claim, but this view is erroneous, both decrees cannot be final within the meaning of the limitation law. We reverse the order of the lower Court and remand the case for execution in due course. Costs to abide the result.

Cause remanded.

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1 A. 510=2 Ind. Jur. 499.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

LACHMAN BIBI AND ANOTHER (*Decree-holders*) v. PATNIRAM AND ANOTHER (*Judgment-debtors*).* [22nd November, 1877.]

Decree made in favour of a Firm in name of Agent—Applications for execution made by Agent other than Agent named in the Decree—Effect of such Applications to keep the Decree in force—Limitation—Act IX of 1871 (*Indian Limitation Act*), *sch. ii, art.* 167.

A decree was passed in favour of a firm in the name of an agent of the firm. The second and subsequent applications for execution were made by an agent of the firm other than the agent named in the decree. Certain persons, alleging that they were the proprietors of the firm, applied for execution of the decree. The application was refused on the ground that the proceedings in execution taken by the last-mentioned agent were invalid, and execution of the decree was therefore barred by limitation. *Held* that such proceedings, however irregular, were not invalid.

[R., 118 P.R. 1912=86 P.L.R. 1913=51 P.W.R. 1910; D., 26 A. 19; A.W.N. 1903, 172.]

THIS was an application for execution of a money-decree dated the 10th May, 1870. This decree was passed *ex parte* in the name of Kishn Lal, described as the agent of the firm of Megh Raj Harbilas. On the date it was passed application for execution was made by Kishn Lal. A second application was made on the 8th December, 1871, by one Mohan Lal, who had succeeded Kishn Lal as agent of the firm of Megh Raj Harbilas. A third and fourth was made by the same person on the 30th May, 1872, and the 13th April, 1875, respectively. The present application was made on the 15th February, 1877, by Lachman Bibi and

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*Miscellaneous Special Appeal, No. 66 of 1877. from an order of J.W. Power, Esq., Judge of Ghazipur, dated 4th August, 1877, reversing an order of Maulvi Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 3rd July, 1877.

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Katu Bibi, alleging themselves to be the proprietors of the firm of Megh Raj Harbilas the decree-holders. The judgment-debtors objected to the execution of the decree on the ground, among other grounds, that the former applications for execution made by Mohan [511] Lal were insufficient to keep the decree in force, as he was not the decree-holder, and execution of the decree was therefore barred by limitation. The Subordinate Judge disallowed this objection. On appeal by the judgment-debtors it was allowed by the Judge, who observed as follows: "The application made to the Court on the 8th December 1871 was not made by the decree-holder then on the record, *viz.*, Kishn Lal, but by another person. It was therefore not a petition to execute the decree, and as all the other applications for execution were made by persons other than the decree-holder, execution of the decree must be considered barred."

Lachman Bibi and Katu Bibi appealed to the High Court, contending that the Judge erred in holding that Kishn Lal was himself the decree-holder, that the decree itself showed that it belonged to the firm of which the appellants were proprietors, that proceedings in execution of the decree were taken by the appellants from time to time in the name of their agent for the time being, and there was no reason in law why they should not take out execution and execution was not barred by limitation.

Munshi *Hanuman Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Pandit *Bishambar Nath*, for the respondent.

JUDGMENT.

The judgment of the High Court was delivered by

TURNER, J.—Owing to an error in procedure the decree was passed in the name of Kishn Lal, described as the agent of the firm of Megh Raj Herbilas, but it was then, as on subsequent occasions and is now, admitted that it was passed in favour of the firm of which the appellants assert they are and were the owners. The second and subsequent applications for execution, with the exception of the one now before the Court, were taken out by Mohan Lal, who succeeded Kishn Lal as the gomashta of the firm. However irregular the proceedings have been, we are not prepared to hold they are invalid. We must set aside the order of the Judge, disallowing the application as barred by limitation, and remand the case for the decision of the other pleas raised. Costs of this appeal will abide and follow the result.

Cause remanded.

1 A. 512 (F.B.).

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FULL BENCH.

1 A. 512 (F.B.).

[512] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

BHIKHAN KHAN AND ANOTHER (*Plaintiffs*) v. RATAN KUAR (*Defendant*)*. [14th August, 1877.]

Act XVIII of 1873 *(North-Western Provinces Rent Act) ss:* 31, 34, 35, 93, 206, 207—*Act XIX of* 1873 (*North-Western Provinces Land Revenue Act*), *s.* 3, *cl.* 8—*Co-sharer—Lambardar—Suit for Profits—Jurisdiction—Civil Court—Revenue Court—Profits when due—Limitation.*

Held, by the Division Bench, following the ruling of the majority of the Full Bench in *Ashraf-un-nissa* v. *Umrao Begam* (1), that a suit by a co-sharer in an undivided mahal against the heir of a deceased lambardar for his share of profits collected by the lambardar before his death is a suit cognizable not by a Civil Court but by a Court of Revenue.

Per STUART, C.J.—Observation on the application of ss. 206 and 207 of Act XVIII of 1873.

Held, by the majority of the Full Bench that the share of a co-sharer in an undivided mahal of the profits of the mahal for any agricultural year are due to him from the lambardar as soon as after the payment of Government [513] revenue and village-expenses, there is a divisible surplus in the hands of the lambardar, unless by agreement or custom a date is fixed for taking the accounts and

* Special Appeal No. 1256 of 1875, from a decree of G.H. Lawrence, Esq., Judge of Aligarh, dated the 2nd September 1875, affirming a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Aligarh, dated the 27th November 1874.

1 A. 512-N (F.B.).

(1) This is an unreported case which arose out of a reference to the High Court under s. 205 of Act XVIII of 1873. The suit was one by a co-sharer in a mahal to recover the profits due on her share for the years 1279 and 1280 Fasli from the heir of the lambardar who made the collections for those years and subsequently died. It was instituted under s. 93, cl. (*h*), Act XVIII of 1873.

The reference was made in view of the case of *Mata Deen* v. *Chundee Deen*, H.C.R. N.W.P., 1870, p. 54, and of *Mata Deen Doobey* v. *Chundee Deen Doobey*, H.C.R.N.W. P., 1874, p. 118.

The Divisional Court (TURNER and SPANKIE, JJ.) before which the reference came referred it to the Full Bench, the order of reference being as follows:

It appears to us, and indeed has been held by us on former occasions, that—(*a*) the heir of a deceased lambardar succeeds to the cause of action and must sue in the Revenue Court; (*b*) the heir of a deceased lambardar is liable for debts of the deceased if he has inherited assets, and therefore the suit is not a suit for profits, although incidentally the amount of the share of the profits claimed must be determined. As our views on the first question are opposed to a recent decision, we refer this reference to a Full Bench for disposal.

PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion:

When the cause of action survives, the nature of a suit is not changed by reason that the plaintiff or defendant is not the person to or against whom the cause of action has accrued but his legal representative; and this being so, it would seem to follow that, where a special Court has been constituted for the trial of suits of a particular nature, the Court has cognizance of suits of that nature, whether they be brought against the person to or against whom the cause of action accrued or his legal representative.

Thus, in the case out of which this reference has arisen, if the suit has been brought against the defendant as the legal representative of the deceased it cannot be argued that, except in the circumstance that the representative is sued instead of the deceased, there is any feature in the suit other than would have been present had the suit been brought in the lifetime of the deceased.

[513] The circumstance that a legal representative is substituted for one of the parties is an accident to rather than a property of the suit. Of course, when a legal representative appears as defendant, the decree cannot be executed against him personally but only against the estate of the deceased.

If, however, a claim be brought not against the legal representative to obtain relief

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1 A. 512 (F.B.).

dividing the profits, in which case any divisible surplus which may have accrued prior to that date is due on that date, and the divisible profits in respect of any arrears which may be collected after that date are due when they reach the hands of the lambardar or his agent.

Held per STUART, C.J. and SPANKIE, J. That where by agreement or custom there is no date fixed for dividing such profits, the share of a co-sharer becomes due on the last day of the agricultural year as fixed by Acts XVIII and XIX of 1873.

[F., 4 A. 412=A.W.N. (1882) 78; R., 14 A. 381 (400) (F.B.)=A.W.N. (1892) 143; D., 5 A. 438 (F.B.)=A.W.N. (1883) 69.]

THIS was a suit for a share of the profits of a mahal for 1278 Fasli, instituted in the Court of the Subordinate Judge on the 29th June 1874. The plaintiffs, who were co-sharers in the mahal, alleged that the profits for that year had been collected by Bulaki Das, a co-sharer and lambardar, that their share of these profits became due and payable on the 1st July 1871, but had not been paid to them, and they sued the widow of Bulaki Das, who was his heir and in possession of his estate, for the share. The defendant set up as a defence, among other matters, that the suit was, under s. 93 of Act XVIII of 1873, cognizable by a Court of Revenue, and that, as the profits for the year 1278 fasli be came due, not on the [514] 1st July 1871, but on the 3rd June 1871, when that agricultural year ended, the suit was barred by limitation, not having been brought within three years from the latter date. The Court of first instance held that the suit was cognizable by a Civil Court, but dismissed it on the ground that it was barred by limitation, not having been instituted within three years from the 3rd of June 1871, the end of 1278 Fasli (1), or setting that date aside and considering that that year ended on the 15th June 1871, the last day of payment of the last instalment of Government revenue within three years of such latter date. The plaintiffs appealed, contending that the suit was governed by art. 118, sch. ii, Act IX of 1871, and the period of limitation was consequently six years. The lower appellate Court, without deciding whether the suit was cognizable by a

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out of the estate of the deceased, but against an heir or stranger on the ground that he has taken and converted to his own use assets of the deceased, and so rendered himself personally liable for the debts of the deceased, the suit is not a mere suit for profits, but a suit which differs in an essential point from the suit which would have been brought against the deceased had he survived; a liability has been created by the act of the heir or stranger attaching to such heir or stranger personally, and on that liability the right of suit is founded. If then a suit be brought against an heir or stranger, to recover from him personally a debt due to the plaintiff in respect of his profits as co-sharer on the ground that the defendant has intermeddled with the estate of the person who collected the profits, the suit lies, not in the Revenue, but in the Civil Court.

STUART, C.J.—I concur in the last case suggested in the above answer, but I cannot accept as law what is laid down in the first part of it; and generally I remain of the opinion explained in my judgment in *Mata Deen Doobey* v. *Chundee Deen Doobey* in our Reports for 1874, page 118. The heir of a deceased lambardar may succeed to the cause of action, or rather to the subject-matter of the cause of action, but it does not therefore follow that the heir can sue in the Revenue Court. That which is here called a cause of action is really a right to recover a portion of the deceased's estate, and can only be sued for in a Civil Court. Again, the circumstance that a legal representative is substituted for a deceased party may be an accident rather than a property of the suit, but, it is an accident in my opinion which determines the *forum* where the suit may be prosecuted to decree.

I have only to add that Act XVIII of 1873 does not affect the question submitted to us, the principle, so far as the legal position of the heir is concerned, being the same as under Act XIV of 1863.

(1) According to the official calendar the year 1878 Fasli did not end till the 28th September 1871.

Civil Court or a Revenue Court, held that the period of limitation applicable to it was that prescribed in s. 94 of Act XVIII of 1873, *viz.*, three years, and that it was barred by limitation not having been instituted within three years from the last day of Jait 1278 fasli, that is to say, the 3rd of June 1871.

The plaintiffs appealed to the High Court, contending that the suit being cognizable by a Civil Court, the period of limitation applicable to it was that laid down in art. 118, sch. ii of Act IX of 1871, and not that in s. 94 of Act XVIII of 1873, and that even if the period of limitation applicable was three years and such period was computed from the end of 1278 Fasli, that year did not end on the 3rd June 1871, but on the 30th June 1871, and the suit was within time. The respondent objected, under s. 348 of Act VIII of 1859, that the suit was cognizable by a Court of Revenue.

STUART, C. J. and PEARSON, J., before whom the appeal came on for hearing, referred to a Full Bench the question how the day on which the profits are due to, and claimable by, co-sharers in a mahal is to be ascertained.

The orders of reference were as follows:

PEARSON, J.—A recent ruling of the Full Bench of this Court (1) has declared a suit of the nature of the present to be cognizable by **[515]** the Revenue and not by the Civil Courts. We must therefore, in pursuance of that ruling, admit the validity of the objection urged by the respondent, under s. 348 of Act VIII of 1859, to the extent that the Subordinate Judge was incompetent to take cognizance of the suit. The lower appellate Court was, however, warranted in disposing of the appeal preferred to it by the provision of s. 207 of the new Rent Act, and under that or the following section, we are also bound to deal with the appeal before us. The first plea fails in reference to the ruling above mentioned.

The question raised by the second plea next presents itself for consideration. By s. 94 of the Act above mentioned a suit for a share of the profits of a mahal must be brought within three years from the day on which the share became due. But the law does not fix the day on which the share becomes due. It may be fair and reasonable to hold that it becomes due on the last day of Jait of the fasli year, but it would be not less fair and reasonable to hold the last day of the agricultural year, as defined in Act XIX of 1873, to be the day from which the period of limitation should run. Again, it might be held that when by agreement or by custom a particular day had been fixed for the distribution of profits in any mahal, or for a settlement of accounts, the time should run, from such day. But where no such day has been fixed by agreement or custom, there would still be room for doubt. I would refer the question how the day on which the profits are due to and claimable by co-sharers in a mahal is to be ascertained, to a Full Bench.

STUART, C. J.—The ruling of the Full Bench referred to by Mr. Justice Pearson was strongly dissented from and is still strongly dissented from by me as matter of law. But if not only in this suit but in all other similar cases I am absolutely bound by that ruling, then of course I must hold that the respondent's objection is well founded, and it was taken in the Court of first instance; s. 207 of the Rent Act therefore strictly applies.

(1) 1 A. p 512, note (1).

1877 AUG. 14. — FULL BENCH. — 1 A. 512 (F.B.).

That section is in the following terms:—"If in any such suit such objection was taken in the Court of first instance, but the appellate Court has before it all the materials necessary for the determination of the suit, it shall dispose of the appeal as if the suit had been instituted in the right Court." The nature of the suit [516] here referred to and the objection are described in s. 206, which is as follows:—"In all suits instituted in any Civil or Revenue Court, in which an appeal lies to the District Judge or High Court, an objection that the suit was instituted in the wrong Court shall not be entertained by the appellate Court, unless such objection was taken in the Court of first instance, but the appellate Court shall dispose of the appeal as if the suit had been instituted in the right Court." It thus appears that "the suit" and "the objection" are the same in both sections, but the manner in which the objection is to be treated is very different. Section 206 applies, by implication, where the objection had not been taken in the Court of first instance, and goes on to provide that the objection shall not be entertained, *i.e.*, shall not be looked at, shall not be taken cognizance of or in any way noticed, but shall be altogether disregarded, and the appeal shall proceed as if the objection had never been taken at all; and therefore, where, as in the present case, the suit had been instituted in the Civil Court, that Court shall be deemed the right Court, that is s. 206. Section 207, as I have stated, applies where the objection had been taken in the Court of first instance, and where, by implication the objection has been entertained and allowed, and it goes on to provide for the case where the appellate Court has before it all the materials necessary for the determination of the suit, in which case the appellate Court "shall dispose of the appeal as if the suit had been instituted in the right Court, which, in the present case, must be understood to be the Revenue Court, and of course according to revenue law. That being so, the limitation of three years prescribed by s. 94 of the Rent Act of course governs. But I share the doubt and difficulty expressed by Mr. Justice Pearson respecting the date from which the limitation is to run. On this subject I concur in the reference to the Full Bench proposed by Mr. Justice Pearson.

Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellants.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

JUDGMENTS.

The Full Bench delivered the following judgments:

PEARSON, TURNER, and OLDFIELD, JJ., *concurring*.—The lambardar collecting rents on account of himself and the other co-sharer [517] in a revenue-paying mahal is entitled to apply the collections, firstly, to the payment of Government revenue and village expenses, and then, after deducting what (if anything) is due to himself as *haq lambardari*, is bound to divide surplus collections among the several co-sharers in proportion to their shares. Ordinarily then profits are due as soon as there is a divisible surplus in the hands of the lambardar. But it not unfrequently happens that by agreement or custom a date is fixed for taking the accounts and dividing the profits. In this case any divisible surplus which may have accrued prior to that date is due on the date so fixed, and the divisible profits in respect of any arrears which may be collected after that date are due at the time they reach the hands of the lambardar or his agent.

SPANKIE, J.—The share, it appears to me, becomes due at the end of the agricultural year, when the rents have been collected and the

Government revenue has been paid. The village-accounts should then be made up. Probably custom or agreement between the shareholders regulates the practice. A Court dealing with a question of this nature should ascertain whether there is any custom or agreement between the shareholders to which it might refer for the determination of the date from which limitation should run. Where there is no custom or agreement the safest guide would be the end of the agricultural year as defined in cl. 8, s. 3 of Act XIX of 1873, that is to say, the thirtieth day of June. This also is the date fixed in the Rent Act as the day upon which the agricultural year expires—*vide* ss. 31, 34, and 35 of Act XVIII of 1873. It may be said that the lambardar may not have been able to collect the rents and that there are no profits to distribute, or that each share is less than the shareholder is ordinarily entitled to receive. In such a case the share would still be due at the close of the agricultural year on the assumption that the rents have been collected, and it would be for the lambardar to show that there were no profits, and that he had exercised all due diligence as lambardar and trustee for the sharers in collecting the rents and income of the estate. So in all disputes between co-sharers, whatever might be the nature of the defence, the share would become due at the expiration of the agricultural year. I would therefore say that where no custom is found to exist regulating the practice, or where [518] there is no agreement between the shareholders on the point, the share becomes due on the 30th June in each year.

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FULL BENCH.

1 A. 512 (F.B.).

STUART, C. J.—I concur substantially in the opinion of Mr. Justice Spankie. I observe in the case that was before Mr. Justice Turner and myself in April of last year, *Girdhari Lal* v. *Lahori* (1), Special Appeal No. 1336 of 1875, in which we made a remand, we expressed the opinion that the limitation of three years ran "from the date when the profits became payable," or otherwise, as we go on to explain, "in the absence of any custom or agreement to the contrary, profits became due from the time when they reach the lambardar's hands," which I suppose must be taken to be at the end of the agricultural year, that is, in this case, on the 30th of June of each year. But it might be well to enquire whether there is any custom or agreement on the subject in the district of Aligarh, where the property here in suit is situated.

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1 A. 518 (F.B.)=2 Ind. Jur. 500.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

ALTAF ALI (*Judgment-debtor*) *v.* LALJI MAL AND ANOTHER (*Decree-holders*).* [3rd December, 1877.]

Trespass on Land—Mesne Profits.

Held, by the majority of the Full Bench, that a trespasser on the land of another should, in estimating the mesne profits which the owner of the land is entitled to recover from him, be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered

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* Miscellaneous Regular Appeal, No. 52 of 1876, from an order of Rai Bakhtawar Singh, Subordinate Judge of Bareilly, dated the 2nd August 1876.

(1) Unreported.

1877 DEC. 3. — FULL BENCH. — 1 A. 518 (F.B.) = 2 Ind. Jur. 500.

or continued on the land in the exercise of a *bona fide* claim of right, but where he has entered or continued on the land without any *bona fide* belief that he was entitled so to do, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground-rent.

Per STUART, C.J.—Whether such trespasser is a trespasser *bona fide* or not he should be allowed such costs.

[F., 24 A. 376 (380) = A.W.N. (1902) 90; R., 22 A. 262 (265); 18 Ind. Cas. 615 = 24 M.L.J. 30 = (1913) M.W.N. 804; Exp., 23 A. 252.]

THIS was an application to recover in execution of a decree the mesne profits of certain villages accruing between the date of the decree and the date on which possession of the village was obtained [519] under the decree by the decree-holders. The judgment-debtor pleaded, among other matters, that the expenses of collecting the rents should be deducted from the sum claimed by the decree-holders. The Court of first instance refused to make this deduction on the ground that the judgment-debtor had been in wrongful possession of the villages.

The judgment-debtor appeals to the High Court against the order of the Court of first instance allowing execution of the decree, contending, among other things, that the expenses of collection should be allowed to him.

STUART, C.J., and PEARSON, J., before whom the appeal came on for hearing, referred the case to a Full Bench, the order of reference being as follows :—

In reference to the second plea in appeal, we observe that the lower Court, in refusing to allow the appellant to charge the estate with the expenses of collection in any shape has relied on the precedent of the 29th November 1862, No. 780 (1), which, however, only followed the ruling in an earlier case, No 271 of 1854, decided on the 28th January 1856 by Begbie, Harington, and M. Smith, JJ., to the effect that a commission on such an account can only be allowed when the possession of the party claiming the same was not wrongful (2). No subsequent ruling of this Court to the contrary has been brought to our notice. But it would appear from the decisions of the Calcutta High Court, dated the 24th January 1867, in case No. 876 of 1866 (3)—dated the 6th March, 1867, in case No. 875 of 1866 (4)—and the 8th April 1868, in case No. 621 of 1867 (5), that a different principle is adopted by that Court, and that it is held equitable and reasonable to allow the charges of collection to be defrayed out of the mesne profits of an estate, even when the expenditure has been made by a person wrongfully in possession, on the ground that the rightful owner, had he been in possession, would have had to bear them. We ask the Full Bench to consider and determine which of the two views is the sounder and more correct.

Mr. *Conlan* and Mir *Zahur Husain*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Pandit *Bishambhar Nath*, for the respondents.

JUDGMENTS.

[520] The following judgments were delivered by the Full Bench :—

STUART, C. J.—It appears to me that the Calcutta rulings referred to in the order of reference expound the law correctly.

(1) S. D. A. N. W. P. 1862, vol. ii, 246.
(2) S. D. A. N. W. P. 1856, p. 49.
(3) 7. W. R. 78.
(4) 7 W. R. 230.
(5) 9. W. R. 457.

1877 DEC. 3. — FULL BENCH. — 1 A. 518 (F.B.) = 2 Ind. Jur. 500.

The Subordinate Judge says that the defendant held possession of the villages without any reason or right, and he therefore concludes that he is not entitled to any collection-fee or village-expenses; but in this view he is clearly mistaken, not only on the authority of these Calcutta rulings, but on the principle that any claim such as is made against the defendant here must be founded on wrong towards the plaintiff (Addison on Torts, p. 11); and the plaintiff can show no such wrong by the fact that the defendant, although wrongfully in possession, had merely made payments which the plaintiff himself, or any other owner, would have had to meet. A recent decision of the Calcutta Court (Kemp and Pontifex, JJ.) (1) appears to recoginse the same principle, where it was held that no suit be for damages as between joint owners on undivided estates will lie in consequence of the sale of the whole estate through the default of one or more of such owners in paying their shares of the Government revenue, the meaning of which ruling appearing to be that no wrong can be pleaded in such a case as the present by the defendant, whether a *bonâ fide* trespasser or not, paying the Government revenue, for that must be paid *as from the land*, and no matter by whom, whether legally or merely ostensibly in possession.

The English case of *Wood* v. *Morewood* (2) was an action for an injury to the plaintiff's reversion in certain cases by making holes and excavations and getting coals, with a count in trover for coals, and Baron Parke told the jury that "if they thought that the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals, as if the coalfield had been purchased from the plaintiff." In another English case, *Doe v. Hare* (3), referred to in Mayne on Damages, Ed., 1856, p. 255, it was laid down that "if the defendant has made any payment while in possession for which plaintiff would be liable, [521] as ground-rent, he is entitled to have it taken in reduction of damages." But the principle thus recognized appears to me to go further, and I think, justifies me in holding that, whether the defendant is a trespasser *bonâ fide* or not, he is entitled as against the rightful owner to be credited with all such payments in respect of the land as these collection-fees and other village expenses.

PEARSON, TURNER, and SPANKIE, JJ., *concurring.*—When in the exercise of a *bona fide* claim of right a trespasser enters on and holds the property of another, the owner is sufficiently compensated by receiving an amount equivalent to the net profits he would have himself received had he been in possession. In such a case then such costs of collection as are ordinarily incurred by the owner might fairly be allowed to the trespasser as well as such sums as must of necessity be paid, as for instance, Government revenue. But when the trespass is altogether tortuous and malicious, in other words, when the trespasser has entered or continued on the property without any *bona fide* belief that he is entitled to do so, where in defiance of the rights of another he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground-rent, it is not imperative on the Court, in estimating the damages, to allow the wrong-doer even such charges as would ordinarily, but voluntarily, be incurred by an owner in possession, but the Court may refuse to sanction the deduction of such charges—*Wood* v. *Morewood* (2).

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(1) 1 C. 406. (2) 3 Q.B. 440. (3) 2 C. & M. 145.

1877
DEC. 3.

APPELLATE CIVIL.

1 A. 521.

1 A. 521.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ABADI BEGAM *(Defendant)* v. INAM BEGAM *(Plaintiff)*.*
[3rd December, 1877.]

Muhammadan Law—Pre-emption.

Under Muhammadan law the legal forms to be observed under that law by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person.

[522] The right of pre-emption may be claimed after a sale, notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has been made simply in consequence of a dispute as to the actual price of the property,

[F., 28 A.691 (692) = 3 A.L.J. 798 = A.W.N. (1906) 177; 35 C. 575 (612).]

THIS was a suit for pre-emption in respect of a dwelling-house founded on the Muhammadan law of pre-emption by vicinage. The "*talab-i-mawasabat*," or immediate claim to the right of pre-emption, and the "*talab-i-ishhad*," or affirmation by witness, the forms to be observed, under the Muhammadan law, in asserting the right of pre-emption, having been made by the plaintiff's husband on the plaintiff's behalf, the defendant, vendee, alleged that the requirements of that law had not been properly fulfilled; she further alleged that she had purchased the property after the plaintiff had refused to purchase it. The Court of first instance held that the "*talab-i-mawasabat*" and the "*talab-i-ishhad*" might, under Muhammadan law, be made by the agent of the person claiming the right of pre-emption, and that, as the right of pre-emption accrued after and not before a sale, the plaintiff's refusal to purchase before the sale to the defendant did not affect her right of pre-emption and gave the plaintiff a decree which on appeal by the defendant was affirmed.

On special appeal by the defendant to the High Court it was again contended by her that the plaintiff had not fulfilled the requirements of the Muhammadan law, and that her refusal to purchase the property destroyed her right of pre-emption.

Pandit *Ajudhia Nath* and Babu *Oprokash Chandar*, for the appellant.

Munshi *Hanuman Prasad* and Pandit *Nand Lal*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows:

SPANKIE, J.—The second plea, too, cannot be maintained. The first Court found on the evidence of five witnesses that, immediately on hearing of the sale, the plaintiff fulfilled the conditions of the Muhammadan law by immediately asserting her claim and by affirmation before witnesses. The Judge affirmed this finding. The claim was made by the plaintiff's husband, but nothing was shown [523] to us to support the plea that a claim so made was invalid. On the contrary, it appears to us that an agent or manager, as in this case, the husband for his wife, may legally assert a pre-emptive claim. The point was not seriously disputed before us.

* Special Appeal, No. 785 of 1877, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 19th April 1877, affirming a decree of Maulvi Wajid Ali, Munsiff of Karimganj, dated the 6th March 1877.

It was orally argued that the Judge had erroneously held that a refusal before a sale, which was all that could be proved in this case, does not vitiate a right of pre-emption advanced by the purchaser after the sale, provided there is no delay.

The plea was not taken in the memorandum of appeal and it is doubtful how far any refusal to purchase has been established. We may however, observe that, if anything is proved, it does not go beyond a refusal of the plaintiff to purchase at the rate demanded by the vendor, on the ground that the actual sale-price was less than that demanded from the pre-emptor. The plaintiff offered to deposit any sum that the Court found to have been the actual purchase-money, and has all along asserted that the sale price was Rs. 130 and not Rs. 200. As we read the Muhammadan law on this point, we find that the right of pre-emption is void if the pre-emptor relinquishes the purchase in plain terms, and any indication of acquiescence in the sale to another would also vitiate a claim after the sale on the part of the pre-emptive claimant. But a claim relinquished upon misinformation of the amount of sale-consideration, or the property sold, may be resumed when the real facts become apparent. Whether this be so or not, we should, where there had been no absolute surrender or relinquishment of a claim, but where the refusal was simply in consequence of a dispute as to the actual sale-consideration, hesitate to hold that, after the completion of the purchase by a stranger the right of pre-emption could not be resumed. It would be our duty to follow the dictates of equity. It would neither be just nor equitable to lay down so hard a rule, as that a refusal to purchase before the actual completion of a sale to another would in all cases bar a subsequent claim, when the right of pre-emption accrues after the completion of the purchase.

Appeal dismissed.

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1 A. 524.

[524] APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

SAHIB ZADAH AND OTHERS (*Defendants*) v. PARMESHAR DAS AND ANOTHER (*Plaintiffs*).* [6th December, 1877.]

Usufructuary Mortgage—Redemption of Mortgage—Conditional Decree.

In a suit to recover possession of certain lands founded on the allegation that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees, and that the mortgage-debt had been satisfied from the usufruct of the lands, the lower Court, although it found that the mortgage-debt had not been satisfied as alleged, gave the plaintiffs a decree for possession conditional on the payment of the balance of the mortgage-debt. *Held* that, inasmuch as the defendants never rendered any accounts, and inasmuch as no agreement had been made between the parties as to the amount at which the profits of the lands should be estimated, it was impossible for the plaintiffs to have ascertained before suit what sum, if any, was due by them and, seeing that whether such decree was altered or not, the plaintiffs might immediately pay the balance of the mortgage-debt and demand possession, it was unnecessary to interfere with such decree.

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* Special Appeal, No. 900 of 1877, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 25th April, 1877, modifying a decree of Munshi Kishori Lal, Munsif of Rasrah, dated the 22nd December, 1876.

1877 DEC. 6. — APPELLATE CIVIL. — 1 A. 524.

THIS was a suit for possession of certain lands founded on the allegation that the defendants were in possession of the same as usufructuary mortgagees under a mortgage from the plaintiffs, and that, as the mortgage-debt had been satisfied from the usufruct of the lands, the plaintiffs were entitled to possession and also to mesne profits for two years. The defendants denied that they were in possession of the lands as usufructuary mortgagees, and that the annual profits of the lands were as large as the plaintiffs asserted them to be. The Court of first instance, fixing an issue as to the amount of the annual profits of the lands, decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and that the mortgage-debt had not been satisfied from the usufruct, and gave the plaintiffs a conditional decree in respect of those lands. On appeal by the defendants the lower appellate Court also decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and gave the plaintiffs a conditional decree in respect of those lands.

On special appeal by the defendants to the High Court it was contended by them that, inasmuch as the plaintiffs had sued on the [525] allegation that the mortgage debt had been satisfied, and it had been found that this was not the case, the plaintiffs were not entitled to a conditional decree.

Munshi *Sukh Ram*, for the appellants.

Lala *Lalta Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court, so far as it is material for the purposes of this report, was as follows:

TURNER, J.—We are not satisfied that a conditional decree was improper in this case. It does not appear that the appellants ever rendered any accounts, indeed, they denied they were in possession as mortgagees, and inasmuch as no agreement had been made as to the amount at which the profits should be estimated, it was impossible for the respondents to have ascertained before suit what sum, if any, was due by them. The more proper course would have doubtless been for the respondents to have offered to pay what might be found due. Seeing that whether the decree is altered or not the respondents may immediately pay the balance and demand possession, and the appellants could not legally refuse it, we think it unnecessary to interfere with the decree in this case.

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1 A. 525.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

HUSAIN BAKHSH (*Decree-holder*) *v.* A. D. MADGE (*Judgment-debtor*).*
[7th December, 1877.]

Execution of Decree—Application to enforce or keep in force the decree—Limitation—Act VIII of 1859 *(Civil Procedure Code)*, ss. 212, 285—*Act IX of* 1871 *(Limitation Act)*, *sch. ii*, *art.* 167.

Held that an application under s. 285 of Act VIII of 1859, being a necessary and decided step towards the execution of the decree was an application to

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* Miscellaneous Regular Appeal, No. 64 of 1877, from an order of H. Lushington, Esq., Judge of Allahabad, dated the 20th June 1877.

enforce or keep in force the decree within the meaning of art. 167, sch. ii of Act IX of 1871. **1877 DEC. 7.**

[F., 1 A. 580 (581) (F.B.); 2 A. 284.]

APPELLATE CIVIL.

1 A. 525.

THIS was an application for the execution of a decree. The decree was passed by the Civil Judge of Lucknow on the 20th February, 1874. On the 28th May, 1875, the decree-holder made an application to the Civil Judge of Lucknow, under s. 285 of Act [526] VIII of 1859, that a copy of the decree should be transmitted to the District Court at Allahabad, together with a certificate that satisfaction of the decree had not been obtained. This application was granted, and on the 5th April, 1877 the present application for execution of the decree was made, under s. 212 of Act VIII of 1859, to the District Court at Allahabad. That Court held, on objection taken by the judgment-debtor, that the application was barred by limitation, inasmuch as no previous application under s. 212 of Act VIII of 1859 had been made. On appeal to the High Court by the decree-holder it was contended that the application dated the 23th May, 1875 kept the decree in force.

Mr. *Niblett*, for the appellant.

Mr. *Chatterji*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The Judge apparently holds the present application, dated 5th April last, for the execution of the decree of the 20th February 1874 to be barred because no previous application of the nature described in s. 212, Act VIII of 1859, had been made. But such an application could not well be made to the Court which passed the decree, if the decree could not be executed within its jurisdiction. The only application which could usefully be made to the Lucknow Court was that which was made to it on the 28th May 1875. The remark that no application under s. 212 was made at the same time is of no weight or importance. The question is whether the application of the 28th May 1875 was not one to enforce or keep in force the decree within the scope and meaning of of art. 167, sch. ii, Act IX of 1871. It is difficult to conceive any other object which the applicant can have had in view in making the application than the enforcement or keeping in force the decree. The idea of *mala fides* is preposterous. The application was a necessary and decided step towards the execution of the decree (1) in the Allahabad district. Under these circumstances we cannot but regard it as an application within the terms of art. 167 aforesaid; and the present application being within three years from the date of that application is within time. The view we take [527] of the nature of the application of 28th May 1875, is supported by a decision of a Bench of this Court, dated 22nd ult., in miscellaneous special appeal No. 64 of 1877, *Banki Behari*, appellant v. *Musammat Rahsi*, respondent.

We reverse the lower appellate Court's order of 20th June last, and, decreeing the appeal with costs, direct that the application be allowed and proceeded with.

Appeal allowed.

(1) See Indian Limitation Act, 1877, sch. ii, art. 179.

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APPELLATE CRIMINAL.

1 A. 527.

1 A. 527.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson and Mr. Justice Turner.

EMPRESS OF INDIA *v.* SALIK.* [7th December, 1877.]

Act XLV of 1860 (*Indian Penal Code*), *s.* 211—*False Charge.*

To constitute the offence of making a false charge under s. 211 of the Indian Penal Code, it is enough that the false charge is made and that the charge is not pending at the time of the offender's trial. *The Queen* v. *Subbanna Gaundan* followed (1).

[R., 22 B. 596 (599); 6 C. 496=7 C.L.R. 467.]

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal passed by Mr. J. W. Power, Sessions Judge of Ghazipur, dated the 8th September 1877, reversing a judgment of conviction passed by Mr. A. E. C. Casey, Assistant Magistrate of the first class, dated the 1st August 1877.

As this case merely follows *Reg.* v. *Subbanna Gaundan* (1) already followed in *Empress of India* v. *Abul Hasan* (2), it is not reported in detail.

1 A. 527.

CRIMINAL JURISDICTION.

Before Mr. Justice Spankie.

MUTHRA *v.* JAWAHIR AND OTHERS. [15th December, 1877.]

Public Ferry—Act XLV of 1860 (*Indian Penal Code*), *ss,* 188, 441—*Criminal Trespass—Regulation VI of* 1819, *s.* 6—*Disobedience to order duly promulgated by Public Servant—Act VIII of* 1851.

A person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit "criminal trespass" within the meaning of that term in s. 441 of the Indian Penal Code (3).

[528] If, when directed by the order of a public servant, duly promulgated to him, to abstain from plying a boat for hire at or in the immediate vicinity of a public ferry, a person disobeys such direction, he renders himself liable to punishment under the Indian Penal Code.

THIS was a reference to the High Court, under s. 296 of Act X of 1872, by Mr. J. H. Prinsep, Sessions Judge of Cawnpore, which arose out of the following circumstances:—

The lessee of a public ferry situated on the Jumna at Barah pargana Kalianpur, zilla Fatehpur, complained to Mr. G. S. D. Dale, Officiating Magistrate of the District, that one Jawahir and certain other persons, *mallahs*, residence of a village situated some three miles to the north-west of his ferry, where there was no authorized public ferry, were in the habit of plying boats for hire illegally, thereby diminishing the profits of his ferry. The Magistrate of the District directed his subordinate, Mr. J. H. Carter, to take up and dispose of the case. Mr. J. H. Carter being of opinion that there was no law obtaining in these provinces by which

(1) 1 M.H.C.R. 30. (2) 1 A. 497.

(3) As to "criminal trespass" on a right of fishery in a public river, see *The Empress* v. *Charu Nayiak*, 2 C. 354.

the illegal plying of boats for hire could be punished, the Magistrate of the District referred him to Act VIII of 1851, Act XV of 1864, Circular No. 22 of 1874, dated the 19th September 1874 published by the Public Works Department of the Local Government, and s. 447 of the Indian Penal Code. Mr. J. H. Carter thereupon charged the accused persons with an offence under s. 447 of the Indian Penal Code, and having tried them summarily acquitted them, on the ground apparently that they were not legally punishable under that section. The Magistrate of the District, with a view to obtaining the orders of the High Court, submitted the case to the Court of Sessions, who referred it, as stated above, to the High Court, observing that the case should, in its opinion, be governed by s. 6 of Regulation VI of 1819, and the accused were liable to punishment for disobeying any orders which might have been previously issued to them as well as for criminal trespass on the rights of the lessee, which matters, however, should form the subject of fuller inquiry, and that the Acts and Circulars referred to by the Magistrate of the District, as they related to the levy of tolls on roads and bridges, floating or stationary, did not appear to it to apply.

The parties to the case were unrepresented.

[529] SPANKIE, J.—I am not prepared to say that the Joint Magistrate has improperly acquitted the accused, who was charged with criminal trespass. This offence is defined in s. 441 of the Indian Penal Code as follows: " Whoever enters into or upon property in the possession of another, with intent to commit an offence (offence denotes a thing made punishable by the Penal Code), or to intimidate, insult, or annoy any person in possession of such property or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass." From the statement of the Officiating Magistrate of the District, it would appear that the criminal trespass charged consisted in accused plying a boat for hire on the Jumna, three miles to the north-west of the public ferry at Barah, which had been leased to the complainant. Mr. Carter, the Joint Magistrate, considers that no offence as defined in s. 441 of the Penal Code was committed, and looking at the terms of the section, and the admitted fact that the accused had plied the boat at a distance of *three* miles from complainant's ferry, I concur with Mr. Carter's view of the case.

Section 6, Regulation VI of 1819, prohibits all persons from employing a ferry-boat plying for hire at or in the *immediate vicinity* of public ferries without the previous sanction of the Magistrate. If, in the case of a prohibition distinctly made known to a person, he continued to ply a boat for hire at or in the immediate vicinity of a public ferry, the Magistrate doubtless is empowered by the Penal Code to punish him for his disobedience of such order.

Act VIII of 1851 enables the Government to levy tolls on public roads and bridges, and s. 6 relates to a distinct offence, defined in the section, committed against the person appointed to collect the toll at a public ferry or bridge, and also to the offence of unlawfully and extortionately demanding a higher rate of toll than that fixed by the schedule to the Act. It would hardly apply to the particular case before the Court... ....The Court, as at present advised, sees no ground for interference under s. 297 of the Criminal Procedure Code.

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CRIMINAL JURISDICTION.

1 A. 530= 2 Ind. Jur. 466.

1 A. 530=2 Ind. Jur. 466.

[530] CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* KAMPTA PRASAD. [15th December, 1877.]

Public Servant—Illegal gratification—Acceptance of present—Act XLV of 1860 (*Indian Penal Code*), ss. 161, 165.

K, a police-officer, employed in a Criminal Court to read the diaries of cases investigated by the police and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided by the Court in which the persons accused were convicted, and a sum of money. the proceeds of the theft, had been made over by the order of the Court to the prosecutor in the case, asked for and received from the prosecutor a portion of such money, not as a motive or reward for any of the objects described in s. 161 of the Indian Penal Code, but as "*dusturi.*" *Held* that *K* was not, under these circumstances, punishable under s. 161 of the Indian Penal Code, but under s. 165 of that Code.

KAMPTA PRASAD, police-officer, was employed in the Court of a Magistrate to read the diaries of cases investigated by the police and to bring up in order each case for trial with the accused and witnesses. On a certain day he brought up, in the usual manner, a case in which one Chattra charged two persons with the offence of theft. These persons were convicted and sentenced, and a sum of money, some Rs. 3, the proceeds of the theft, was, by the order of the Magistrate, made over to Chattra, the prosecutor in the case, who then left the court-house. Immediately after his departure Kampta Prasad also left the court-house without orders, there being no reason why he should have left it, and it subsequently transpired that he had asked Chattra for and had received from him a portion of the money made over to Chattra by the Magistrate. On these facts the Magistrate of the District convicted Kampta Prasad of an offence under s. 161 of the Indian Penal Code. On appeal by Kampta Prasad the conviction was set aside by the Sessions Judge, who observed as follows: "I think there is no reasonable doubt that the appellant took a small gratification of one rupee from a plaintiff in a criminal case. There is, however, no evidence whatever produced which proves or makes it even very probable that this gratification was given with any of the objects mentioned in s. 161 of the Indian Penal Code, under which section the appellant has been punished. The payment was made probably exactly as described by the giver, as '*dusturi,*' that is, a customary payment made **[531]** to a person clothed with a little brief authority irrespective of any return or consideration for the payment. Such an offence is probably punishable under s. 29 of Act V of 1861, and in this view of the case I alter the finding of the lower Court and modify its sentence, and order Kampta Prasad to be imprisoned under s. 29 of Act V of 1861 for one month from the 10th September last.

The case was reported for the orders of the High Court.

SPANKIE, J.—The Sessions Judge appears to me to be right in his view of this case in so far as it is affected by s. 161 of the Indian Penal Code. Under the terms of s. 161 of the Penal Code, the gratification must be taken by a public servant as a motive or reward for doing or forbearing to do any official act, or for showing, or forbearing to show in the exercise of his official functions, favour or disfavour to any person, &c., &c. But it is not pretended here that the one rupee paid to the accused was given to

him as a motive or reward for any official act, or for showing or forbearing to show favour or disfavour in the exercise of his official acts. There was no agreement between the parties and indeed no previous connection. The accused was the person attached to the Deputy Magistrate's Court to bring up police-cases for trial. He is the police clerk in the Magistrate's office, and he was not the police-officer who sent in the case nor connected with the police-inquiry. The party who gave the rupee himself stated that it was asked for and taken as "*dusturi*" after the case had terminated and the accused persons had been convicted. The giver of the rupee had been the original prosecutor. It seems to me that the section requires that the gratification should be taken with the view of doing or forbearing to do an official act, or for showing or forbearing to show favour or disfavour in the exercise of official functions. It is not taken after the act has been done, and without some previous understanding. I do not find evidence in this case that the money was promised and given as a reward for the accused's performance of his duty in Court.

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It appears to me that s. 165 more nearly applies, and that as the accused was the subordinate of the Deputy Magistrate who had tried and closed the case, and asked for a reward, the one rupee after the case was over, he is guilty of accepting "a valuable thing," and without reference to any particular motive or reward for doing or [532] forbearing to do an official act. However, I am desirous that the record should go before a Bench, or that it should be heard before myself and another Judge, as the Hon'ble Chief Justice may direct. I therefore send the case to the Registrar in order that it may be laid before the Hon'ble Chief Justice.

ORDER.

STUART, C. J.—In accordance with Mr. Justice Spankie's suggestion I directed this case to be brought before the first Bench of the Court, consisting of Mr. Justice Spankie and myself, and the case has been attentively considered by me.

I believe that Mr. Justice Spankie remains of the opinion expressed in the note issued by him previously to the case being brought before us, and I quite agree with him that s. 161 of the Penal Code has no application to the facts, and I must express may surprise that the Officiating Magistrate should have so misconceived the law. The motive or reward explained in s. 161 has obviously no application whatever to such a case as this. But, on the other hand, I scarcely think that the one rupee which was given by, or possibly extorted from, Chattra, can be regarded as in the nature of "*dusturi.*" It appears to me to be too considerable for that, for it was nearly one-third of the whole sum recovered by Chattra. "*Dusturi*" is a customary payment very much less. It varies I believe throughout India from two to four pice on the rupee, and therefore "*dusturi*" in the present case should not have exceeded two annas, if it was proper for Kampta, the policeman, to accept anything of the kind, which I do not think it was. Probably the offence might come under s. 29 of the Police Act, Act V of 1861, for in taking the rupee Kampta appears to have clearly violated the Police instruction—see these on "gratifications."

But I also agree with Mr. Justice Spankie that such a case as this is covered by the terms of s. 165 of the Penal Code. The only question is whether the rupee here was a "valuable thing" within the meaning of that section. The value must, I think, be looked at with reference to the

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proportion it bears to the money or property of which it forms part, and here the rupee was rather less than a third of the whole sum obtained by Chattra from the Criminal Court. I therefore consider that in lieu of the conviction before the Judge, and of the sentence passed by him, Kampta may be [533] convicted under s. 165 of the Penal Code, and that he should suffer four months' simple imprisonment. I would also order him to pay a fine of one rupee, and in default to suffer one month's additional imprisonment, such additional imprisonment to cease when the fine is paid or is recovered by process of law.

SPANKIE, J.—I concur with the Hon'ble Chief Justice on the propriety of the conviction under s. 165, and in the sentence proposed. The conviction of accused and sentence passed by the Sessions Judge under s. 29 of Act V of 1861 is annulled, and the prisoner is convicted under s. 165 of the Indian Penal Code, and a warrant must issue accordingly.

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1 A. 533.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

HASAN ALI AND ANOTHER (*Plaintiffs*) *v.* MEHDI HUSAIN AND OTHERS (*Defendants*).* [18th December, 1877.]

Muhammadan Law—Inheritance—Minor—Justice, Equity, and Good Conscience—Act VI of 1871 (*Bengal Civil Courts Act*), s. 24.

H, being in possession of certain real property on her own account, and on account of her nephew and niece, minors, of whose persons and property she had assumed charge in the capacity of guardian, sold the property in good faith, and for valuable consideration in order to liquidate ancestral debts, and for other necessary purposes and wants of herself and the minors. *Held*, that, under Muhammadan law and according to justice, equity, and good conscience, the sales were binding on the minors.

[F., 26 A. 22=A.W.N. (1903) 183; R., 20 B. 199 (201); 34 C. 36=4 C.L.J. 485=11 C.W.N. 71 (75); 34 C. 65=4 C.L.J. 578=11 C.W.N. 160 (161); 26 M. 734 (739); 37 M. 514=15 Ind. Cas. 576=23 M.L.J. 244 (248)=12 M.L.T. 147=(1912) M.W.N. 889 (892); 19 Ind. Cas. 911 (914)=6 S.L.R. 268; 9 O. C. 97 (100); 43 P.L.R. 1907 (F.B.)=23 P.W.R. 1907.]

THIS was a suit for possession of certain shares in a dwelling-house and in certain villages, by cancelment of sales of the property. The plaintiffs were respectively the son and daughter of one Najib Husain, who died in 1857. At the time of his death the plaintiffs were minors, and their mother being also dead, Husaini Bibi, their father's only sister, assumed charge of their persons and their property in the capacity of guardian. Najib Husain and Husaini Bibi had inherited from their father a dwelling-house and certain shares in six villages, which property was heavily mortgaged. On the 3rd January 1862, the plaintiffs being minors at the time, [534] Husaini Bibi sold the dwelling-house to her paternal uncle, defendant in this suit, and the shares in the six villages to her cousins, also defendants in this suit. These sales were made by her in good faith, and for valuable consideration, in order to liquidate ancestral debts, and for the benefit of the plaintiffs. The plaintiffs sought in the present

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* Special Appeal, No, 860 of 1877 from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 1st May 1877, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 4th June 1875.

suit to set aside these sales. The Court of first instance dismissed the suit, holding that under Muhammadan law and according to justice, equity, and good conscience, the sales were binding on the plaintiffs. On appeal by the plaintiffs the lower appellate Court concurred in the ruling of the Court of first instance.

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On special appeal by the plaintiffs to the High Court it was contended by them that, inasmuch as Husaini Bibi was not their legal guardian, he had no power to make contracts on their behalf, and the sales were invalid.

Pandit *Bishambhar Nath*, for the appellants.

Mr. *Colvin* and *Shah Asad Ali*, for the respondents.

JUDGMENT.

The judgment of the Court, so far as it is material for the purpose of this report, was as follows :

We may, however, observe that we should be disposed to accept the Judge's finding on the merits. Even if the plea that Musammat Husaini was not the legal guardian of the appellants when she made the sales was good, we think that the plea is not one to be taken in special appeal for the first time; no such objection was made below; and further it does not appear that the plaintiffs came into Court offering their shares of the ancestral debts on account of which the sales were effected (1). On the contrary, they denied any necessity for sale, and seek to repudiate the transactions. But we are not satisfied that we are not within Muhammadan law in this case (2). We must look to the position of the parties, the circumstances of the case, and the facts found by the Judge. Musammat Husaini was one of the heirs of the property, and was manager on behalf of the children—her nephew and niece. Their father and mother had died, and there was no one to take care of the orphans. The father had been in straitened circumstances before his death. The debts [535] of deceased had to be satisfied. Their discharge is a matter of necessity, and as observed in the Full Bench decision quoted above (2), the right of the heirs is connected with the estate on the sole condition of its being free from incumbrance. Musammat Husaini was in possession of the property, whatever it was, on her own account, and on behalf of the minors, and, in that character, it would seem that she could act for them. In about five years after his death she was compelled to sell the property covered by the deeds of sale, the landed portion of which was already mortgaged for more than Rs. 3,000 to satisfy the debts and for other necessary family purposes and wants. She thus was enabled to bring up the children and maintain and marry them. Whatever she did was done openly, and the Judge has found that the consideration was duly paid, that the sales were effected to pay the ancestral debts and that they were paid to meet pressing necessity for the benefit of the minors. Under these circumstances, we agree with the lower appellate Court that the Muhammadan law and principles of equity and justice are binding on the plaintiffs who have not in their petition of plaint assigned any reason or grounds for repudiating the act of Musammat Husaini.

With these observations, which go to all the pleas in appeal, we dismiss the appeal and affirm the judgment of the lower appellate Court with costs.

Appeal dismissed.

(1) *Pana Ali* v. *Sadik Hossein*, H.C.R. N.W. P., 1875, p. 201; *Sahee Ram* v. *Abdul Rahman*, H.C.R., N.W.P., 1874, p. 268.
(2) *Hamir Singh* v. *Zakia*, 1 A. 57.

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APPELLATE CIVIL.

1 A. 535 = 2 Ind. Jur. 468.

1 A. 535=2 Ind. Jur. 468.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

WALI-UL-LA (*Plaintiff*) v. GHULAM ALI (*Defendant*).*
[19th December, 1877].

Reference to Arbitration—Form of Oath—Power of Arbitrator to administer Oath other than in prescribed form—Validity of awards based upon evidence taken on Oath illegally administered—Act X of 1873 *(Indian Oaths Act), ss.* 8, 10, 13 *—Act XLV of* 1860 *(Indian Penal Code), s.* 20*—Act 1 of* 1872 *(Indian Evidence Act), s.* 3*—Special appeal—Objection.*

The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of these matters by [536] the arbitrators the plaintiff offered to be bound by the oath of the defendant administered on the Koran. The defendant agreed to take such oath and such oath was accordingly administered to him by the arbitrators, and his evidence taken, and an award made based on the evidence so taken. On special appeal to the High Court by the plaintiff, he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void.

Held per PEARSON, J., SPANKIE, J., *dissenting*, with reference to the legal competency of the arbitrators to administer the oath, that the objection was good, and that the arbitrators had no power to administer the oath.

Per PEARSON, J., SPANKIE, J., doubting, that as the objection was one which vitally affected the procedure of the arbitrators it could not be ignored, although it was not preferred in the lower Courts, and was not to be found in the memorandum of special appeal.

Per PEARSON, J., that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award and the award was void and should be set aside.

Per SPANKIE, J., that the plaintiff having offered to be bound by the oath and the defendant having agreed to take it, the plaintiff was bound by, the evidence given on such oath, and that as the arbitrators had by law and consent of parties, authority to receive the evidence of the defendant, the substitution by them of an oath on the Koran for an affirmation did not under the provisions of s. 13 of Act X of 1873, invalidate such evidence and consequently render the award based on such evidence void.

THIS was a suit for the recovery of money in which, by the desire of the parties to the suit, the matters in difference between them were referred to arbitration by the Munsif. During the investigation of these matters by the arbitrators the plaintiff offered to be bound by the defendant's oath administered on the Koran. The defendant agreed to take such oath, and the arbitrators administered it to him, and made an award in accordance with his evidence taken by them on such oath. The plaintiff applied to the Munsif to set aside the award for reasons which it is unnecessary for the purposes of this report to state. The Munsif refused this application, and gave judgment according to the award. On appeal by the plaintiff to the Subordinate Judge, when he again contended that the award should be set aside for the reasons stated by him in the Court of first instance, the Munsiff's decree was affirmed. The plaintiff then appealed to the High Court, where he contended, among other things,

* Special Appeal, No. 878 of 1877, from a decree of Maulvi Abdul Majid Khan, Subordidinate Judge of Shajahanpur, dated the 16th May 1877, affirming a decree of Babu Brijpal Das, Munsif of Shajahanpur, dated the 26th March 1877.

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for the first time, the contention not being raised in his [537] memorandum of special appeal, that the arbitrators were not legally competent to administer the oath to the defendant, and that the defendant's evidence taken on such oath could not form a valid basis of an award, and the award was consequently void and should be set aside.

Mr. *Colvin* and Pandit *Nand Lal*, for the appellant.

Munshi *Kashi Prasad* and Shah *Asad Ali*, for the respondent.

JUDGMENT.

PEARSON, J.—(After disposing of the pleas set forth in the memorandum of appeal continued):—A far more serious objection to the procedure of the arbitrators has been here orally urged by the learned counsel for the appellants, *viz.*, that the arbitrators were not legally competent to administer the oath to the respondent under s. 10 of Act X of 1873, which only empowers a Court to administer such an oath as is mentioned in s. 8 thereof. The arbitrators were persons authorized by law to take evidence and for that purpose to put witnesses upon oath or affirmation according to the provisions of the law for the examination of witnesses, but they do not constitute a Court, and are not empowered to administer an oath of the nature mentioned in s. 8 of the Oaths Act. Their proceeding in administering such an oath to the respondent in this case was therefore invalid as being without warrant of law, and consequently his statement, made on an oath so illegally administered, cannot form a valid basis of an award. I am constrained to admit the strength of this objection, which being one vitally affecting the arbitrators' procedure cannot, I think, be ignored by us, although it was not preferred in the lower Courts and is not to be found in the memorandum of special appeal. I would decree the appeal, set aside the decree of the lower Courts and the award in conformity with which it has been passed, and remand the case to the Court of first instance for fresh disposal, under s. 351 of Act VIII of 1859, with an instruction that the costs of the litigation up to this time should follow the event.

SPANKIE, J.—The objection which my honourable colleague would admit was never urged in the first Court, nor in appeal. It is not even one of the pleas in the memorandum of special appeal in this Court. It was raised for the first time at the hearing of the appeal. I am doubtful whether we should entertain the objection. The lower appellate Court disposed of all the pleas taken by the appellant, and its [538] judgment and that of the first Court was in accordance with the award. Assuming that the learned counsel was at liberty to take the plea, I would reject it because there is no question that the appellant offered to abide by the defendant's oath on the Koran, that his offer was contained in a written petition to the arbitrators and accepted by the defendant. He was bound by his agreement, made with the free consent of both parties competent to make it, and for a lawful object, *viz.*, the ascertainment of the truth by means which the petitioner, plaintiff, considered most likely to be successful, and which the defendant accepted. The plaintiff, in my opinion, should be held bound by the evidence of the defendant, given under an obligation imposed upon him, and fulfilled in the manner required by the plaintiff himself. But going beyond this, I would say that I do not find that there is any section in Act X of 1873 which would make it unlawful for the arbitrators to administer an oath on the Koran to a party willing to be sworn upon it. It is conceded that arbitrators are authorized to administer an oath; they are also persons, if the Oaths Act applies to them,

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who by that Act are "persons having by consent of parties authority to receive evidence." They, however, are not a Court within the meaning of s. 8 of the Act. A Court of Justice includes a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when the Judge or body of Judges is acting judicially—s. 20 of the Indian Penal Code. Moreover, the Indian Evidence Act thus defines the meaning of the Court which receives the evidence in the judicial proceeding referred to in s. 8 of the Oaths Act. "Court" includes all Judges, Magistrates and all persons, *except arbitrators*, legally authorized to take evidence—s. 3. I am therefore disposed to conclude that s. 8 refers to parties and witnesses in every judicial proceeding actually before the Court for the purpose of giving evidence, or who may offer through their representatives actually before the Court to give evidence in any form held binding by them. But I am not prepared to extend the section to arbitrators, who do not appear to be fettered by the Act or bound to communicate the offer of a party or witness to be sworn in any particular form to the referring Court for sanction. It seems to me that if arbitrators are not lawfully empowered by the Oaths Act to do what a Court is empowered to do by s. 8, their act in administering [539] an oath or affirmation to any witness in any form "common amongst or held binding by persons of the same race or persuasion to what he belongs and not repugnant to justice or decency, or not purporting to affect a third person" is covered by s. 13, in which there is not only no exclusive mention of the term Court but in fact the word is not to be found there at all. The section which is in a different chapter from s. 8 runs thus: "No omission to take any oath, or make any affirmation, *no substitution* of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall effect the obligation of the witness to state the truth." If the arbitrators in this case were authorised to affirm witnesses in the manner now in force in our Courts, and they substituted an oath on the Koran by request of one of the parties assented to by the other party, the substitution, under s. 13 of the Act, does not invalidate the evidence, and therefore does not render void the award founded on that evidence. I therefore would affirm the judgment of the lower appellate Court, and dismiss the appeal with costs.

Appeal dismissed.

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1 A. 539 = 2 Ind. Jur. 609.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

MADHO DAS (*Plaintiff*) v. KAMTA DAS (*Defendant*).* [2nd January, 1878.]

Saniasi—Inheritance—Guru—Chela.

Among Saniasis generally no *chela* has a right as such to succeed to the property of his deceased *guru*. His right of succession depends upon his nomination by the deceased in his life time as his successor, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together to perform the

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* Special Appeal, No. 936 of 1877, from a decree of Maulvi Sultan Husan, Subordinate Judge of Gorakpur, dated the 30th June, 1877, affirming a decree of Maulvi Muhammad Kamil, Munsif of Basti, dated the 31st March, 1877.

funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among his *chelas*, such successor is elected and installed by the *mahants* and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased. *Nirunjun Barthee* v. *Padaruth Barthee* (1) followed.

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1 A. 539 = 2 Ind. Jur. 609.

Where therefore a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela* without alleging that he had been nominated by the deceased as his successor [540] and confirmed, or that he had been elected as successor to the deceased, such suit was held to be unmaintainable.

[R., 8 C.L.J. 499; 11 C.W.N. 167-n.]

THIS was one of two suits against one Kamta Das for possession of a certain village. These suits were brought by Madho Das and Gopal Das respectively, and both were founded on the plaintiff's right of succession to the property of Paras Ram, deceased, as his *chela* or disciple. Kamta Das, defendant in these suits, alleged that the village had been presented to his *thakur dwara* at Ajudhia by the deceased. The Court of first instance held that the defendant's allegation was not proved, and that Gopal Das, being the sole disciple of Paras Ram, was entitled to the property in suit, and gave him a decree, and dismissed Madho Das' suit. On appeals by Madho Das and the defendant respectively, the lower appellate Court concurred with the Court of first instance in thinking that the defendant's allegation was not proved, but held that, as Madho Das was the senior disciple of Paras Ram, he had preferential title to the property in suit. It, however, dismissed Madho Das' appeal and allowed that of the defendant, as it held that both suits were unmaintainable, on the ground that neither of the plaintiffs had declared himself to have been chosen *mahant*, or elected such after the death of Paras Ram, nor had it been shown what was the custom of succession in regard to the shrine belonging to Paras Ram. Both the plaintiffs appealed to the High Court, each contending that having proved his right of succession it was not necessary to consider whether there had been a selection of a successor by Paras Ram or an installation by *mahants* after his death, and that if the decision of the Court of first instance was defective in this respect, the lower appellate Court should itself have ascertained what was customary.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

The Senior Government Pleader (Lala *Juala Prasad*) and Maulvi *Mehdi Hasan*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J., who, after stating the facts, continued:—With reference to former precedents of the late Sudder Dewanny Adawlut of these Provinces, we cannot say that the Subordinate Judge was in error in dismissing both claims for the reasons assigned by him, since it was not for him to make out a title which neither plaintiff alleged [541] for himself as his ground of action. But he was right in noticing the defect, because it had been pleaded by the defendant in appeal.

It has been laid down by the late Sudder Dewanny Adawlut (1) that amongst the general tribe of fakirs called Saniasis (and the plaintiffs here appear to be of the description) a right of inheritance strictly so speaking to the property of a deceased *guru* or spiritual preceptor does not exist; but the right of succession depends upon the nomination of one

(1) S.D.A., N.W.P., 1864, Vol. I, 512.

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amongst the disciples by the deceased *guru* in his own lifetime, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made the succession is elective, the *mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, installing him then and there on the occasion of performing the funeral ceremonies of the late *guru*.

Neither plaintiff avers that he was nominated by the deceased Paras Ram during his life and confirmed afterwards, nor does either assert that in consequence of Paras Ram's omission to nominate a successor, he had been elected after the latter's death by the neighbouring *mahants* and members of the sect; but both plaintiffs have based their claim on inheritance and discipleship, which would not be sufficient to establish a right of succession. We therefore dismiss the appeal and affirm the judgment of the lower appellate Court with costs.

Appeal dismissed.

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1 A. 541 = 2 Ind. Jur. 680.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

JEONI (*Plaintiff*) *v.* BHAGWAN SAHAI AND ANOTHER (*Defendants*).* [2nd January, 1878.]

Act VIII of 1859 (*Civil Procedure Code*), *s.* 246—*Effect of Order under s.* 246—*Suit to establish Right—Limitation.*

B caused a certain dwelling-house to be attached in execution of a decree held by him against *M* as the property of *M*. *J* preferred a claim to the property, which was disallowed by an order made under s. 246 of Act [542] VIII of 1859. Two days after the date of such order *M* satisfied *B*.'s decree. More than a year after the date of such order *J* sued *B* and *M* to establish her proprietary right to the dwelling-house alleging that *M* had fraudulenty mortgaged it to *B*. *Held*, following the Full Bench ruling in *Badri Prasad* v. *Muhammad Yusuf* (1), that *J* having failed to prove her right within the time allowed by law, was precluded from asserting it by the order made under s. 246 of Act VIII of 1859, and that whether or not the decree was satisfied after the order was made, the effect of the order was the same.

THIS was a suit to establish the plaintiff's proprietary right in a certain dwelling-house, instituted on the 22nd of February, 1876. The cause of action was stated in the plaint to be the fraudulent mortgage of the house to Bhagwan Sahai, defendant in the suit, by the plaintiff's husband, also a defendant in the suit, which mortgage the plaintiff alleged she became aware of in February, 1874. Bhagwan Sahai set up as a defence to the suit, among other matters, that he had caused the house to be attached in execution of a decree held by him against the plaintiff's husband as the property of her husband, that the plaintiff had been preferred a proprietary claim to the house, which was disallowed by the Court executing the decree

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* Special Appeal, No. 1042 of 1877, from a decree of W. C. Turner, Esq., Officiating Judge of Meerut, dated the 28th July, 1877, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 11th September, 1876.

(1) 1 A. 381.

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by an order made under the provisions of s. 246 of Act VIII of 1859 on the 14th November, 1874, and that, as the present suit to establish the plaintiff's right to the house was brought more than a year after the date of such order, it was barred by limitation. The Court of first instance dismissed the suit as barred by limitation. On appeal by the plaintiff the lower appellate Court also held that the suit was barred by limitation, overruling her contention that the order made under s. 246 of Act VIII of 1859 did not affect her suit, inasmuch as Bhagwan Das' decree had been satisfied two days after the order had been made, and that it was only in the case of a sale that such an order would affect a suit brought to establish a claim rejected by it.

On appeal by the plaintiff to the High Court it was again contended by her that, as the decree in execution of which the property in suit was formerly attached was satisfied within two days after the order of the 14th November, 1874, made under s. 246 of Act VIII of 1859, was passed, there was no necessity to bring a suit for the establishment of her right, and that order was no bar to the suit.

[543] Pandit *Ajudhia Nath* and Babu *Oprokash Chandar*, for the appellant.

Munshi *Hanuman Prasad* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondents.

JUDGMENT.

The judgment of the High Court, so far as it related to this contention, was as follows:—

SPANKIE, J.—The first plea would fail if we hold that the suit should have been brought within one year from the date of the order passed under s. 246 of Act VIII of 1859. For it is the order then made which, if contested at all, must be contested within one year, and after that date cannot be questioned. The Full Bench decision of this Court in *Badri Prasad* v. *Muhammad Yusuf* (1), has conclusively settled this point. Whether the decree was settled after the order was made has no bearing on the point at issue. Having examined the record of this case and the order made under s. 246, Act VIII of 1859, there cannot be a doubt that the plaintiff was, and now is, entirely bound by that order, and that she cannot now re-assert her title to the house, which was not allowed as against the judgment-debtor and decree made in 1874.

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1 A. 543.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

LACHMAN SINGH AND ANOTHER (*Defendants*) v. SANWAL SINGH (*Plaintiff*).* [2nd January, 1878.]

Act VIII of 1859 *(Civil Procedure Code)*, s. 7—*Relinquishment or omission to sue for any part of claim—Fraud—Cause of action.*

S, as one of the heirs of his brother, *M*, sued the sons of *M*, the other heirs of *M*, for, amongst other things, a declaration of his right to share in the rights and interests of *M*, as the mortgagee, under a deed of mortgage which he valued at

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* Special Appeal, No. 1043 of 1877, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 11th June, 1877, affirming a decree of Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 22nd July, 1876.

(1) 1 A. 381.

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the principal sum advanced under the mortgage, *viz.*, Rs. 5,600, stating his cause of action to be the obstruction caused by the sons of *M* to his sharing in *M's* estate. He obtained a decree declaring his title to the share claimed. *L*, one of the sons of *M*, had fraudulently concealed from and kept *S* in ignorance of the fact that previously to the suit he had [544] realised Rs. 8,624 under the mortgage. On this fact coming to *S's* knowledge he sued the sons of *M* to recover his share of that sum. *Held* that the second suit was not barred by s. 7 of Act VIII of 1859. *Bulwant Singh* v. *Chittan Singh* (1) followed and observed on.

THIS was a suit for Rs. 2,540-11-0, being the plaintiff's share of the moneys recovered by Lachman Singh, a defendant in the suit, on a deed of mortgage, dated the 14th February, 1871, together with interest thereon. The plaintiff in the suit was the brother of Manohar Singh, deceased, the mortgagee, and he and his brother and his brother's sons were members of a joint and undivided Hindu family. In 1874, after Manohar Singh's death, the plaintiff, as one of the heirs of Manohar Singh, sued his nephews to establish his right to a share in Manohar Singh's estate, including in that suit a claim to share in the rights and interests of Manohar Singh under the deed of mortgage, valuing such rights and interests at Rs. 5,600, the principal sum. He obtained a decree in that suit which declared, amongst other things, his right to the share claimed. After obtaining this decree it came to the plaintiff's knowledge that Lachman Sing had in 1873 realized from the mortgagor Rs. 8,624, being the original debt due under the mortgage together with interest, a fact which Lachman Singh had fraudulently concealed from and kept him in ignorance of. He therefore brought the present suit to recover from his nephews his share of that sum. Lachman Singh, on his own behalf and on behalf of his minor brother, set up as a defence to the suit, amongst other matters, that the suit was barred by the provisions of s. 7 of Act VIII of 1859. The Court of first instance, refusing to admit this defence, gave the plaintiff a decree which, on appeal by the defendants, the lower appellate Court affirmed.

The defendants then appealed to the High Court, again contending that the suit was barred by s. 7 of Act VIII of 1859.

Pandits *Bishambar Nath* and *Nand Lal*, for the appellants.

The *Junior Government Pleader* (Baboo *Dwarka Nath Banarji*), for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—The plaint in the former suit is badly drawn up, but the claim, so far as the mortgage-debt is concerned, was clearly [545] for a declaration that the plaintiff was entitled to a fifth share in the sum lent under the mortgage-deed. The plaintiff stated the principal sum to be Rs. 5,600, and his own share in that sum Rs. 1,120. He did not sue to recover any portion of the debt. He claimed by right of succession, and his cause of action was the obstruction offered by the defendants to his possession of the family estate. It appears that at the time he instituted the first suit the defendant had realized the original debt with interest to the amount of Rs. 8,624. The plaintiff had no knowledge of this fact which was concealed from him; and he now sues to recover his share of that sum. We find that the defendant wrongfully appropriated the assets of the estate, and the Judge's finding is to the effect that he dishonestly concealed from the plaintiff information that he had realised the debt. We have thus the element of fraud introduced into the transaction and

(1) H.C.R., N.W.P., 1871, p. 27.

giving another cause of action to that on which the former suit was brought. We concur with the Judge in holding that, under the circumstances, s. 7 of Act VIII of 1859 cannot be applicable to bar this suit. We notice that a similar view was taken by this Court in *Bulwant Singh* v. *Chittan Singh* (1), and without endorsing or accepting all that is in that judgment, we consider that it expresses the course that we should adopt in this case. We dismiss the appeal with costs.

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1 A. 543.

Appeal dismissed.

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1 A. 545=2 Ind. Jur. 681.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

DURGA PRASAD (*Plaintiff*) *v.* KHAIRATI AND OTHERS (*Defendants*).*
[2nd January, 1878.]

Act VIII of 1859 (*Civil Procedure Code*), *ss.* 337, 351—*Act XXIII of* 1861, *s.* 37—*Appeal—Appellate Court, powers of.*

An appellate Court, hearing an appeal *ex-parte* in the absence of the respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the question raised by the appellant.

[546] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff in this suit appealed against the order of the lower appellate Court remanding the suit to the Court of first instance for a new trial. The plaintiff contended in special appeal that the order of remand was unauthorized by law.

Munshi *Hanuman Prasad*, for the appellant.

The respondents did not appear.

JUDGMENT.

The judgment of the High Court, so far as it related to this contention, was as follows :

OLDFIELD, J.—It appears that the defendants-respondents executed a deed of mortgage in favour of plaintiff on the 9th June, 1873, for a consideration of Rs. 1,000, which was payable in one year, and the purport of the deed is to give possession to the plaintiff. On the same date another deed was executed by which the defendants agreed to take a lease of the property on payment of rent, for the due payment of which the property was hypothecated in the deed. The rent not having been paid, the plaintiff sues to recover arrears of rent, principal and interest, Rs. 164-7-1, by enforcing the charge on the property, together with interest, subsequent to institution of the suit, and to obtain possession of the mortgaged property. The defendants appeared in the Court of first instance by their

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* Special Appeal, No. 995 of 1877, from a decree of W. Lane, Esq., Officiating Judge of Moradabad, dated the 10th May, 1877, reversing a decree of Maulvi Wajih-ul-lah Khan, Subordinate Judge of Moradabad, dated the 21st January, 1875.

(1) H. C. R., N.-W. P., 1871, p. 27. For a case in which the omission was due to be a *bona fide* mistake, and it was held, following *Buzloor Ruheem* v. *Shamsunnissa Begum*, 8 W. R. P. C. 3, that the result was the same as if there had been an act of deliberate relinquishment, see *Ganes Chandra Chowdhry* v. *Ram Kumar Chowdhry*, 3 B.L.R. A.C. 265=12 W.R. 79.

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pleader and asked for an adjournment to enable them to put in their defence; this was refused; and they failed to put in any reply to the claim, and the Court of first instance decreed the claim for possession and the principal amount of rent, and dismissed the claim for interest. The plaintiff then preferred an appeal to the Judge on the matter of interest. The defendants did not defend the appeal notwithstanding that the Judge summoned them to appear in person. The Judge has held that under s. 37 of Act XXIII of 1861, he is at liberty to open the whole case on the appeal preferred by the plaintiff, and as he considered the Court of first instance was not justified in refusing to allow time to the defendants to prepare their answer to the suit, and also that, looking into the deeds, there is reason to think that the claim to be put in possession of the mortgaged property is not maintainable, and that the second deed is invalid for want of registration, he has reversed the decree of the first Court and remanded the suit for **[547]** re-trial on the merits, under s. 351 of Act VIII of 1859. This decision is open to the objection taken on special appeal.

Section 37 of Act XXIII of 1861 gives the appellate Court the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits. But the Judge's order cannot be supported under this section. He has held that there has been an improper consideration and admission of evidence affecting the merits of the claim, although these matters were never put in issue in the appeal before him. The Judge should have confined himself to deciding the matters put in issue by the parties. S. 337 of Act VIII of 1859 shows the circumstances under which a Court may reverse or modify a decree in favour of plaintiffs or defendants who have not appealed, but this section does not apply to the case before us. The defendants might have appealed or preferred objections under s. 348, and in that case the Judge would have had to decide the question raised, but they never appeared to defend the appeal, and, we may add, have not done so in this Court. The only question before the Judge was that raised by the appellant, the plaintiff, and he should have confined his decision to that question.

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1 A. 547.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

UMRAO BEGAM (*Judgment-debtor*) v. THE LAND MORTGAGE BANK OF INDIA (*Decree-holder*).* [2nd January, 1878.]

Act XVIII of 1873 *(North-Western Provinces Rent Act)*, s. 9—*Landholder—Right of occupancy tenant—Transfer of right of occupancy in execution of decree.*

Section 9 of Act XVIII of 1873 does not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. *Ablakh Rai* v. *Udit Narain Rai* (1) distinguished.

[Affir., 2 A. 451 ; D., 7 A. 511 (513) ; 7 A. 878 (F.B.).]

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* Miscellaneous Regular Appeal, No. 96 of 1877, from an order of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 27th August, 1877.

(1) 1 A. 353.

THE proprietary rights of the judgment-debtor in the village of Sikandarpur were sold on the 23rd October 1876, and were [548] purchased by the decree-holder. The decree-holder now applied for the sale of the right of occupancy acquired by the judgment-debtor, under the provisions of s. 7 of Act XVIII of 1873, in the *sir* land appertaining to such proprietary rights. The judgment-debtor objected that, under the provisions of s. 9 of that Act, such right of occupancy was not transferable. The Court of first instance overruled this objection on the ground that the provisions of s. 9 of Act XVIII of 1873 were not applicable to sales in execution of decrees, but to voluntary transfers.

On appeal by the judgment-debtor to the High Court, it was again contended by her that her right of occupancy in the *sir* land as an ex-proprietor could not be sold in execution of decree under the provisions of s. 9 of Act XVIII of 1873.

Babu *Beni Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

JUDGMENT.

The judgment of the High Court was delivered by

PEARSON, J.—The lower Court's view that s. 9 of the Rent Act applies to private transfers of occupancy rights only and not to sales of such rights in execution of decree is, in the general form in which it is stated, opposed to the Full Bench ruling of this Court, dated 19th February, 1877 (1). But in the case out of which that ruling arose the person who sought to bring to sale an occupancy right possessed by his judgment-debtor in a holding was not the zamindar, the proprietor of the land. In the present case the decree-holder is himself the zamindar. The section appears to have been enacted in the interest of landholders, who may presumably waive the privilege it confers on them. It would be unreasonable to hold that a landholder should not be free to cause the sale in execution of his own decree of the occupancy right of his own judgment-debtor in land belonging to himself. Such a case cannot fall within the scope of the Full Bench ruling above mentioned. We therefore dismiss the appeal with costs.

Appeal dismissed.

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1 A. 549=2 Ind. Jur. 834.

[549] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

KANAHI RAM (*Plaintiff*) *v.* BIDDYARAM (*Defendant*).*
[2nd January, 1878.]

Hindu Law—Guardian and minor—Act XXI of 1850*—Caste—Marriage—Medical examination.*

A Hindu who has been deprived of caste by the members of his brotherhood on account of intending, for a money-consideration, to give his infant daughter in marriage to a man both old and impotent, does not, under Hindu law, thereby forfeit his right as guardian to the custody of such daughter. Even if there were

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* Special Appeal, No. 560 of 1877, from a decree of G. E. Watson, Esq., Judge of Aligarh, dated the 14th May 1877, affirming a decree of Munshi Man Mohan Lal, Munsiff of Aligarh, dated the 11th May, 1877.

(1) In *Ablakh Rai* v. *Udit Narain Rai*, 1 A. 353.

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a rule of Hindu law which in such a case inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced.

Where accordingly, because a Hindu had been deprived of caste for the reason above-mentioned, a person sued to have the custody of the infant himself as her guardian in lieu of her father, and, as such, to be declared empowered to arrange for her marriage to a suitable husband, basing his suit on Hindu law, *held* that such suit was not maintainable.

Held, also that the lower Courts properly refused to cause the intended husband in this case to be medically examined as to his alleged impotency, he not being a party to the suit, and there being no provision of law authorising such a procedure.

[F., 28 A. 233 (235)=2 A.L.J. 663=A.W.N. (1905) 205; 167 P.L.R. 1901.]

THIS was a suit for possession of Ram Piari, minor daughter of the defendant. The plaint stated that the defendant desired, contrary to Hindu law, to give his daughter in marriage to a very old and impotent man, having taken Rs. 400 from him; that the members of his caste had deprived the defendant of caste, and he had thereby lost his right to the protection of his daughter and to give her in marriage, which right had accrued to the plaintiff, the son of the defendant's uncle; and the plaintiff claimed an injunction restraining the intended marriage, and a declaration of his right to give the defendant's daughter in marriage to a fit and proper person. The Court of first instance dismissed the suit as unmaintainable, and on appeal by the plaintiff the lower appellate Court affirmed the decree of that Court.

[550] On special appeal by the plaintiff to the High Court it was contended that the suit was maintainable, and that the lower Courts had improperly rejected the plaintiff's application to have the intended husband examined by the Civil Surgeon, in order that it might be ascertained whether or not he was physically fit for marriage.

Pandits *Ajudhia Nath* and *Nand Lal*, Lala *Harkishen Das* and Babu *Oprokash Chandar*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

PEARSON, J.—This case has been argued before us at great length, and the conclusion at which I have arrived, after consideration of all that has been said on both sides, is that the suit as brought is not maintainable. The appellant has, in my opinion, failed to show that, because the defendant has been put out of caste by the members of his brotherhood on account of his intending to give his infant daughter, aged eleven years, in marriage to a man by name Phunda Ram, said to be more than seventy years old and impotent, in consideration of receiving from him about Rs. 400, he (the defendant) has, according to Hindu law, lost his right as guardian to the custody of the said girl; and such a contention, even were it supported by Hindu law, must be disallowed in reference to the provisions of Act XXI of 1850. The claim on the appellant's part on the basis of that contention to have the custody of the girl himself as her guardian in lieu of her father, and as such, to be declared empowered to arrange for her marriage to a suitable husband, cannot therefore be conceded. Assuming that in a suit properly brought for that purpose, and on proof of Phunda Ram's physical disqualification for marriage, the Courts could interfere so far in the matter as to restrain the defendant from

marrying his daughter to that person, it would not be necessary to proceed so much further as to deprive the defendant of his rights or to relieve him of his duties as a father. The lower appellate Court has held the assertion respecting Phunda Ram's impotency not to be substantiated. It is urged, that the lower Courts should have caused Phunda Ram to be examined by the Civil Surgeon, but no provision of law authorising such a procedure has been pointed out. Phunda Ram was not even [551] a party to the suit. It has been stated in the course of the argument before us that under Hindu law a marriage may be dissolved on the ground of the bridegroom's impotency. If this statement be correct, it is satisfactory to think that, should the defendant insist on carrying out his intention, the girl may, if entitled to claim it, have a remedy at law. Although the appellant may not have been entitled to bring this suit as her guardian or to claim her guardianship, his action in the matter is attributable to commendable motives, and in dismissing his appeal, not without reluctance, I would dismiss it without costs, and in affirming substantially the decrees of the lower Courts, I would modify them in so far as they order the costs of the defendant to be paid by the plaintiff.

STUART, C. J.—I have taken a little time to consider this case, for I confess I was anxious, if I possibly could, to give the plaintiff the remedy he seeks. In our order of the 13th June last (1) it is justly remarked "that the marriage of a girl eleven years old to a man of seventy years old is, on the face of it, an immense injury to the girl, and an extreme abuse of the father's authority as her guardian:" and having heard the case out, in fact and in law, I still adhere to that remark, and I would, if I could, prevent this marriage. But I regret to say that, having fully considered it in all its bearings, as well with respect to the peculiar principles and precepts of the Hindu Law as on the other legal grounds which were maintained at the hearing, I have arrived at the same conclusion as that expressed by Mr. Justice Pearson. No doubt it would have been better if the old man, Phunda, the would-be-bridegroom, had been a party to the original suit, but it is too late to consider that now, even if he had been prejudiced by the order we now make. So far, however, as he is concerned the result is substantially favourable to him, although I should be glad to learn that the marriage does not take place.

I also agree with Mr. Justice Pearson that this appeal should be dismissed without costs of the Courts below. I would order each party to bear his own in both.

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(1) This was an order granting, under s. 193 of Act VIII of 1859, an injunction restraining the defendant from carrying out the intended marriage, pending the determination of this special appeal.

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FULL BENCH.

1 A. 552 (F.B.) = 2 Ind. Jur. 836.

1 A. 552 (F.B.)=2 Ind. Jur. 836.

[552] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice. Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

CHAMAILI RANI (*Defendant*) v. RAM DAI (*Plaintiff*).*
[10th January, 1878.]

Act VII of 1870 (*Court Fees Act*), *ss* 17, 27—*Act VIII of* 1859 (*Civil Procedure Code*), *ss*, 8, 9—*Multifarious suit—Distinct subjects—Plaint—Memorandum of appeal.*

Held (SPANKIE, J., dissenting) that the words "distinct subjects" in s. 17 of Act VII of 1870 mean distinct causes of action or distinct kinds of relief.

Per SPANKIE, J.—Such words mean every separate matter distinctly forming a subject of the claim.

[F., 27 A. 186 (189); A.W.N. (1904) 210; 5 L.B.R. 94 (96); Ap., 3 A. 108 (F.B.); Cons., 2 A. 676 (F.B.); 16 A. 401 (403)=A.W.N. (1894) 124.]

THE defendant in this suit having preferred an appeal to the High Court against the decree of the Court of first instance after the time allowed by law, the Court called upon the respondent to show cause why the appeal should not be admitted after such period. The respondent preferred a petition to the Court stating that the memorandum of appeal was insufficiently stamped, the appellant having paid in respect thereof a Court-fee of Rs. 610, whereas under s. 17 of Act VII of 1870 a fee of Rs. 808-12 0 was chargeable. Under the order of the Court the following report was made by the Assistant Registrar :—

"The claim embraces different subjects, and under s. 17 of the Court Fees Act, the Court-fees should apparently have been calculated on each subject-matter, and not on the aggregate value, as has been done. The fees should be calculated as follows :—

				Court fees.		
	RS.	A.	P.	RS.	A.	P.
1.—For possession (on five times the jama) ...	4,315	1	2	245	0	0
2.—For a house, value	4,100	0	0	230	0	0
3.—For wasilat	5,243	3	2	285	0	0
4.—For damages	648	0	0	48	12	0
Total ...	14,306	4	4	808	12	0

On the aggregate amount the stamp is sufficient, but this apparently is not correct as stated above. It should have been calculated under s. 17 of the Court Fees Act, and the stamp is therefore insufficient by Rs. 198-12-0."

[553] The Court (STUART, C. J., and SPANKIE, J.) referred to the Full Bench for an opinion as to the meaning of the words "distinct subjects" in s. 17 of Act VII of 1870.

Mr. *Colvin* and Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, Pandit *Bishambar Nath*, and Mir *Zahur Husain*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—It appears to me that the meaning of the words "distinct subjects" in s. 17 of Act VII of 1870 is shown with sufficient

* Miscellaneous Application, No. 32-B of 1877.

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clearness in that section itself, when it states that "the plaint or memorandum of appeal shall be chargeable with the *aggregate amount* of the fees to which *the plaints or memoranda of appeal in suits embracing separately each of such subjects* would be liable under this Act." This, I think, can only mean that the two or more distinct subjects are to be so chargeable as being distinct causes of action. The words "*plaints* or memoranda of appeal in *suits*" in the section show this to my mind conclusively, and it is not enough that the distinct subjects should be merely separate and distinct matters embraced in the claim.

But, on the other hand, I am of opinion that this interpretation of s. 17 of the Court Fees Act does not in the least degree affect the correctness of the calculation submitted by the office in the case which has given rise to this reference, for it is very clear to me that each of the separate distinct subjects mentioned in the report might be separate causes of action in separate suits, and therefore whether viewed in that light or merely as distinct and separate matters of claim, the correct fee chargeable in this case is that suggested by the Assistant Registrar.

TURNER, J.—Seeing that the fee to be charged in such cases is the aggregate of the fees to which the plaints in suits embracing separately each of the subjects would be liable under the Act, I am inclined to think that "distinct subjects" mean distinct causes of action or distinct kinds of relief; *e.g.*, if a suit is brought for the recovery of an inheritance, although the inheritance might consist of distinct properties and properties differing in kind, the fee would be computed on the aggregate value of the one subject of suit. But where a suit is brought (i) for the recovery of an inheri-[554] tance (ii) for an injunction, and (iii) for the amount of a bill-of-exchange accepted by the defendant, each of these three subjects would be distinct, and the fee chargeable would be the aggregate of the fee chargeable in respect of each subject if sued for in a separate suit. On the report now submitted by the office it is not possible to determine the proper fee. When the record is before the Court it can be ascertained what are the subjects to which the appeal relates.

PEARSON, J.—I concur in the view taken by my learned colleague, Mr. Justice Turner.

SPANKIE, J.—I adhere to the opinion which I expressed when this question was argued by Pandit Ajudhia Nath before the referring Bench, which opinion I believe the learned Chief Justice shared. But it became necessary to refer the question as a doubt had been expressed elsewhere as to the meaning of the words "distinct subjects" in s. 17 of the Court Fees Act.

I regard the words as meaning every separate matter distinctly forming a subject of the claim. The section runs thus: "Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act." The fee to which each of the distinct subjects embraced by the suit is liable, if a separate suit were brought, is first to be ascertained and then the aggregate amount of all the items is to be charged. The words "multifarious suits" in the margin have no reference to s. 8 of Act VIII of 1859 in the sense suggested by the learned pleader for appellant, that we are to read the words "two or more distinct subjects" as if they were "two or more distinct causes of action;" and the second clause in s. 27 that "nothing in the former part of the section shall be

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deemed to affect the power conferred by the Code of Civil Procedure, s. 9" simply affirms what is laid down in s. 9 that, where two or more causes of action are joined in the same suit, and the Court shall be of opinion that they cannot conveniently be tried together, the Court may order separate trials of such causes of action to be held.

I would reply that the Assistant Registrar has calculated the fees strictly in accordance with the provisions of s. 17 of Act VII of 1870.

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1 A. 555.

[555] APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

GUMANI AND ANOTHER (*Plaintiffs*) *v.* RAM CHARAN AND OTHERS (*Defendants*).* [18th January, 1878.]

Contract—Specific performance—Act I of 1877 *(Specific Relief Act)*, s. 27, *cl.* (*b*)—*Misjoinder of causes of action.*

The plaintiffs sued to enforce an agreement for the execution of a conveyance of certain immoveable property, and for the possession of such property, making the party to such agreement and the persons who had, subsequently to the date of the same, purchased such property in execution of decree defendants in the suit, on the allegation that such persons had purchased in bad faith and with notice of the agreement. *Held*, with reference to s. 27 of Act I of 1877, that,under such circumstances, there was not necessarily a misjoinder of causes of action.

RAM PADARATH and Ram Charan, two brothers, claimed a certain share in a certain village as their joint and undivided property. To enable them to sue for this property, the deceased husband of Gumani and Harbansa advanced them certian monies. In consideration of the loan, Ram Padarath, on the 7th May, 1873, and Ram Charan, on the 10th December, 1874, agreed in writing to execute in favour of the deceased a deed of sale of three-fourths of the share should they obtain a decree in respect of it, the brothers sued for possession of the share and obtained a decree. On the 20th June, 1876 the rights and interests of Ram Charan in such decree were sold in execution of decree, and were purchased by Nakched and certain other persons. On the 21st August, 1876, the rights and interests of Ram Padarath in such decree were sold, and were also purchased by Nakched and the other persons,who obtained possession of the share. Gumani and Harbansa brought the present suit against RamCharan and Nakched and the other persons to enforce the agreement, dated the 10th December 1874, and for possession of three-fourths of the share. They also brought at the same time a suit against Ram Padarath and Nakched and the other persons to enforce the agreement dated the 7th May 1873. The Court of first instance dismissed both suits, on the ground that the auction-purchasers were not parties to the agree-[556]ments and there was consequently in the suits a misjoinder of causes of action, and its decrees were on the same ground affirmed by the lower appellate Court on appeal by the plaintiffs.

On special appeal to the High Court in the present suit it was contended by the plaintiffs that there was no misjoinder of causes of action.

*Special Appeal, No. 1053 of 1877, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 13th July 1877, affirming a decree of Shah Rahat Ali, Munsif of Bansi, dated the 1st June 1877.

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1 A. 555.

Pandit *Ajudhia Nath* and Babu *Beni Prasad*, for the appellants.
Lala *Lalta Prasad* and Munshi *Sukh Ram*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—We think that the lower appellate Court has too readily assumed that, because the auction-purchaser was no party to the contract to sell to plaintiff, the suit is bad for misjoinder. It is part of the plaintiff's case that the auction-purchaser at the time of his purchase was aware of the original contract in favour of the plaintiff, and that he and the defendant Ram Charan were acting in collusion and to the injury of the plaintiff. Under cl. (*b*), s. 27, Act I of 1877, a contract may be enforced against any party to it or any other person claiming under him by a title arising subsequently to the contract, *except* a transferee for value who has paid his money in good faith and without notice of the original contract. The claim therefore is not necessarily bad for the reason assigned by the lower Courts. The defendants who were parties to the original contracts in the cases before us may be said to have admitted them, as Ram Charan did not defend the suit against him, and Ram Padarath in the other suit acknowledged the justice of the claim. It is true that the auction-purchaser contends that these defendants are in collusion with the plaintiff to injure him.

The Court would have to determine first whether or not there was any agreement enforceable by law between the contracting parties, and, if so, was the contract one specifically enforceable by law as being one for which compensation in money would be no adequate relief. If the lower appellate Court found that the contract was one specifically enforceable, it would have to determine whether or not it was a contract entered into at the time it professes to have been made in good faith between the contracting parties, or, as alleged by the auction-purchaser, the transaction was [557] not made *bona fide* and was prepared in fraud of himself. If the lower Court found that there was a genuine contract of sale, the Court would then have to determine whether or not the auction-purchaser at the time of his purchase was aware of the original contract.

With this view of the case we annul the finding of the lower appellate Court, and remand the case, under s. 351 of Act VIII of 1859, with directions that it may be restored to its original number on the file, and be tried on its merits by the lower appellate Court. Costs will abide the result.

Case remanded.

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APPELLATE CIVIL.

1 A. 557 = 2 Ind. Jur. 790.

1 A. 557=2 Ind. Jur. 790.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

FAZAL HAQ (*Plaintiff*) *v.* MAHA CHAND AND ANOTHER (*Defendants*).* [18th January, 1878.]

Public thoroughfare—Easement—Act XV of 1873 *(North-Western Provinces and Oudh Municipalities Act), ss.* 27, 32, 38—*Special damage—Right of action—Municipal Committee, powers of.*

While certain land formed part of a certain public thoroughfare, *F* had immediate access to such thoroughfare and the use of a certain drain. The Municipal Committee sold such land to *M* and constructed a new thoroughfare. *M* used and occupied such land so as to obstruct *F's* access to the new thoroughfare and his use of the drain. *F* therefore sued him to establish a right of access to the new thoroughfare over such land and a right to the use of such drain. *Held* that, having suffered special damage from *M's* acts, *F* had a right of action against him, and that such right of action was not affected by the circumstance that *M* had acquired his title to the land from the Municipal Committee, inasmuch as the Municipal Committee could not have dealt with the old thoroughfare to the special injury of *F*, and had it closed the same, would have been bound to provide adequately for his access to the new thoroughfare and for his drainage.

[Ap., 9 M. 463 (465).]

THIS was a suit to establish a right of access to a certain public thoroughfare and to the use of a certain drain, the plaintiff alleging that he had peaceably enjoyed such access and the use of such drain as easements and as of right, without interruption and for twenty years. The facts of the case and the manner in which the lower Courts dealt with the suit are sufficiently stated in the order of **[558]** remand made by the High Court, to which the plaintiff appealed against the decree of the lower appellate Court. That decree affirmed the decree of the Court of first instance dismissing the plaintiff's claim to such right of access.

Munshi *Hanuman Prasad* and Shah *Asad Ali*, for the appellant.

The Senior Government Pleader (Lala *Juala Prasad*), the Junior Government Pleader (Babu *Dwarka Nath Banerji*), and Babu *Oprokash Chandar*, for the respondents.

The Court made the following

ORDER OF REMAND.

As we understand the facts, it would appear that land which belonged to and formed part of the old public road and adjoined the plaintiff's premises has been sold by the Municipality to the defendant, but that a sufficient portion of land remains in use as the public road, and the defendant has appropriated to his own exclusive use that portion which he has purchased and which lies between the plaintiff's premises and the present public road, and by so doing the plaintiff avers that defendant has interfered with his right of way and prevented approach as of old on his part from his premises to what now constitutes the public road. The plaintiff asks that a passage three yards wide be opened across the purchased land to the public road for his use; he also seeks to have a drain opened which defendant has closed. The Court of first instance decreed the opening of the drain, and dismissed the rest of the claim, and the lower appellate Court has affirmed

* Special Appeal, No. 1909 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 5th July 1876, affirming a decree of Muhammad Imdad Ali, Munsiff of Saharanpur, dated the 18th May 1876.

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this decision. The Subordinate Judge has found that the land purchased by the defendant was a public thoroughfare, but has held that plaintiff has no right to relief in respect of maintenance of his right of way, apparently on the ground that he could obtain access to the public road by making a detour, and that any inconvenience to him would be trifling compared with the loss to the defendant who has purchased the land at a high price. This judgment proceeds on erroneous grounds. If the land purchased from the Municipality was part of a public thoroughfare, and the defendant by his purchase obstructs its use, the plaintiff can sue for relief, if he can show that he has been individually injured by the defendant's act. In the present case there is no doubt that such injury has been shown, if the plaintiff's allegations are true that he has no longer the direct access to the present public road which he had before, and that the act of the defendant has [559] caused the closing of an established drain, and it would be no ground for denying him relief that he may by making a detour to get access to the road, or that to give him relief will interfere with the benefit which defendant anticipated from his purchase.

The questions for decision are whether the land bought by defendant was part of a public thoroughfare; whether the title obtained by the defendant under the Municipality's right to sell was one which gave him the land free from any liability or responsibility to the plaintiff on account of previous user of it; and whether plaintiff has suffered the injuries alleged by the defendant's act so as to give him a right of action and a claim to the relief now sought.

It will be necessary that the Municipality be properly represented in the suit as defendant, and we remand the case under s. 354 of Act VIII of 1859 that this may be done and the above issues tried and decided; when the lower appellate Court will return the case with its finding to this Court, and seven days will be allowed for objections to be preferred to the finding.

On the return of the Subordinate Judge's finding, the Court delivered the following

JUDGMENT.

The lower Court's finding on the issues remitted is to the effect that the land in dispute formed part of a public thoroughfare, and that the defendant by his occupation of it since his purchase from the Municipal Committee has interfered with the plaintiff's right of drainage and way. On the latter point the Court's finding shows that plaintiff's premises adjoin this land, and while it formed part of the highway he and his tenants had immediate access to the highway, but by the exclusive occupation of this portion of the highway, by defendant their access to that portion which now forms the highway has been shut off, and no other adequate means of access has been provided.

Accepting this finding, it shows that plaintiff has suffered injuries and inconveniences by the closing of the highway by defendant, which affect him beyond what affects the public at large, and he has in consequence a right of action against the defendant, Maha Chand, and there is nothing in the circumstance that defendant's title is derived by purchase of the land from the Municipality, as has been urged, which can affect the plaintiff's right to relief. [560] No doubt by s. 38 of the Municipalities Act the property in all public highways is vested in the Committee, and by s. 27 the Committee can, with the

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sanction of the Local Government, sell any portion of land referred to in that section which is not required for the purposes of the Act, and shall keep roads in repair and may do all acts and things necessary for purposes of general utility— s. 32. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act; on the contrary, provision is made for such suits. Here the plaintiff has made out a case. He has shown that the drainage from his premises has been stopped, and that he has been isolated and shut off from access to the present highway. The Municipality could not have thus dealt with the highway to the special injury of the plaintiff. In closing a portion of it they would have been bound to provide adequately for his drainage and his access to the highway which they had substituted; indeed, it is not clear that they had any intention of doing otherwise, and the defendant can do no less.

The relief which plaintiff now seeks is very reasonable. He does not ask to set aside the sale of the land, but that a cart-road nine feet wide should be reserved communicating with the highway, and that the existing course of drainage be not interfered with.

We decree the appeal, and modifying the decrees of the lower Courts, decree the claim with all costs.

Appeal allowed.

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1 A. 560.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RADHIA (*Defendant*) *v.* BENI AND OTHERS (*Plaintiffs*).*
[21st January, 1878.]

Act VIII of 1859 (*Civil Procedure Code*)., *s.* 2—Res judicata.

The plaintiffs in the present suit claimed. as the heirs of *J.* certain property from *M.* the daughter of *R*, alleging that such property was the joint and undivided property of *R* and *J*, to which on *R*'s death *J* had succeeded. The [561] plaintiffs had formerly, after the death of *J*, sued *M* for such property, alleging that it was the separate property of *R*, and that on the death of *R*'s widow they were entitled to succeed thereto. *Held* that the decision in the former suit that such property was the separate property of *R*, to which *M* was entitled to succeed on the death of his widow, was a bar to their present suit.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court to which the defendant appealed against the decree of the lower appellate Court. That decree affirmed the decree given by the Court of first instance to the plaintiffs. The defendants contended that the matter in dispute was *res judicata*.

The Senior Government Pleader (Lala *Jwala Prasad*), for the appellant.

Lala *Lalta Prasad* and Munshi *Kashi Prasad*, for the respondents.

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* Special Appeal, No. 866 of 1877, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 30th April 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Akbarpur, dated the 1st December 1875.

JUDGMENT.

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APPELLATE CIVIL.

1 A. 560.

The judgment of the Court was delivered by

OLDFIELD, J.—It appears that one Jai Ram had four sons, Basawan, Mata Din, Jhau, and Ram Bakhsh. They are all deceased, Jhau having died in 1868 and Ram Bakhsh some sixteen years ago, leaving a widow Dallo, who died in 1871, and a daughter, the defendant in this suit. The plaintiffs represent Mata Din. On the death of Dallo they sued in 1874 this defendant, the daughter of Ram Bakhsh, for the property now in suit, alleging that they were the heirs of her deceased father, Ram Bakhsh, and of Dallo; that suit was dismissed. They now sue her for the same property, alleging that Jhau and Ram Bakhsh lived and held the property as joint property, and that Jhau succeeded to Ram Bakhsh, and they are his heirs. The defendant pleaded that the claim was barred with reference to the decision in the former suit, and that it was also barred by limitation, owing to the long adverse possession of Dallo and the defendant. Both Courts have decreed the claim; the lower appellate Court has held that there is no estoppel under the Evidence Act to bar the suit, and that Ram Bakhsh and Jhau held the property jointly, and this being so, it must be concluded that, at Ram Bakhsh's death, Jhau succeeded to his share, and the possession of Dallo in a part of the premises was not adverse to him.

[562] It appears to us that this judgment of the lower appellate Court is inconsistent with the findings on facts made in the suit which the plaintiffs brought in 1874 against the defendant, and that the lower appellate Court has failed to properly consider the plea which was raised as to the effect of the judgment on this claim, and we consider that the suit cannot be maintained with reference to the former case. The plaintiffs brought the former suit on the ground that they were heirs of Ram Bakhsh and Dallo; that the property formed the estate left by Ram Bakhsh and Dallo; and they further alleged that Ram Bakhsh had lived separate in estate from all his brothers. When they brought that suit Jhau had been dead some years, and their present claim, that he succeeded to the estate at Ram Bakhsh's death as his heir, and that he held it jointly with Ram Bakhsh, was never urged in the former suit, and is wholly inconsistent with their allegations in that suit. But it further appears to us that the question of the nature of the estate, whether held separately by Ram Bakhsh from all his brothers, and the nature of Dallo's and the defendant's title and possession were questions which properly fell to be decided in that suit, and were in our opinion decided in favour of the defendant, and that the effect of that decision is to bar the claim both under s. 2 of Act VIII of 1859 and the Limitation Act. It was distinctly pleaded by defendant in that suit that after Ram Bakhsh's death Dallo had possession of the house in suit, and that defendant was entitled to the house by inheritance and the finding was as follows: "It is therefore satisfactorily established that for a long period Ram Bakhsh, and after his decease his widow, Dallo Kuar, had separate and adverse possession of the property in dispute, and under such circumstances the daughter, *i.e.*, the appellant, has according to Hindu law, the right of inheritance to the estate in suit left by Ram Bakhsh and his widow as against respondents. We cannot reconcile the above with the present finding that Dallo's possession was not adverse to Jhau. Anyhow, the judgment in that case appears to us to be final in respect of defendant's title as against the plaintiffs whether they claimed in that suit as

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heirs of Ram Bakhsh or of Jhau, for at that time any title they had as heirs of Jhau had already accrued, and as we have remarked the entire character of Dallo's and defendant's title and possession as against [563] them was opened out by the pleadings, and properly fell to be decided in that case, and cannot be raised again.

We decree the appeal with all costs and reverse the decrees of the lower Courts and dismiss the suit.

Appeal allowed.

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1 A. 563.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

CHADAMI LAL (*Plaintiff*) *v.* MUHAMMAD BAKHSH AND ANOTHER (*Defendants*).* [21st January, 1878.]

*Pre-emption—Contract—*Wajib-ul-arz*—Custom—Appeal.*

The plaintiff in a suit to enforce a right of pre-emption in respect of certain shares in certain villages, founded his claim on a special agreement contained in the village administration-papers, and such claim was tried and determined in the lower Court as so founded. *Held*, that the plaintiff could not in appeal set up a claim to enforce such right founded on custom (1).

[Exp., 2 A. 876 (F.B.); 16 A. 40 (48).]

THIS was a suit for pre-emption founded on special agreement. The facts of the case and the manner in which the Court of first instance dealt with the suit are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of first instance dismissing his suit.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath*, *Ajudhia Nath* and *Nand Lal*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—This suit has been brought to recover certain shares in mauza Saran Top and Mahal Bagh, pargana Kanauj, by right of pre-emption based on the village administration-papers of the current settlement. It was urged in defence by the purchaser [564] that the village administration-papers are not binding on his vendor, who was no party to them, and that, as a matter of fact, the plaintiff refused the offer of the estates when made to him. The lower Court has dismissed the claim finding in favour of the answering defendant. The objections now taken in appeal by the plaintiff appear to us to fail. The *wajib-ul-arz* of Mahal Bagh was not signed by the vendor or any one he represents, and though in that of the zemindari mahal there is an endorsement to the effect that

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* Regular Appeal, No. 86 of 1877, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 28th April 1877.

(1) See also *Koonj Behari Lal* v. *Girdhari Lal*, 1 B.L.R.S.N. 12=10 W.R. 189, and *Shiu Sahai* v. *Hari Sahai*, 3 B.L.R.Ap. 142, in which cases it was held that, where a plaintiff seeks to enforce a right of pre-emption upon the ground of partnership, he cannot obtain a decree upon the ground of vicinage.

Gajabhar Lal attested it, there is nothing to show that, if he did so, he had any authority to do so. He was the lessee of the owner, Musammat Banno, but this position did not give him authority to act for her at the settlement. In his evidence he states that he cannot remember about the attestation of the *wajib-ul-arz*, and he never had any power of attorney to act as her agent.

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We concur with the lower Court in considering that it is not satisfactorily proved that the vendor or any one he represents was a party to the execution of the village administration-papers, or knowingly accepted their conditions. Whether or not any similar condition of pre-emption was entered in the previous administration-paper cannot affect this claim, which is brought on the contract under the recent settlement-paper, and not on any well-established custom apart from the contract made under the administration-paper, nor would the entry of the right of pre-emption in a former administration-paper necessarily establish, though it might be evidence towards proving such a custom.

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1 A. 564 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

DWARKA DAS AND ANOTHER (*Defendants*) v. HUSAIN BAKHSH (*Plaintiff*).* [22nd January, 1878.]

Pre-emption—Hindu vendor—Muhammadan Law—Act VI of 1871 *(Bengal Civil Courts Act)*, s. 24.

Held (STUART, C. J. and PEARSON, J., *dissenting*) that where the vendor is a Hindu a suit to enforce a right of pre-emption founded upon Muhammadan law is not maintainable. *Chundo* v. *Alim-ud-din* (1) overruled. *Poorno Singh* v. *Hurrychurn Surmah* (2) followed.

[565] *Per* STUART, C. J. and PEARSON, J., *contra.*

[R., 7 A. 755 (F.B.)=A.W.N. (1885) 228; 32 C. 982 (986)=9 C. W. N. 826; D., 5 A. 110 (115).]

THIS was a suit to enforce a right of pre-emption in respect of a dwelling-house, the suit being founded on Muhammadan law, the plaintiff claiming such right as a neighbour of the vendors-defendants in suit, who were Hindus, the plaintiff and the purchaser, also a defendant in the suit, being Muhammadans. The defence to the suit raised the question whether a suit to enforce a right of pre-emption founded upon Muhammadan law was maintainable whether the vendor was a Hindu. The Court of first instance did not determine this question, but dismissed the suit on grounds which it is immaterial for the purposes of this report to state. On appeal by the plaintiff the lower Court of appeal, reversing the judgment of the Court of first instance, held, with reference to the case of *Chundo* v. *Alim-ud-din* (1) that a suit to enforce the right of pre-emption founded on Muhammadan law was maintainable where the vendor was a Hindu, and gave the plaintiff a decree.

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* Special Appeal, No. 1358 of 1876, from a decree of H. W. Dashwood, Esq., Judge, Meerut, dated the 12th September 1876, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 21st April 1876.

(1) 6 H.C.R. N.W.P., 1874. p. 28. (2) 10 B.L.R., 117.

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1 A. 564 (F.B.).

The defendants appealed to the High Court, again contending that under s. 24 of Act VI of 1871, the vendors being Hindus, the Muhammadan law of pre-emption was not applicable.

The Court (Spankie and Oldfield, JJ.) referred to the Full Bench the question whether the Muhammadan law of pre-emption applied, with the following remarks :—

The question was decided in the affirmative by a majority of three out of four Judges comprising a Full Bench of this Court in *Chundo* v. *Alim-ud-din* (1). One of the Judges composing the Court however dissented, and the Chief Justice subscribed to the view taken, with hesitation. We have considerable doubts as to the correctness of the ruling, which is opposed to one by the High Court of Calcutta in *Poorno Singh* v. *Hurry-churn Surmah* (2) and thinking it desirable that the question be reconsidered, we refer it to the Full Bench of the Court.

Munshi *Hanuman Prasad* and Pandit *Ajudhia Nath*, for the appellants.

Mr. *Conlan* and Babu *Oprokash Chandar*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench :

[566] STUART, C.J.—I am reminded by the order of reference that in the case of *Chundo* v. *Alim-ud-din* (1), I gave my judgment with hesitation. I did so, no doubt, but chiefly, if not solely, in consequence of the deference I felt for the opinion of my colleague, Mr. Justice Spankie, in the case of *Shumshoolnissa* v. *Zohra Beebee* (3), who had most carefully and anxiously considered the question now referred in the long judgment he therein delivered. I cannot, however, say for myself that I had any doubt, that is, any argumentative doubt, on the question then before us, and I remain of the opinion I then expressed and subsequently in the Full Bench in the above case of *Chundo* v. *Alim-ud-din*(1), and this is my answer to the reference.

PEARSON, J.—For the reasons given in my judgment of the 1st December 1873, in Full Bench, in the case of *Chundo* v. *Alim-ud-din* (1), I adhere to the opinion therein expressed.

TURNER, J.—I have never been able to accept the ground on which it was contended that on the sale of the property by a Hindu a right of pre-emption arises. Our Courts are not strictly bound to enforce the law of pre-emption unless founded on custom or contract, though they have gone so far as to give effect to that law where the vendor is a Muhammadan. The circumstance that on a sale a right of pre-emption accrues greatly affects the value of the property, and it has always appeared to me most inequitable to allow such a claim to be asserted on the sale of the property by a Hindu, if it be not based on local custom or special agreement.

SPANKIE, J.—The point has been so exhaustively argued in the decision of this suit and in the Full Bench case cited in the order of reference that it is quite unnecessary to go over the ground again. I would say that, as the purchaser bought the property from a Hindu, there is no right of re-purchase from him under the Muhammadan law of pre-emption on the ground that the vendee and pre-emptor are both Muhammadans.

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(1) 6 H. C. R. N. W. P., 1874, p. 28. (2) 10 B. L. R. 117.
(3) H. C. R. N. W. P. 1874, p. 2.

OLDFIELD, J.—The Muhammadan law recognises the right of pre-emption on the ground of avoiding the inconvenience to a neighbour which might arise by the sale of adjoining property to a stranger. The right can be claimed by all description of persons without reference to difference of religion. We find in the Hedaya [567] that "the privilege of Shaffa is established after sale, and the right of the Shaffee is not established until after demand be regularly made, &c." These and similar passages imply only that a complete title to claim the right of pre-emption accrues only on completion of sale, when the former owner's interest in the property has ceased, but the right itself would seem to spring out of a rule of Muhammadan law enacted in the interest of neighbours, and which would seem to be binding only on all those owners being vendors of property who are subject to Muhammadan law, and who necessarily hold their property subject to this rule of law, which will affect them and the property wherever a sale takes place to bring the rule of law into operation.

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I concur in the view taken in *Poorno Singh* v. *Hurry Churn Surah* (1). I would reply that the Muhammadan law of pre-emption does not apply to the case referred to.

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1 A. 567.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Turner.

MARATIB ALI (*Plaintiff*) v. ABDUL HAKIM AND OTHERS (*Defendants*).* [23rd January, 1878.]

*Pre-emption—Contract—Muhammadan Law—Custom—*Wajib-ul-arz*—Special appeal.*

Where the existence in a certain village of the right of pre-emption was recorded in the village administration-paper as a matter of agreement and not of custom, and a suit was brought to enforce such right founded on the agreement, and was tried and determined in the lower Courts as so founded, the plaintiff could not in special appeal claim such right as a matter of custom in virtue of the entry (2).

A claim to the right of pre-emption founded on a special agreement does not exclude a claim to such right founded on Muhammadan law (3).

THIS was a suit to enforce a right of pre-emption in respect of a share in a certain village, the suit being founded on an agreement contained in the village administration-paper and on the Muhammadan law of pre-emption. The Court of first instance dismissed the suit on the ground that the administration-paper was not signed by the vendor and the agreement was consequently not binding on him, and on the further ground that the plaintiff had not [568] fulfilled the conditions of the Muhammadan law of pre-emption. On appeal by the plaintiff the lower appellate Court also held that the claim on the agreement was unmaintainable, as the vendor had not signed the administration-paper, and

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*Special Appeal, No. 571 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 20th February 1877, affirming a decree of Muhammad Imdad Ali, Munsif of Saharanpur, dated the 21st December 1876.

(1) 10 B. L. R. 117.
(2) See also *Chadami Lal* v. *Muhammad Bakhsh*, 1 A. 563, and note to that case.
(3) See also *Nehchul* v. *Than Singh*, H.C.R.N.W.P. (1870), 222.

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held also that the claim on the agreement excluded the claim based on Muhammadan law.

The plaintiff appealed to the High Court, contending that the claim on the administration-paper did not exclude that based on the Muhammadan law; and that the mere fact that the vendor had not signed the administration-paper did not affect the claim thereon, the administration-paper being only a record that the custom of pre-emption prevailed.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Oprokash Chandar*, for the respondents.

The Court made the following

ORDER OF REMAND.

The second plea is overruled because it was admitted that the existence of the right of pre-emption was entered in the record as a matter of agreement and not of custom, and on these averments the suit has been tried and the issues fully investigated; but the validity of the first plea must be admitted. The claim based on the *wajib-ul-arz* did not exclude a claim under Muhammadan law. The lower appellate Court must determine whether the appellant had, under the Muhammadan law, the right of pre-emption, and secondly, if he had the right, whether he duly performed the conditions which, under the Muhammadan law, are essential to the validity of the right, namely, the immediate expression of his intention to purchase and immediate demand.

Cause remanded.

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1 A. 568 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

MAKUNDI LAL (*Plaintiff*) v. KAUNSILA (*Defendant*).*
[24th January, 1878.]

Sale in execution of decree—Right of auction-purchaser to recover purchase-money on the sale being set aside—Fraud on the part of decree-holder—Fraud on the part of auction-purchaser—Minor—Costs.

A decree-holder fraudulently caused the sale in execution of his decree of certain immoveable property belonging to a minor. The minor brought a suit [569] for a declaration that such sale was invalid and obtained possession of the property from the auction-purchaser. The auction-purchaser sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor. *Held per* PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., it being found that the auction-purchaser was not a party to or cognizant of the fraud on the part of the decree-holder, that neither the mere fact that the auction-purchaser knew that he was purchasing the property of a minor, nor the mere fact that he did not ascertain whether or not the sale was justified by the terms of the decree, disentitled him to recover the purchase-money from the decree-holder.

Held also that, being innocent of fraud and having purchased in the *bona fide* belief that the property of the minor was saleable, he was entitled to recover the purchase-money. *Kelly* v. *Gobind Das* (1) distinguished.

Held also that he could not recover the costs incurred by him in defending the suit brought by the minor, being a suit he ought not to have defended.

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* Appeal No. 4 of 1876 under cl. 10, Letters Patent.

(1) H.C.R.N. W. P. (1874), 168.

Per STUART, C. J.—That the auction-purchaser, being guilty of fraud, was not entitled to recover the purchase-money, and, assuming that he was innocent of fraud, that having purchased with the knowledge that the property was the property of a minor and without ascertaining that the sale was justified by the terms of the decree, he could not recover the purchase-money.

[D., 2 A. 780.]

THIS was an appeal to the Full Court under s. 10 of the Letters Patent.

Tikaitin, defendant in the present suit, gave one Hira Singha bond for the payment of money in which, as guardian of her minor son, she mortgaged certain immoveable property belonging to the minor. Hira Singh sued Tikaitin in her own right and as guardian of her son upon this bond, and obtained only a money-decree against Tikaitin personally, in execution of which he was allowed by the Court which made the decree to bring to sale the property of the minor. The property was purchased by Makundi Lal, the plaintiff in the present suit. The minor having subsequently, in a suit against Makundi Lal, obtained a declaration that the sale was invalid, and recovered possession of the property from him, Makundi Lal brought the present suit to recover from Hira Singh and Tikaitin his purchase-money, the costs incurred by him in defending the suit brought by the minor, and interest. Hira Singh pleaded that the plaintiff had no cause of action. The Court of first instance dismissed the suit, holding with reference to the case of *Kelly* v. *Gobind Das* (1) that the suit was barred by the rule *caveat emptor.* The lower appellate Court, relying on *Neelkunth Sahee* v. **[570]** *Asmun Matho* (2) set aside the lower Court's decree and remanded the suit under s. 351 of Act VIII of 1859. Hira Singh having died while the suit was pending in the lower Courts, Kaunsila, the mother and guardian of his minor son, his representative, appealed to the High Court, contending that the case was governed by the decision in *Kelly* v. *Gobind Das* (1) and the rule *caveat emptor* applied. The Court (Stuart, C. J., and Oldfield, J.), having examined the plaintiff as to the circumstances of the sale, differed as to the plaintiff's right to recover the purchase-money.

STUART, C. J.—I am of opinion that the judgment of the Judge is wrong and must be reversed, and that the decree of the Munsif should be restored. The facts are these: On the 20th September, 1867, plaintiff purchased at auction two pies four gandas share in mauza Ballipur Tatta, pargana Chail, in execution of a decree of Hira Singh, father of Beni Prasad, the present defendant, against Tikaitin. This decree had been obtained in a suit on a bond which had been executed by Tikaitin, and in which she hypothecated the property of Ganga Din, who was at the time a minor. She herself had no means or property of her own, and in fact lived on offerings received by her in charity, and the money borrowed, Rs. 100, was to meet her own personal wants, and not on account of any necessity relating to the interest or benefit of her minor son. Ganga Din had been made a defendant in the suit by Hira Singh, but the fact of his minority had been brought before or had come to the knowledge of the Court, for the decree given was against Tikaitin herself exclusively. The attempt, therefore, to execute the decree against the property of the minor could not but fail; and in a suit instituted by the minor, after he became of age, against the auction-purchaser, he obtained a decree, dated

(1) H. C. R. N. W. P. (1874), 168.

(2) H. C. R. N.W. P. (1871), 67.

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the 29th November, 1873, for possession of his property, and which of course had the effect of invalidating and setting aside the auction-sale itself.

Under these circumstances, the auction-purchaser now brings the present suit to recover back from the defendant, Beni Prasad, the son and heir of Hira Singh, the original decree-holder, and Tikaitin, the amount of the sale-price and the costs which he had to pay in the litigation with Ganga Din, together with interest on [571] both. Tikaitin makes no defence, and the other defendant, Beni Prasad, simply denies that there is any cause of action against him, and that he is not liable to the claim. The Munsif was of opinion that the doctrine of *caveat emptor* applied, and in support of this view of the law referred to the ruling of this Court in the case of *Kelly* v. *Gobind Das* (1); he therefore dismissed the claim with costs and interest. On appeal to the Judge the decision of the Munsif was reversed, he relying on another earlier ruling of this Court in the case of *Neelkunth Sahee* v. *Asmun Matho* (2).

In special appeal it is now contended that the plaintiff had purchased with notice of Ganga Din's minority, and that on the authority of the above ruling in *Kelly* v. *Gobind Das* (1) the doctrine of *caveat emptor* clearly applies. The bad faith of the decree-holder in attempting to sell the minor's rights under a decree which applied only to his mother I do not for one moment defend. In such a case as this, however, the decree-holder's conduct, however bad, is immaterial, unless the auction-purchaser is considered to have shown the opposite qualities, and to have acted honestly and in good faith, *i.e.*, that he became the purchaser of the minor's property in the honest belief that it could legally be sold in execution of the decree. The only ground for holding that he entertained such an honest belief was what is stated to have been an official announcement or proceeding read at the time of the sale that the minor's rights would be included. It is stated to have been reported to the Civil Court that the name of Ganga Din's mother was not upon the revenue record, but only his (the minor's), and that, thereupon, the Court made an order to put up the rights of both mother and son to sale. How the Court could have done this, in the face of its own decree, it is difficult, if not impossible, to understand, but of itself it appears to afford no sufficient excuse for the plaintiff's deliberately going on with his purchase; and it cuts both ways, for if it is good for the auction-purchaser it was equally good for the decree-holder, and the latter had as much right and reason to rely upon it as the former; and assuming that they both thus acted in good faith, *i.e.*, in honest reliance on the Court's announcement or order, what is the necessary consequence? Namely, that [572] the decree-holder has at once a good answer and can safely say *caveat emptor* to the plaintiff. After the first hearing of the case we ordered that Makundi Lal, the auction-purchaser, should attend and give his evidence before us as to his knowledge of the facts relating to the sale. He appeared and stated that he was a mahajan and had been such for upwards of twenty years; that he was in the habit of going to the Collector's Court, and it happened that he was there on the day of this sale, and bid. He did not at first know that it was the property of the minor that was to be sold, but a proceeding was read out to the effect that the rights and interest of Tikaitin and Ganga Din, the minor, were to

(1) H.C.R., N.W.P. (1874), 168. (2) H.C.R. N. W. P. (1878), 67.

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be sold in execution of a decree held by Hira Singh. He then knew that it was the property of the minor that was to be sold, and he understood that the money was to be applied on account of expenses incurred in the maintenance of the minor. He does not say anything about the decree, or that he had seen it, or that he knew its terms, but he makes the singular statement that he believed the decree-holder, was present at the sale, that is, in the same place with himself *but he had no conversation with him, he was not acquainted with him.* Notwithstanding, he adds that, from what he had been told about the sale proceeding and the proceeding from the Collector, he was satisfied that the property of the minor could be sold, and he offered Rs. 230. He added that it is not his habit to make enquiries except as regards the value of the property to be sold, and "I take into consideration whether the auction involves any dispute or does not, when the judgment-debtor is a minor. In such a case I do not bid at all. In the present case I thought from what took place that there would be no dispute, and I bid." This is surely a very extraordinary and far from satisfactory explanation by a mahajan of twenty years' experience. There appears to me to be bad faith on the face of his deposition, and that the real meaning and significance of the portion of it I have just quoted was that he determined to take the risk of the minor's subsequently disputing the sale. My belief is that both parties, the decree-holder and auction-purchaser, were in bad faith, and that in trying to overreach each other they have simply contributed to the well-known contention which results in honest men coming by their own. The plaintiff-auction-purchaser tells us distinctly that he made the purchase [573] with the full knowledge that the property belonged to the minor, and that the fact that it was the minor's property was publicly and distinctly announced at the sale. Yet, although the decree-holder was present, he makes the ridiculous excuse that he had no conversation with him, and that he was not acquainted with him, nor did he take any pains to ascertain the terms of the decree. And this from an acute and cautious mahajan of twenty years' experience! The very words of the decree are these,—"Having duly considered the arguments of both the parties, it is ordered that a decree be given in the plaintiff's favour for the amount claimed, with costs and interest, against the female defendant. She is to pay the amount of the decree in a year. Pleaders to get their fees." All this the auction-purchaser was bound to know, and if he was content with the sort of general inquiries he appears to have made, he must take the consequences. He had every opportunity and the means for ascertaining the real state of the case, and I cannot listen to him for one moment when he states that, although the decree-holder was present with him at the sale, nothing passed between them. Under all the circumstances, and having regard to his own evidence, the auction-purchaser must be taken to have had not only full notice of the minority of the person whose property he was seeking to purchase, but as having lent himself to a proceeding not only illegal and invalid in itself but grossly in fraud of the minor's rights. It was argued before us that the doctrine of *caveat emptor* does not apply to a public sale; but for this opinion there does not appear to be any authority, although in a case like the present it is unnecessary to consider the question. Such a view of the law probably arises out of a misapprehension of the rules of the common law of England as to sales in market *overt* but which can have no possible application to the sale in execution of a decree in India of the rights and interests of a minor. And in such a case as this where, under cover of

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a sale of such rights and interests, the minor's property was attached and taken, it would be subversive of all justice if an auction-purchaser was not made to feel the risk he ran, and that, to say the least, he was fully, if not within the principle at least, liable to the penal consequences of the rule of law in question. The peril he undertook was in truth greater than that of a venturous buyer shutting his eyes to [574] his possible danger, for he clearly knew of Ganga Din's minority and all the circumstances when he appeared at the sale, and he therefore not only acted in bad faith, but involved himself in a risk as purchaser which was different from that against, only because it was much greater than that against, which the doctrine of *caveat emptor* is directed. I should add that I cannot accept the ruling of this Court in the case of *Neelkunth Sahee* v. *Asmun Matho* (1); but I fully adhere to my own ruling in the case of *Kelly* v. *Gobind Das* (2), in which the judgment was very carefully considered by Mr. Justice Spankie and myself. There was another case referred to by the respondent, that of *Doolhin Har Nath* v. *Baijoo Oojha* (3), where the auction-purchaser succeeded in recovering his money. The case, however, is not well reported. There was a speciality in respect to the property sold being *jagir*, and, therefore, not subject to sale; and it was stated, although it does not appear from the report to have been proved, that the auction-purchaser was aware of the property being *jagir*. If he was aware of the objection, he acted in bad faith, and I must dissent from the ruling. On the other hand if he was not aware of the nature of the property and of its exemption from sale in execution, then he was simply deceived and misled by the decree-holder, and the judgment of this Court was clearly right. But in neither view of the case would the rule of *caveat emptor* have applied. That doctrine relates to defects, latent defects, which the seller at the inception of the contract, does not or is not bound to know or to inquire into, the purchaser taking the risk of the *status quo*. The doctrine, in truth, if it does not contemplate absolute good faith on both sides, at least puts the burden of inquiry and investigation on the seller, but it has not the same application where there is anything in the nature of bad faith or fraud. The precise terms of the decree cannot be got over, and no announcement by the Court which issued it or by any officer could avail to the contrary; and if the plaintiff might contend that, at any rate, he was misled, it was a misleading which could give him no cause of action against the present defendant, for it was a misleading which he could only share with him, seeing that the defendant was as much entitled to rely on the Court's order (to put up the minor's rights to sale) as [575] the plaintiff. Yet such an order was the plaintiff's only ground for the claim he makes in this suit against the defendant. On the other hand, any difficulty he experienced, and he must, under the circumstances, have felt some, should have put him on his inquiry as to the ownership of, and title to, the property. But he chose to go on, and what he might have easily ascertained, if he did not already know, has come to pass to his loss. In short, the sum and substance of the case is this: the decree-holder attempted to sell the property, and the auction-purchaser took the risk on the chance of the sale not being successfully disputed by the minor and lost his money on the venture. I would decree the appeal, reverse the judgment of the Judge, restore the decree of the Munsif, and dismiss the suit with costs in all the Courts.

(1) H.C.R. N.W.P. (1871), 67. (2) H.C.R. N.W.P. (1874), 168.
(3) H.C.R. N.W.P. (1867), 60.

OLDFIELD, J.—Hira Singh, father of Beni Prasad, defendant, sued on the 17th January 1866, Tikaitin, the mother and guardian of Ganga Din, for the recovery of a sum of money lent on a bond executed in his favour by Tikaitin and her son Ganga Din, and obtained a decree against Tikaitin, dated the 27th January 1866 ; the decree was a mere money-decree and a personal decree against her and not in her representative capacity. In execution of this decree, however, the decree-holder caused the rights and interests of both the lady and of Ganga Din, then a minor, to be sold. It appears that it was reported to the Civil Court that the lady's name was not borne upon the revenue records, but only the minor's name was on the records, and the Court made an order to put up the rights and interests of both persons to sale, and the said rights and interests representing a two-pie four-ganda share in Ballipur, were sold and purchased by the plaintiff on the 20th September 1867. Subsequently Ganga Din, on attaining his majority, brought a suit against the decree-holder and the plaintiff, the auction-purchaser, and Tikaitin to invalidate and cancel the bond and the decree of the 27th January 1866, obtained on it, and to establish his right in the property sold. The decree-holder did not defend the suit, and Tikaitin pleaded that the loan under the bond was a personal loan to herself, and the Court made a decree, on the 29th November 1873, in favour of Ganga Din, and held that the money had not been lent for the use or to meet the necessities of the minor so as to render him or his property liable under Hindu law.

[576] The plaintiff, the auction-purchaser, now sues to recover from the defendant, the son and heir of the original decree-holder, and from Tikaitin, the amount of sale price and costs with interest incurred in the suit brought by Ganga Din against him. The Judge has reversed the decision of the Munsif, who held that plaintiff had no cause of action against defendant, and has remanded the case for trial on the merits. The defendant (heir of the decree-holder) now appeals against this judgment. The facts disclosed appear to me to show an amount of bad faith on the part of the decree-holder such as should entitle the plaintiff to recover from him. The decree he obtained was a mere money-decree against Tikaitin personally, notwithstanding which fact he obtained through the Court in execution of his decree the sale of the rights and interests of the minor whom the decree did not affect. The decree-holder was best acquainted with the nature of the decree he had obtained and cannot be exonerated from the imputation of having deliberately permitted rights and interests of a person not touched by the decree to be sold and bought by the plaintiff. Indeed, he by his pleader appears to have pressed on the Court to order the sale of the minor's interests on the ground that the money had been lent for the maintenance of the minor, a fact disallowed in the suit brought by the minor, where it was held that the money was not lent for the minor's benefit. The decree-holder's bad faith is not confined to the sale-proceedings but attaches to his conduct throughout. The bond which hypthecated the minor's property, and on which the decree-holder obtained his decree, has been held to have represented a loan to Tikaitin for her own use and not for the benefit of the minor, and notwithstanding that Ganga Din was a minor when the bond was executed, yet the decree-holder did not scruple to take a bond in which he the said minor is represented as one of the contracting parties contracting in his own person. I can, on the other hand, discover no grounds for attributing bad faith to the auction-purchaser. No doubt he knew he was purchasing a minor's rights and interests, but this knowledge does not necessarily imply connivance in any fraud on the

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minor, nor have the lower Courts found fraud on his part, nor is it implied that he knowingly bought what he knew was a risky purchase. He seems to have honestly believed that the minor's rights and interests were [577] properly saleable under the decree, and when, in course of execution-proceedings taken by the decree-holder under the decree, the Court ordered the sale of the minor's interests, he was justified in believing that those interests were properly saleable under the decree. He might, perhaps, have been somewhat more careful in looking into the decree, but at most was guilty of some carelessness, and not of the bad faith or sharp practice to which the conduct of the decree-holder appears to me to amount, and I therefore consider his position to be a better one than that of the decree-holder. The cases referred to by the Judge appear to me much in point, while the facts in the case of *Kelly* v. *Gobind Das* (1) appear somewhat different. In that case, Kelly, the auction-purchaser, bought at auction-sale property which he had already privately purchased and then conveyed to his wife, and he must have known the insecure nature of his auction-purchase, which was afterwards set aside at his wife's suit, and he may well have been held to have bought accepting the risk, and so not entitled to recover back his purchase-money from the decree-holder. I would affirm the decree of the lower appellate Court and demand the suit to the Court of first instance, that the amount due to the plaintiff might be ascertained, and a decree to that amount should be given against the heir of the decree-holder as his representative, and I would dismiss this appeal with costs.

The plaintiff appealed to the Full Court against the judgment of Stuart, C.J., under cl. 10 of the Letters Patent, on the ground that (i) there was no evidence to show that he was guilty of laches or fraud, and as the rights of the minor were sold at the instance and on the application of the decree-holder, the decree-holder was liable to make good the loss sustained by the plaintiff; and (ii) that the case of *Kelly* v. *Gobind Das* (1) was distinguishable from the present case, inasmuch as in the present case the conduct of the decree-holder from the beginning was such as to make him liable to the plaintiff's claim.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*) and Munshi *Hanuman Prasad*, for the appellant.

[578] Babus *Oprakash Chandar* and *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:—

STUART, C. J.—I adhere to my first judgment, having heard nothing from the bar when the case came before the Full Bench, or from the other members of the Court, to induce me to change my opinion in any respect.

PEARSON, TURNER, SPANKIE, and OLDFIELD JJ. concurring.—(After stating the facts as set out, the judgment continued):—The purchaser has appealed to the Full Court, and it is contended on his behalf that there is no evidence of any fraud on his part nor of any such laches as disentitle him to recover, and that as a *bona fide* purchaser he is entitled to the return of his purchase-money now that the sale of the minor's share has in effect been set aside. Firstly, then, as to the question of fraud, it is to be noticed that no allegation was made in the written statement filed by the decree-holder imputing fraud to the purchaser. It was indeed stated

(1) H. C. R. N. W. P. (1874), 168.

that he was acquainted with the circumstances set out in the proceeding ordering the sale; that he knew he was purchasing the property of a minor brought to sale for the satisfaction of a debt stated to have been contracted on the minor's behalf; but it was not alleged that he was aware the debt had not been so contracted, nor that he was aware the order for sale was not warranted by the terms of the decree. The Munsiff having dismissed the suit without trial, the only evidence as to the present appellant's knowledge of the circumstances of the sale is that which is to be derived from the examination of the present appellant in the High Court. That evidence is insufficient to justify the inference that he was in any way a party to or had cognizance of the fraud of the decree-holder.

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It is, however, argued that the purchaser ought not to recover his purchase-money because he was aware he was purchasing the property of a minor, and therefore incurring risk, and that in the next place he did not take the pains to see that the order was warranted by the decree. To hold that the purchaser, if the sale of a minor's property is set aside, is not entitled to recover back the consideration from a third party who has brought about the sale and obtained the consideration, would very greatly depreciate the [579] selling value of the property of minors, and no authority has been cited to support the contention. It is not apparent why in purchasing the property of minors the purchaser should be deprived of an equity which cannot injure the minor, and to which a purchaser would be entitled if the property purchased had belonged to a person of full age.

If the doctrine of *caveat emptor* applies where the sale has been practically set aside, then it may be proper to hold that the omission to see that the order of sale was warranted by the decree amounted to such a want of reasonable care as to deprive the purchaser of his right to relief. But should not the question of what amounts to reasonable care be considered in reference to the circumstances of the place? In England purchases of real estates are rarely made without the intervention of a solicitor and a scrutiny of title. In these provinces such precautions are almost entirely unknown. However this may be, it would be going too far to hold that the mere omission to see that the order for sale was warranted by the decree ought to deprive the purchaser of relief under the circumstances at present known to the Court, if on other grounds he is entitled to it. Assuming then that the purchaser was innocent of fraud and purchased in the *bona fide* belief that the minor's property was properly saleable, there seems no reason why he should not recover back his purchase-money from the decree-holder through whose misfeasance the order for sale was obtained. This case is clearly distinguishable from *Kelly's* case (1) which have been cited at the hearing. Here the sale has been virtually set aside so far as regards the rights and interests of the minor, the owner of the share. In *Kelly's* case the sale was not set aside. Kelly, knowing that his wife had already purchased the judgment-debtor's interests in the property offered for sale, purchased what was offered for sale, that is to say, whatever right, title, or interest remained to the judgment-debtor in the property. On similar grounds it has been held in other cases that a purchaser at auction in execution of decree is not entitled to recover back his purchase-money or compensation, although it may be subsequently discovered that the judgment-debtor has a less interest in the property offered for sale than was [580] suggested by

(1) H.C.R., N.W.P., (1874) 168.

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the advertisement or even no interest at all. But in these cases also the sale has not been set aside (1).

But while the present appellant is entitled to recover from the decree-holder his purchase-money and reasonable interest, it cannot be held that he can recover the costs of a suit which he should not have defended. On receiving information of the minor's claim he might have investigated it, and by surrendering the property have escaped the costs of suit. Had he wished to protect himself from those costs he might have informed the decree-holder that he declined to defend the suit unless he obtained a guarantee for the costs. In the absence of such a guarantee he cannot recover anything on this account as against the decree-holder. The decree of the Division Bench, so far as it dismisses the claim to the purchase-money and interest, is reversed, and the order of the Judge affirmed with proportionate costs.

Tikaitin did not appear in the Court of first instance nor in the Judge's Court, nor did she appeal the Judge's order to the Court, but in carrying out the order the Munsif should see that some cause of action is established against this defendant; at present no cause of action is disclosed.

Appeal allowed.

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1 A. 580 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner and Mr. Justice Spankie.

FAKIR MUHAMMAD (*Decree-holder*) *v.* GHULAM HUSAIN AND ANOTHER (*Judgment-debtors*).* [29th January, 1878.]

Execution of decree—Limitation—Act IX of 1871 *(Limitation Act), sch. II, art.* 167—*Application to enforce or keep in force a decree.*

Held by the Full Bench that the date on which an application for the execution of a decree is presented, and not any date on which such application may be pending, is "the date of applying" within the meaning of art. 167, sch. II of Act IX of 1871.

[581] *Held*, by the Division Bench that an application by the decree-holder for the stay of execution-proceedings is not an application to enforce or keep in force the decree, within the meaning of the same law.

[Rel., on, 14 Ind. Cas. 335 (337) = 155 P.L.R. 1912 = 80 P.W.R. 1912; F., 3 A. 757; 30 C. 761 (770); R., 22 B. 722 (726); 10 C.L.J. 479; 1 C.W.N. 260 (263); 8 C.W.N. 251 (255).]

THE decree-holder in this case applied for execution of the decree on the 9th April 1872. On the 28th August 1872, he represented to the Court executing the decree that partial execution thereof had been obtained, and that the parties would probably come to some arrangement respecting the other relief granted by the decree, and to enable this arrangement to be made, he prayed that the proceedings in execution might be stayed for

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* Miscellaneous Regular Appeal, No. 12 of 1876, from an order of Maulvi Muhammad Abdul Majid Khan, Subordinate Judge of Shahjahanpur, dated the 14th December 1875.

(1) See *Muhammad Basirulla* v. *Shaikh Abdulla*, 4 B L. R., App. 35; *Sowdamini Chaudrain* v. *Krishna Kishore Poddar*, 4 B. L. R., F. B. 11 = 12 W. R. F. B. 8; *Rajiblochun* v. *Bimalamoni Dasi*, 2 B. L. R. A. C. 85; and 6 B. H. C. R. A. C. J. 258.

15 days. The Court, however, on the same day, without according time, struck off its file the application for execution. The next application for the execution of the decree, being the present one, was filed on the 28th July 1875. The Court held that this application was barred by limitation. 1878 JAN. 29. FULL BENCH. 1 A. 580 (F.B.).

On appeal by the decree-holder to the High Court it was contended by him that the application for execution dated the 9th April 1872, kept the decree in force up to the date it was disposed of, *viz.*, the 28th August 1872, and that the application of the 28th July 1875, being within three years of that date, was within time.

The Court (STUART, C.J., and TURNER, J.), with reference to this contention, referred to the Full Bench, the question as to the construction to be placed on the term "the date of applying" used in art. 167, sch. II, of Act IX of 1871.

ORDER OF REFERENCE.

This case turns on the construction to be placed on the term "the date of applying to the Court." Does that term mean the date on which an application is made, or can it be interpreted to mean any or the last day on which the application previously made was pending before the Court? The former construction may in many cases work great hardship, and is opposed to the construction placed by the Judicial Committee of the Privy Council on the language of the former Act (1). But grave as the injustice may be, we are constrained to give effect to the law if its terms are free from ambiguity. The point, however, is of such importance that we consider it should be determined by the Full Bench, and refer it accordingly.

[582] Pandit *Bishamber Nath* and Mir *Zahur Husain*, for the appellant.

Munshi *Sukh Ram* and Shah *Asad Ali*, for the respondents.

JUDGMENTS OF THE FULL BENCH.

The following judgments were delivered by the Full Bench:

STUART, C.J.—It appears to me that the judgment of the Privy Council (1) referred to has no application to the present case. That was a judgment under a totally different limitation law from that which we have now to consider. S. 20 of Act XIV of 1859 provided that 'no process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." But the provisions of Act IX of 1871 are much more precise, for under No. 167 of the second schedule the time when the period of limitation begins to run is "the *date of applying* to the Court to enforce or keep in force the decree or order." I can quite understand that this may operate harshly in many cases, but the meaning is too plain, and it is that "the date of the applying to the Court" is the particular day on which the application is actually presented, and not the last or any other day on which the application was pending.

PEARSON, J.—The date of applying must in my opinion be held to be the date of making application. But an application to enforce or keep in force may not be exclusively an application of the nature described in s. 212 of Act VIII of 1859 (2).

(1) See *Matab Chund* v. *Bulram Singh*, 13 M. I. A. 479.
(2) See *Husain Bakhsh* v. *Madge*, 1 A. 525.

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TURNER, J.—However inconvenient may be the construction, I feel bound by the plain terms of the Act to hold that the date of applying means not any day on which an application may be pending but a certain day, the day of its presentation; but the Court may not feel constrained to hold that by the term applying we are to understand only an application to execute the decree. Any application made to a Court during the pendency of proceedings in execution to enforce or keep in force the decree might be held to give a date from which limitation might be calculated, and I am confirmed in this view by the more explicit language of the Act recently passed (1).

[583] SPANKIE, J.—I concur.

The case having been returned to the Division Court, the Court (after stating the facts) delivered the following.

JUDGMENT (DIVISION BENCH).

The period of three years must be computed from the date on which the last application to enforce the decree was filed. It cannot be said that the application of the 28th August 1872, was an application to enforce the decree. It was on the contrary an application for the suspension of the proceedings. Under the circumstances the Court below was right in holding the present application barred by limitation. The appeal is dismissed with costs.

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1 A. 583 (F.B.)=2 Ind. Jur. 792.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner and Mr. Justice Spankie.

WILAYAT-UN-NISSA (*Decree-holder*) *v.* NAZIB-UN-NISSA (*Judgment-debtor*).* [13th February, 1878.]

Execution of decree obtained on bond specially registered—Act XX of 1866 *(Registration Act)* ss. 52, 53, 54, 55—*Appeal.*

Held (STUART, C. J., *dissenting*) that an appeal lies from an order passed in the execution of a decree obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act.

Ramanand v. *The Bank of Bengal* (2) over-ruled. *Petition of Beharee* (3) and *Hurnath Chatterjee* v. *Futtick Chunder* (4) dissented from.

[F., 1 A. 586 (588); 5 B. 673 (676) (F.B.).]

THIS was an application for the execution of a decree which had been obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act. The judgment-debtor objected that the application was barred by limitation, inasmuch as it was governed by art. 166, sch. II of Act IX of 1871. The decree-holder contended that the application was within time, as it was governed by art. 167, sch. II of Act IX of 1871. The Court of first instance held that the period of limitation applicable was that provided in art. 166,

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* Miscellaneous Special Appeal, No. 10 of 1877, from an order of H.M. Chase, Esq., Judge of Aligarh, dated the 27th November 1876, affirming an order of Maulvi Sami-ul-la Khan, Subordinate Judge of Aligarh, dated the 19th May 1876.

(1) See *Hussain Bakhsh* v. *Madge*, 1 A. 525.
(2) 1 A. 377.
(3) 7 W.R. 130.
(4) 18 W.R. 512.

viz., one year, and not that provided in art. 167, *viz.*, three years, and, as [584] the period of one year had elapsed, rejected the application as barred by limitation. 1878 FEB. 13.

On appeal by the decree-holder the lower appellate Court also held that the period of limitation applicable was that provided in art. 166. FULL BENCH.

The decree-holder appealed to the High Court, contending that art. 167 governed the application. The Court (TURNER and OLDFIELD, JJ.) referred to the Full Bench the question whether an appeal would lie from an order made in the execution of a decree obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act. 1 A. 583 (F.B.) = 2 Ind. Jur. 792.

Lala *Lalta Prasad*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—The question submitted to the Court in this reference was raised almost under identical circumstances in a case before and decided by Mr. Justice Oldfield and myself—*Ramanand* v. *The Bank of Bengal*(1)—and to our ruling in that case I advisedly and deliberately adhere. Indeed, the reasoning that arrives at a different conclusion is, to my mind, after an experience of thirty years in the practice of the law, absolutely unintelligible.

The provision in s. 53 of Act XX of 1866 enacts that "such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure," and this lets in the Code *so far as the enforcement of decrees* made under this portion of Act XX of 1866 is concerned, but it does not follow, and it is not the law, that this s. 53 lets in and enforces the *whole* provisions of the Code of Civil Procedure, Act VIII of 1859, relating to the execution of decrees. To hold otherwise would be, in effect, to render nugatory s. 55 of Act XX of 1866 which provides that "there shall be *no appeal* against any decree or order made *under s. 53, s. 54, or this section.*" *To that extent* therefore this section forbids the application of the Code of Civil Procedure, that is, so far as *appeals* are concerned, and only imports the Code [585] "for the *enforcement* of decrees." The ruling of the Calcutta High Court therefore in 7 W. R. 130 and 18 W. R. 512 is clearly right.

It is suggested that the prohibition against appeals in s. 55 is intended only to apply to *orders* passed under that and the two previous sections, and not to decrees in course of execution under the Civil Procedure Code. But no such distinction is admissible in this case. The Civil Procedure Code, so far as it relates to the enforcement of decrees, is, by the sections in question, 53, 54, and the first part of s. 55, made part of Act XX of 1866, only limited by the proviso of the first part of s. 55, which takes away all appeals. In all other respects the Code of Procedure for the enforcement of decrees applies, and this is the meaning of Act XX of 1866 in regard to all decrees and *orders whatsoever* passed "in any proceeding under this part of the Act," as s. 54 provides. The proceeding which is the subject of the reference before us is an order passed on an application for the execution of a decree under s. 53 of the Act, and the order of the Subordinate Judge was that the decree

(1) 1 A. 377.

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was barred by lapse of time, and this is clearly an order within the meaning of s. 55, which take away all right of appeal whatever.

PEARSON, J.—I am of opinion that the orders in execution of the decree given under s. 53 of Act XX of 1866 are not passed under that section, but under the Civil Procedure Code, which that section makes applicable to them, and are appealable under the Code.

TURNER, J.—With every respect for the opinions of those learned Judges who have entertained a different view, I am of opinion that the words "there shall be no appeal against any decree or order made under ss. 53, 54, or this section," are to be construed as confined to decrees or orders passed under the express provisions of the sections of the Act, and that they do not prohibit appeals from orders passed when the decree is in course of execution under the provisions of the Procedure Code. It was evidently intended that in certain cases of special registration a bond-holder should be enabled to go to the Court and obtain an *ex parte* and final decree without having recourse to a suit. To carry out this intention the Legislature provided that the decree so passed should not be open to appeal. But to guard against hardship and injustice the law gave the Court which passed the decree powers to set aside its decree or stay execution, and declared those powers also should not be open to appeal. [586] Where a person has executed a bond consenting at the time of registration that it should be registered in such a manner that the bond-holder may at once obtain a decree, it is intelligible that the law should declare the decree final unless the alleged executant of the bond could show cause why the decree should be stayed. But the reasons which induced the Legislature to declare such decrees and orders final do not extend to orders passed under the provisions of the Civil Procedure Code for the execution of such decrees. Construing the terms of s. 55 strictly, they do not deprive the parties to the decree of such rights of appeal as the Code of Civil Procedure declares to attach to orders in execution passed under the provisions of that Code.

It is a more difficult question whether the execution of the decrees obtained under the Registration Act, 1866, is governed by cl. 166 or cl. 167, sch. II of the Limitation Act, 1871. They are not mere decisions of a Civil Court, but on the other hand they are not decrees or orders passed in a regular suit. They are decrees passed without the formalities prescribed for regular suits. They resemble decrees passed on awards filed under the provisions of the Procedure Code. It has, I believe, never been doubted that the execution of decrees passed on awards is governed by cl. 167 and not cl. 166, and I consider that cl.167 is equally applicable to decrees obtained under the special provisions of the Registration Act of 1866.

SPANKIE, J.—I concur in the views expressed by Mr. Justice Turner on the point expressly referred to.

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FULL BENCH.

1 A. 586 (F.B.).

1 A. 586 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

JAI SHANKAR AND ANOTHER (*Decree-holders*) *v.* TETLEY (*Judgment-debtor*).* [23rd January, 1878.]

Execution of decree obtained on bond specially registered—Act XX of 1866 (*Registration Act*), *ss.* 52, 53—*Limitation—Act* XI *of* 1871 (*Limitation Act*), *sch. II, arts.* 166, 167.

Held that art. 167, and not art. 166, sch. II of Act IX of 1871, applies to an application for the execution of a decree made under the provisions of s. 53 of Act [587] XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act.

[Diss., 5 B. 673 (676).]

THIS was an application for the execution of a decree which had been obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act. The judgment-debtor objected that the application was governed by art. 166, sch. II of Act IX of 1871, and was barred by limitation, and also that, even if it were governed by art. 167 of the same schedule, it was barred by limitation. The Court of first instance held that the application was barred by limitation under art. 166 and also under art. 167, sch. II of Act IX of 1871.

The decree-holders appealed to the High Court, contending that art. 166, sch. II of Act IX of 1871, was not applicable; that even if it were, the application was within time; and that art. 167 was applicable, and the application was within the time prescribed by the same.

The Court (STUART, C.J., and TURNER, J.) referred to the Full Bench the question whether the application was governed by art. 166 or art. 167, sch. II of Act IX of 1871.

Mr. *Conlan*, Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellants.

Mr. *L. Dillon* and Mir *Akbar Husain*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

STUART, C.J.—I agree with the other members of the Court that the appeal in this case must be allowed. Art. 167, sch. II of Act IX of 1871 clearly applies and governs the case, and the application therefore is not barred.

PEARSON, J.—In my opinion the appeal lies. The law of limitation applicable to the case appears to be art. 167, sch. II of Act IX of 1871. Art. 166 is not applicable, for execution is not sought of a decision but of a decree. The application is clearly within three years of preceding applications to enforce or keep in force the decree, and is therefore not barred.

TURNER, J.—It is admitted at the bar that the application is not barred by limitation, if the application is governed by art. 167, sch. II of Act IX of 1871. There were clearly applications sufficient [588] to keep

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* Miscellaneous Regular Appeal, No. 34 of 1877, from an order of Maulvi Sam-i-ul-la Khan, Subordinate Judge of Aligarh, dated the 16th April 1877.

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the decree alive made within three years before the present application was presented. That the application is governed by the provisions of that article I have held in Miscellaneous Special Appeal No. 10 of 1877 (1). The order of the Court below must be reversed, and the proceedings returned to that Court that the application may be disposed of on the merits. The costs of this appeal should abide and follow the result.

SPANKIE, J.—I concur in the view expressed by Mr. Justice Turner.

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1 A. 588.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

ALISHA (*Plaintiff*) *v.* HUSAIN BAKHSH AND ANOTHER (*Defendants*).*
[4th February, 1878.]

Sale in execution of decree—Auction-purchaser—Lis pendens—Res Judicata—*Act VIII of* 1859 (*Civil Procedure Code*, s. 2).

A, the auction-purchaser of certain immoveable property at a sale in execution of a decree, purchased with notice that a suit by *H* and *M* against the judgment-debtor and the decree-holder for a share in such property was pending, but did not intervene in such suit. Before the sale to *A* was made absolute, *H* and *M* obtained a decree in the suit for a moiety of the share claimed by them. *A* took no steps to get such decree set aside, but sued them to establish his right to such moiety in virtue of his auction-purchase. It appeared that the Court which passed the decree in favour of *H* and *M* did so without jurisdiction. *Held* that, inasmuch as the suit in which such decree was made was tried and determined by a Court having no jurisdiction, it could not be held that *A* was bound to intervene in it and dispute the claim preferred therein, or that he was bound by such decree, and that it could not be said that *A* was bound to take steps to get such decree set aside by means of appeal, or that because he had omitted to do so, it had become binding on him, and his suit was precluded.

Quære, where the doctrine of *lis pendens* applies in the case of purchase in execution of decree.

[F., 10 B. 400 (405); R., 28 B. 378 (381).]

THIS was a suit for possession of a one biswa ten biswansis share in a certain village. This share was included in an eight-biswas share which belonged to two brothers, Khoda Bakhsh and Ghulam Hussain. Khoda Baksh pre-deceased Ghulam Hussain, leaving a [589] widow, Rajbibi, and a son, Ali Bakhsh. Before his death Khoda Bakhsh conveyed to Rajbibi his rights and interests in this property in lieu of dower. In July 1863, Rajbibi obtained possession of a portion of the property in execution of a decree obtained by her against her son. While Rajbibi was in such possession, she borrowed money from one Behari Lal, charging the whole property with the payment of the money borrowed. Behari Lal sued Rajbibi to recover this money and obtained a decree against her. In execution of this decree the whole property was attached and advertised for sale. Husain Bakhsh and Mahammed Ali, the sons of a daughter of Ghulam Hussain, preferred a claim to the share in the property of their maternal grandfather, but their claim was disallowed. They accordingly sued Behari Lal and the legal representatives of Rajbibi, who had

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* Second Appeal, No. 1183 of 1877, from a decree of S. Melville, Esq., Judge of Meerut, dated the 19th June 1877, affirming decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 7th September 1876.

(1) See *Wilayat-un-nissa* v. *Najib-un-nissa*, *ante*, 1 A. 583.

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meantime died, in the Munsiff's Court to establish their right to, and obtain possession of, a three biswas share out of the eight biswas, applying to the Munsif at the time of instituting the suit, for a postponement of the sale of so much of the property. The Munsif requested the Court executing the decree to postpone the sale of a three biswas share, but that Court refused to do so. It, however, notified at the sale that such a suit was pending. The property was sold and was purchased by Ali Shah, the plaintiff in the present suit. After his purchase, but before the sale was confirmed, the Munsif gave Husain Bakhsh and Muhammad Ali a decree against Behari Lal and the legal representatives of Rajbibi for a moiety of their claim, which decree was eventually affirmed by the High Court. Ali Shah did not intervene in this suit, nor did he take any steps to get the decree set aside. He now claimed possession of the moiety for which Husain Bakhsh and Muhammad Ali had obtained a decree in virtue of his auction-purchase. The Court of first instance held that the doctrine of *lis pendens* was applicable to the suit, and the plaintiff was bound by the judgment of the Munsif in the suit brought by Hussain Bakhsh and Muhammad Ali, and dismissed his suit. On appeal by the plaintiff the lower appellate Court concurred in this ruling.

On special appeal by the plaintiff to the High Court it was contended by him that the doctrine of *lis pendens* was not applicable; and that, as the value of a three-biswas share of the property exceeded Rs. 1,000, the Munsif's decree was made without juris-[590] diction, and under these circumstances the plaintiff was not bound to take notice of the suit nor was he affected by the decree.

Munsif *Hanuman Prasad*, Babu *Oprokash Chandra*, and *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—It seems to us very doubtful whether the doctrine of *lis pendens* applies in this case. The decree passed by the Munsif in the suit brought by the heirs of Gulam Husain against the heirs of Rajbibi and her decree-holder, Behary Lal, was passed before the present plaintiff had acquired a title to the rights and interests of Rajbibi aforesaid as auction purchaser by the confirmation of the auction-sale. Moreover, that doctrine appears to be applicable to cases in which the alienation is of a voluntary nature, and not to an alienee who has bought a property sold in execution of a decree (1). Doubtless also there is irresistible weight and force in the last ground of appeal. The rights and interests purchased by the plaintiff at auction-sale, which may be assumed to represent an eight-biswas share, fetched a price of Rs. 15,000. The one and a half biswa claimed in the present suit is valued at Rs. 2,784 6-0. It cannot then be doubted that the value of the three biswas claimed in the suit of Gulam Husain's heirs exceeded Rs. 1,000, and that the suit was not cognizable by the Munsif. It would be unreasonable to hold that the present plaintiff was bound to intervene in that suit, and to dispute the claim preferred in a Court which had not jurisdiction to dispose of the matter. We must add that he cannot be bound by a decree which is

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(1) See, however, *Manual Fruval* v. *Sanagapalli*, 7 M. H. C. R. 104, where the doctrine was applied in the case of a sale in execution of a decree *pendente lite*.

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patently invalid, and for that reason could not bind even the parties to the suit in which it was passed. The question which was tried and determined in that suit is not a *res judicata*, because the Court which determined it was not a Court of competent jurisdiction, and is therefore open to be adjudicated in the present suit. The decree passed in that suit being invalid for want of jurisdiction and nullity, we cannot say that the present plaintiff, as successor in title to Rajbibi, was bound to take steps to get it set aside by means of appeal, or that, because he omitted to [591] do so, it has become binding upon him, and that he is precluded from bringing this suit. Accordingly we set aside the decrees passed by the lower Courts in this suit, and remand it to the Court of first instance under ss. 562 and 587 of Act X of 1877 for disposal on the merits, with a direction that the costs of the parties in all the Courts shall follow the result.

Cause remanded.

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1 A. 591.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

DURGA PRASAD AND ANOTHER (*Plaintiffs*) *v.* NAWAZISH ALI AND ANOTHER (*Defendants*).* [6th February, 1878.]

Pre-emption—Conditional Decree.

Where the plaintiff in a suit to enforce the right of pre-emption sued alleging that the actual price of the property was not the price entered in the sale deed but a smaller price, and claimed the property on payment of such smaller price, and did not allege in his plaint that he was ready and willing to pay any price which the Court might find to be the actual price, and on the day that his suit was finally disposed of, presented an application to the Court stating that he was ready and willing to do so, *held* that the Court was not bound to allow him to amend his plaint and bring into Court the larger sum (1).

[D., 3 A. 753 (755).]

THIS was a suit to enforce the plaintiffs' right of pre-emption in respect of a share in a certain village, the suit being founded upon a special agreement contained in the village administration paper. The plaintiffs claimed the right on payment of Rs. 1,800, which sum they alleged was the actual price paid for the property, and not Rs. 2,790, the price entered in the deed of sale. They did [592] not state in their plaint that they were willing to pay any sum that might be found to be the actual price of

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* Second Appeal, No. 1212 of 1877, from a decree of C. J. Daniell, Esq., Judge of Mainpuri, dated the 15th September 1877, affirming a decree of Maulvi Hamid Hasn Khan, Subordinate Judge of Mainpuri, dated the 13th July 1876.

(1) See also *Kudhara* v. *Khuman Singh*, H.C.R.N.W.P., (1866), 265, and *Achurbur Panday* v. *Buckshee Ram*, 2 W.R. 38. In the first case the person claiming the right of pre-emption refused to give a certain sum for the property on the ground that a certain smaller sum was the actual price, and sued to enforce his right on payment of such smaller sum. It was held that, it having been found that the larger sum was the actual price, the plaintiff's suit was properly dismissed. In the second case the plaintiff not only sued to enforce his right of pre-emption on payment of a specific sum, but in respect also of a specific property. The right alleged being found to have no existence, his suit was properly dismissed. See also *Madhub Chunder* v. *Tomee Bewah*, 7 W.R. 210, in which case also the principle that a person claiming the right of pre-emption must take the bargain as it was made or not at all, is recognised.

the property. The suit was instituted on the 20th November 1875. On the 13th July 1876, the date on which the Court of first instance finally disposed of the suit, they made an application to that Court offering to pay whatever sum the Court might adjudge to be the actual price. The Court refused to entertain this application; and finding that the actual price of the property was Rs. 2,790, dismissed the suit. On appeal by the plaintiffs the lower appellate Court affirmed the decision of the Court of first instance.

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1 A. 591.

On second appeal by the plaintiffs to the High Court, they contended that they were entitled to a conditional decree, having offered before the suit was decided to pay any sum that might be adjudged to be the actual price of the property.

Mr. *Mahmood* and Pandit *Ajudhia Nath*, for the appellants.

Mr. *Colvin*, Pandit *Bishambhur Nath* and Lala *Ram Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—We cannot hold as a matter of law that the Court of first instance was bound to allow the plaintiff to amend his plaint, and to bring in the very much larger sum which he should have offered to pay when he brought his suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

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1 A. 592.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

BIJAI RAM (*Defendant*) v. KALLU (*Plaintiff*).*
[11th February, 1878.]

Pre-emption—Limitation—Act IX of 1871 (*Limitation Act*), *sch. ii, art.* 10.

In 1861 *B* purchased conditionally certain immoveable property which in 1865 was attached in execution of a decree. In 1874, the conditional sale having been foreclosed, *B* obtained a decree for possession of such property. In February 1875, he obtained mutation of names in respect of such property.

[593] In November 1875, arrangements having been made by him to satisfy the decree in execution of which such property had been attached, the attachment was removed. In December 1875, he acknowledged having received possession of such property in execution of his decree. *K* sued him in November 1876, to enforce his right of pre-emption in respect of such property. *Held*, that limitation ran from the date when *B* obtained such possession of that status of his conditional vendor as entitled him to mutation of names and to the exercise of the rights of an owner, and that the suit was barred by limitation. The principle laid down in *Jageshar Singh* v. *Jawahir Singh* (1) followed.

THIS was a suit to enforce the plaintiff's right of pre-emption in respect of a certain share in a certain village, the right being founded upon custom and upon a special agreement contained in the village administration-paper. The cause of action was stated in the plaint to have arisen on the 17th December 1875, when the defendant, vendee,

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* Second Appeal, No. 1145 of 1877, from a decree of C. A. Daniell, Esq., Commissioner of Jhansi, dated the 20th July 1877, affirming a decree of J. S. Porter, Esq., Deputy Commissioner of Jhansi, dated the 7th April, 1877.

(1) 1 A. 311.

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obtained possession of the property. The suit was instituted on the 16th November 1876. The defendant set up as a defence to the suit that it was barred by limitation. It appeared that the property was conditionally sold to the defendant under a deed, dated the 10th September 1861. On the 29th March 1865, the property was attached in execution of a decree. On the 7th November 1868, under proceedings taken by the defendant under the conditional sale, notice of foreclosure was issued to the conditional vendor. On the 4th July 1874, the conditional sale having been foreclosed, the defendant obtained a decree for possession of the property. On the 5th February 1875, he obtained mutation of names in respect of the property. On the 18th November 1875, arrangements having been made by him to satisfy the decree under which the property had been attached on the 29th March 1865, the property was released from attachment. On the 17th December 1875, he acknowledged that he had received possession of the property in execution of the decree dated the 4th July 1874. The Court of first instance held, with reference to the case of *Jageshar Singh* v. *Jawahir Singh* (1), that the suit was within time, as the property did not vest in the defendant till the 17th December 1875, and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court concurred in the view taken by the Court of first instance of the question of limitation and affirmed the decree.

[594] On second appeal by the defendant to the High Court, it was contended that, with reference to the principle laid down in the case cited above, the suit was barred by limitation.

Munshi *Hanuman Prasad*, for the appellant.

Mr. *K. M. Chatarjee*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—The principle laid down in the Full Bench judgment of the Court (1) governs this case. The appellant was not bound to discharge the debts in respect of which the property was attached immediately he had obtained his decree confirming the sale. He took such possession as he then could obtain. The appellant having established his title, carried his decree to the revenue office, and got his name entered in substitution for that of the former owner, and having obtained such possession as the nature of the property admitted, he then set himself to discharge the incumbrances for which it was under attachment. Limitation in such a case runs from the date when he obtained possession of the status of the owner sufficient to enable him to procure mutation and to exercise the rights of an owner. The appeal is decreed, the decrees of the Courts below reversed, and the suit dismissed with costs.

Appeal allowed.

(1) 1 A. 311.

1 A. 594=2 Ind. Jur. 722.

1878 FEB. 13.

APPELLATE CIVIL.

1 A. 594= 2 Ind. Jur. 722.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

RUKA BAI (*Plaintiff*) v. GANDA BAI (*Defendant*).*
[13th February, 1878.]

Hindu Law—Decree for Maintenance—Suit for Reduction of maintenance,

A Hindu lady obtained a decree awarding her maintenance at a certain fixed rate and charging the assets of a certain firm with the payment of such maintenance. There was no provision in this decree that such rate was subject to any modification which future circumstances might render necessary. The assets of such firm having diminished the proprietor of the same brought a suit [595] for the reduction of such rate of maintenance. *Held* that such suit was maintainable (1).

[Ap., 24 B. 386 (392); 22 M. 175 (177); R., 26 B. 707 (709).]

THIS was a suit in which the plaintiff claimed the reduction of an allowance payable by her to the defendant out of the assets of a firm of which she was the proprietor. One Gulab Rai, the head of a joint and undivided Hindu family, carried on business under the style of Gulab Rai Chura Mal. The defendant in this suit, who was the daughter of Gulab Rai, obtained a decree in 1876 which awarded her as maintenance an allowance of Rs. 30 per mensem so long as the firm of Gulab Rai Chura Mal should exist. The present suit was brought by the widow of Munna Lal, son of Gulab Rai, as the proprietor of the firm, for the reduction of this allowance on the ground that the business of the firm of Gulab Rai Chura Mal, was gradually failing. The Court of first instance gave the plaintiff a decree directing that the defendant's allowance should be reduced to Rs. 20 per mensem, intimating that if the business of the firm of Gulab Rai Chura Mal improved, the defendant would be entitled to claim an increase in her allowance. The lower appellate Court, on appeal by the defendant, dismissed the suit as unmaintainable, on the ground that the plaintiff had no cause of action.

The plaintiff preferred an appeal to the High Court.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), with him Pandit *Ajudhia Nath*, for the appellant, contended that the suit was maintainable. At the time the defendant's allowance was fixed at Rs. 30 per mensem, and made a charge on the assets of the firm, those assets were capable of meeting such a charge without detriment to the firm. The plaintiff has shown that the assets are not now capable of meeting the charge without detriment to the firm, and is therefore entitled in equity to a reduction of the allowance. The Mofussil Courts being Courts of equity can entertain the suit. There is no law prohibiting such a suit. In an administration suit there is always a direction in the decree that [596] the parties to the suit may apply to the Court from time to time

* Second Appeal, No. 1290 of 1877, from a decree of C. A. Daniell, Esq., Commissioner of Jhansi, dated the 22nd August 1877, reversing a decree of J. V. Stuart, Esq., Assistant Commissioner, dated the 12th May, 1877.

(1) In *Ram Kullee Koer* v. *The Court of Wards*, 18 W.R. 474; and *Nubo Gopal Roy* v. *Sreemuttee Amrit Moyee Dossee*, 24 W.R. 428, the principle is recognised that the rate of maintenance fixed by a decree is subject to any modification which future circumstances may render necessary. In the first mentioned case, however, it was held that such modification should be made by review of judgment.

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as they may be advised touching the estate of which administration is sought.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.— The appeal must prevail. The diminution of the income of the estate on which the defendant's income is chargeable, since her allowance was fixed, is obviously a sufficient cause for the present action of which the object is the reduction of the allowance formerly fixed. It would be unreasonable to hold that, even if the income of the estate should come to an end altogether, that allowance should still continue ; and therefore it must be liable to be reduced in proportion to the existing income. We set aside the lower appellate Court's decree and remand the case to it for fresh disposal on the merits, with a direction that the costs of this appeal shall follow the result.

Appeal allowed.

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1 A. 596=2 Ind. Jur. 722.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

GULZARI LAL AND OTHERS (*Defendants*) *v.* THE COLLECTOR OF BAREILLY (*Plaintiff*).* [15th February, 1878.]

Act VIII of 1859 *(Civil Procedure Code)*, ss. 270, 309—*Pauper Suit—Attachment in Execution of Decree—Court Fees—Prerogative of the Crown.*

N was allowed to bring a suit as a pauper. His suit was dismissed, the decree directing that he should pay the costs of the defendant. On the defendant's application certain immoveable property belonging to *N* was attached in execution of this decree, and was sold. *Held* that the Crown was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees *N* would have had to pay if he had not been allowed to sue as a pauper. The principle of the ruling in *Ganpat Putaya* v. *The Collector of Kanara* (1) followed.

[R., 33 C. 1040=10 C.W.N. 857.]

THIS was a suit for Rs. 84-2-0. One Nait Lal had sued Gulzari Lal and certain other persons, defendants in this suit, in *forma* [597] *pauperis.* His suit was dismissed by the Court of first instance with costs. He appealed, and his appeal was dismissed and the decree of the Court of first instance affirmed with costs. Gulzari Lal and other persons applied to recover, in execution of these decrees, the sum of Rs. 787, being the costs incurred by them in defending the suit, and certain houses belonging to Nait Lal were accordingly attached. Subsequently, on the application of the Collector of the District, the Court executing the decrees ordered that the property should be sold in satisfaction of the amount which Nait Lal would have had to pay as Court fees had he not been allowed to sue and appeal as a pauper, *viz.*, Rs. 530-8-0, as well as in satisfaction of the demand of Gulzari Lal and the other persons, and that the Collector should be paid

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* Second Appeal, No. 1142 of 1877, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 10th July 1877, reversing a decree of Muhammad Mubarik Baz Khan, Officiating Munsif of Bareilly, dated the 9th January, 1877.

(1) 1 B. 7.

first out of the sale proceeds. The property was sold and realized Rs. 155. After the confirmation of the sale the Court made another order under which the Collector and Gulzari Lal and the other persons were paid out of the sale proceeds rateably; the former getting Rs. 62-2-0 the latter Rs. 84-2-0. The present suit was brought by the Collector to contest this order. The Court of first instance dismissed the suit, holding that, under s. 270 of Act VIII of 1859, the defendants were entitled as attaching creditors to be first paid out of the sale-proceeds. It distinguished the present case from that of *Ganpat Putaya* v. *The Collector of Kanara* (1) on the ground that in the present case the pauper suit had been dismissed. On appeal by the plaintiff the lower appellate Court held that the principle laid down in the Bombay case applied, and gave the plaintiff a decree.

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The defendants appealed to the High Court, contending that the decision of the lower appellate Court was opposed to the provision of s. 270 of Act VIII of 1859, under which they were entitled as attaching creditors to be paid first out of the sale-proceeds; and that the case relied on by the lower appellate Court was not applicable.

Munshi *Hanuman Prasad*, for the appellants.

The Senior Government Pleader (Lala *Jwala Prasad*), for the respondent.

JUDGMENT.

[598] The following judgment was delivered by the Court:—

PEARSON J.—The principle of the ruling of the Bombay Court (1), on which the lower appellate Court has relied, appears to us to be reasonable and we decline to interfere.

Appeal dismissed.

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1 A. 598.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

ABASI (*Plaintiff*) v. DUNNE (*Defendant*).* [15th February, 1878.]

Custody of Minor—Guardian—Muhammadan Law.

Held, where the plaintiff sued for the custody of her minor sister as her legal guardian under the Muhammadan law, that the fact of the plaintiff being a prostitute was, although she was legally entitled to the custody of such minor, a sufficient reason for dismissing the suit in the interests of such minor.

[R., 26 A. 594; 10 Ind. Cas. 904 (905); 25 M.L.J. 661 (678).]

THIS was a suit for the custody of the plaintiff's minor sister, Chittan, the suit being based on the plaintiff's right of guardianship under Muhammadan law. In November 1871, the Sessions Judge of Cawnpore tried a case in which the plaintiff in this suit, who was a prostitute by profession, had charged another prostitute with obtaining possession of Chittan for the purposes of prostitution. The accused was acquitted by the Sessions Judge, with an injunction to the Magistrate of the district to make suitable arrangements for the welfare of the minor. The Magistrate procured Chittan's admission to the Ghuttia Orphanage at Cawnpore. The present

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* Special Appeal, No. 1312 of 1877, from a decree of J.H. Prinsep, Esq., Judge of Cawnpore, dated the 30th August, 1877, affirming a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 9th January 1877.

(1) 1 B. 7.

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suit was instituted against the Magistrate and the Superintendent of the Orphanage. The lower Courts dismissed the suit on the ground that the plaintiff, being a prostitute, was not a proper person to have the custody of the minor.

The plaintiff appealed to the High Court, contending that under Muhammadan law she was the legal guardian of the minor and therefore entitled to the custody of her person.

Maulvi *Obeidul Rahman*, Mir *Akbar Husain* and Mir *Zahu Husain*, for the appellant.

[599] The Senior Government Pleader (Lala *Jwala Prasad*) for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The claim in this suit was simply for the recovery of the minor, Chittan, from the custody of the Government; and the fact that the plaintiff is a prostitute, and therefore an unfit person to have the charge of the girl, seems to be a sufficient reason for dismissing the claim in the interest of the minor. It may be admitted that the plaintiff would, under the Muhammadan law, be *prima facie* entitled to the guardianship of her younger sister were her fitness for the charge established; but her own bad character and manner of life must be held to disqualify her; and we must affirm the decree of the lower Courts dismissing her suit. It is stated in the plaint that the tenets of Christianity are being imparted to the minor at the Orphanage at which she has been placed by the Magistrate, and that "in bringing her claim, the plaintiff prays that the Court, after satisfying itself that the plaintiff would not bring up the minor in her own trade of prostitution, and that she would marry her according to Muhammadan law, may order the minor to be given to her." But it is difficult to see how the minor, if made over to her, could be secured from the evil effects of her example, influence, and association. The appeal is dismissed with costs.

Appeal dismissed.

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1 A. 599=2 Ind. Jur. 723.

CRIMINAL JURISDICTION.

Before Mr. Justice Turner and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* MULUA. [15th February, 1878.]

Regulation IV of 1797, s. 3—*Act XLV of* 1860 *(Indian Penal Code)*, s. 302—*Act VI of* 1861—*Act XVII of* 1862, ss. 1, 2, 4—*Act I of* 1868 *(General Clauses Act)*, ss. 3, 6—*Act VIII of* 1868—*Act X of* 1871 *(Criminal Procedure Code)*.

Up to the 1st January 1862, a person committing the offence of murder was liable to trial and punishment under the Regulations. By Act XVII of 1862, the Regulations prescribing punishments for offences were repealed "except as to any offence committed before the 1st January 1862." By the same Act it was declared that no person who should claim the same should be deprived of any right of appeal or reference which he would have enjoyed under such Regulations. By s. 6 of Act I of 1868 the repeal of an [600] Act does not affect any thing done, or any offence committed, or any fine or penalty incurred before the repealing Act shall have come into operation. Under the provisions of this section the repeal of Act XVII of 1862 by Act VIII of 1868 and Act X of 1872 did not, in respect of offences committed before the 1st January 1862, affect the penalties

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prescribed by such Regulations nor were any of the Regulations prescribing punishments for offences which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January 1862, prior to the passing of Act I of 1868.

Held accordingly, where a person committed murder in the year 1855, that such person was punishable under the Regulations.

Held also that, inasmuch as such a right as the right of reference given by s. 3 of Regulation IV of 1797 accrues on conviction, and therefore in the present case had not accrued before Act XVII of 1862 was repealed, it is doubtful whether a person convicted of murder committed before the 1st January 1862, has such right.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, which was delivered by

TURNER, J.—The prisoner was charged with the offence of murder committed in the year 1855. On that charge he was tried by the Judge of Fatehgarh and convicted and sentenced, under the Regulation in force before the 1st January, 1862, to transportation for life. The Judge has submitted the sentence for confirmation, and at the same time has called the attention of the Court to a Full Bench ruling of the High Court of Calcutta (1), in which it has apparently been held that a person who has committed an offence prior to the 1st January, 1862 could not now be legally convicted and sentenced. We say apparently it was so held, because such was the opinion expressed by the learned Judges before whom the case was originally heard, and although the judgment of the Full Bench proceeds on grounds which do not necessarily involve that conclusion, the conviction was pronounced illegal and set aside.

Up to the 1st January, 1862, the law under which persons were liable to trial and punishment for the offence of which the prisoner has been convicted was declared in the Regulations. On the 1st January, 1862, the Indian Penal Code came into operation, for although in the Code itself the date on which it should [601] take effect was declared to be the 1st May, 1861, that date was altered by the subsequent Act VI of 1861. By Act XVII of 1862, ss. 1 and 2, the Regulations and Acts prescribing punishments for offences were repealed from the 1st January, 1862, "*except as to any offence committed before the 1st January*, 1862." In respect of those parts of India in which the Code of Criminal Procedure came into operation on the 1st January, 1862, the Acts and Regulations theretofore regulating procedure in the trial of offences were by s. 4 of the same Act, XVII of 1862, repealed ; and it was declared that thereafter the Criminal Courts should be guided by the Code of Criminal Procedure and exercise the powers and jurisdiction vested in them under the said Code, provided that no person convicted of an offence committed before the 1st January, 1862 should be liable to any other punishment in respect of such offence than that to which he would have been liable had he been convicted of such offence before the said first day of January 1862, and that no person who should claim the same should be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed under any of the Regulations or Acts thereby repealed.

The effect then of Act XVII of 1862 was this ; it left the Regulations and Acts under which offences were therefore punishable unrepealed in respect of an offence committed before the 1st January, 1862 ; and while it declared that the Criminal Courts should in the investigation and trial of offences be thereafter guided by the provisions of the Code of Criminal

(1) *Empress* v. *Diljour Misser*, 2 C. 225.

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1 A. 599 = 2 Ind. Jur. 723.

Procedure, and enjoy the powers and jurisdiction conferred on them by that Act, it saved offenders guilty of offences committed before the 1st January, 1862 from liability to any other punishment in respect of such offences than that to which they would have been amenable under the repealed Regulations and Acts, and secured to them the same rights of reference and appeal to the Sudder Court which they would have enjoyed if they have been tried under the Regulations and Acts thereby repealed.

By the General Clauses Act, I of 1868, s. 3, it is provided that in all Acts made by the Governor General in Council for the purpose of reviving either wholly or partially a Statute, Act, or [602] Regulation repealed, it shall be necessary expressly to state such purpose, and by s. 6 of the same Act it is enacted that the repeal of any Statute, Act, or Regulation shall not affect any thing done or any offence committed, or any fine or penalty incurred before the repealing Act shall have come into operation. By the repealing Act VIII of 1868 the 1st, 2nd and 7th sections of Act XVII of 1862 were repealed, and by Act X of 1872 the sections of the Act then unrepealed were also repealed. There being no express words to that effect, the repeal of Act XVII of 1862 of course did not revive the Regulations in so far as they had been repealed by the Act, but neither did it operate to repeal those Regulations in so far as they were not repealed by the Act. Thus in respect of offences committed prior to the 1st January, 1862, the penalties prescribed by the regulations were not affected by the repeal of Act XVII of 1862, nor, as far as we can discover, were any of the Regulations prescribing punishments for offences, which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January, 1862, prior to the passing of the General Clauses Act, I of 1868.

We agree with the High Court of Calcutta that a person could not be convicted of an offence committed prior to the 1st January, 1862, under Act XVII of 1862, and for this reason, that that Act was a repealing Act and not an Act providing for the punishment of such offences. But it is another question whether persons who have committed offences prior to the 1st January. 1862 are not amenable to punishment under the Regulations. To the several repealing Acts passed since the General Clauses Act came into operation, the provisions of s. 6 of the General Clauses Act apply, and the repeal of the Regulation subsequently to the passing of the Act does not relieve offenders from the penalties to which they were liable under the Regulations.

It is a more difficult question whether the righ tof reference remains after the repeal of Act XVII of 1862. That right had not accrued before the Act was repealed, for it accrued on conviction and the conviction did not take place till after the repeal of Act XVII of 1862 ; but to avoid any illegality by the omission of confirmation if it be still required, we have considered the case on the [603] merits and hold the conviction justified by the evidence and the sentence not improper. We therefore confirm it.

Conviction affirmed.

1 A. 603=2 Ind. Jur. 725.

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APPELLATE CIVIL.

1 A. 603=
2 Ind. Jur.
725.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

BALDEO PANDAY (*Plaintiff*) v. GOKAL RAI (*Defendant*).*
[19th February, 1878.]

Bond—Interest.

G gave *B* a bond for the payment of certain money within a certain time, with interest at the rate of 1¾ per cent. per mensem, in which he agreed that, in case of default, the obligee "should be at liberty to recover the principal money and interest from his person and property" and mortgaged "his four-anna share in mauza K until payment of the principal money and interest." *Held* that the bond contained an express contract for the payment of interest after due date at the rate of 1¾ per cent. per mensem, and that such contract was enforceable.

Semble that, where there is no express agreement fixing the rate of interest to be paid after the date a bond becomes due, an agreement to pay at the rate of interest agreed to be paid before such date cannot be implied, but the Court must determine what would be a reasonable rate to allow. In such a case the rate agreed to be paid before such date may ordinarily be regarded as the rate to be allowed after such date, provided that the rate agreed to be paid before such date is not excessive.

[F., 7 A. 333=5 A.W.N. 27; 3 A.W.N. 35; Ap., 2 A. 639 (640); R., 2 A. 617; 11 A. 416 (419)=9 A.W.N. 165.]

THIS was a suit for money charged on immoveable property by a bond. This bond was dated the 8th January, 1872, and the plaintiff claimed to recover thereunder Rs. 1,913-11-0, principal and interest. The suit was instituted on the 11th May, 1877. The facts of the case are sufficiently stated for the purposes of this report in the judgments of the High Court, to which the plaintiff appeals against the decree of the lower appellate Court.

Munshi *Kashi Prasad* and Shah *Asad Ali*, for the appellant.

Mr. *J. E Howard*, the Senior Government Pleader (Lala *Juala Prasad*) and Pandit *Bishambhar Nath*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court.

STUART, C. J.—In this case I think the appeal must be allowed. I am not sure that I quite follow the Subordinate Judge in the [604] reasons he assigns for his judgment, but his order is clearly right and ought to be restored. The Judge, on the other hand, is as clearly wrong in allowing interest at the rate of six per cent. per annum "from the date when the bond fell due," evidently thinking that that was at the end of two years. He is also of opinion that the rate of interest stipulated in the bond, *viz.*; twenty-one per cent., is excessive. I differ from him on both points. The bond is in the following terms: "I, Gopal Rai, son of Bhandhan Rai, do declare that, whereas Rs. 434 is due by me to Baldeo Panday on account of previous dealings, and whereas I have borrowed from the said Baldeo Panday a further sum of Rs. 566 for the payment of revenue and to meet other household expenses, the whole sum amounting to Rs. 1,000, I therefore execute this bond in respect of the sum borrowed at present

* Second Appeal, No. 1076 of 1877, from a decree of J.W. Power, Esq., Judge of Ghazipur, dated the 6th September, 1877, modifying a decree of Maulvi Zain-ul-Abdin, Additional Subordinate Judge of Ghazipur, dated the 28th May, 1877.

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APPELLATE CIVIL.

1 A. 603 = 2 Ind. Jur. 725.

and that formerly due by me, and agree and covenant that, having paid the entire aforesaid sum within two years with interest at Re. 1-12-0 per cent. per mensem, I shall take back the bond from the said mahajan; that in case of default the creditor shall be at liberty to recover the whole amount including principal and interest, by instituting a suit, or in any way he pleases, from my person and property, both moveable and immoveable; that until payment of the whole debt including principal and interest, I hypothecate my four-anna share in mauza Kharkapur, which I have neither directly or indirectly transferred, nor shall I do so; that I shall get whatever payments I make endorsed on the bond, and that I shall not plead any payment without getting the same endorsed, and that if I do so or set up any receipt or discharge the same shall be invalid. Hence this bond." Now what was the contract here made? The contract I mean as to interest, for that was the whole question in the case before us. Clearly to my mind the contract so recorded was of this nature; "you the debtor shall not be troubled about the debt for two years, at the end of which time, if payment is made by you with interest at Rs. 1-12-0 per cent. per mensem, there shall be an end to the transaction, and the bond will be returned to you; but if it be otherwise and you then make default, the creditor shall be at liberty," *not*, observe, "shall then be *bound*," "to recover the whole debt including principal and interest, and until payment of such principal and interest the property mentioned in the bond is hypothecated, all the other conditions of [605] the bond meanwhile remaining in force." Such I take to be the true meaning of the contract in the present case, the rate of interest remaining the same in all the events contemplated. The only peculiarity that might suggest any doubt on this point might be supposed to arise from the fact that, although default appears to have been made at the end of the two years, the plaintiff, Baldeo Panday, did not institute his suit till the 11th May 1877, upwards of three years after default. Now if the interest was excessive, this delay might possibly be justly attributed to the plaintiff's laches and fairly considered to have the effect of modifying his claim. But I do not think that in the present case such a consideration should prevent us from reading and construing the bond as a contract to be applied according to its terms, and according to these, as I view them, the creditor was not bound to proceed to recover immediately upon default, but might do so at any time within the limitation period, which, in such a case as the present, I should say would be twelve years from the time when the money became due.

Nor do I think the rate of interest stipulated for excessive. A Calcutta case was referred to (1) where Kemp, J., in delivering the judgment of the Court, appears to have considered that 18 per cent. per annum or Re. 1-8-0 per month was an excessive rate, but he appears to have formed that opinion from his reading of the judgment of Lord Selborne in the case of *Cook* v. *Fowler* (2) decided by the House of Lords, where the principle laid down is that "the rate of interest to which the parties have agreed during the term of their contract may well be adopted." The rate of interest, however, claimed in that case was £5 per cent. per month, or £60 per annum, and that was justly disallowed, the ordinary rate of interest in England not being more than 5 per cent. But when it is remembered that

(1) *Deen Doyal Lall* v. *Het Narain Singh*, 2 C. 41; 25 W.R., 189. See also *Joy Ram* v. *Nobind Chunder Doss*, 25 W.R. 318; *Luchmee Narain* v. *Het Narain Singh*, 18 W. R. 322; and *Sitanath Bose* v. *Mathurenath Roy*, 2 B.L.R. Ap. 10.
(2) L. R. 7 H. L 27.

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in India the ordinary rate of interest is one per cent. per month or 12 per cent. per annum, a rate of Re. 1-8-0, or even Re. 1-12-0, ought not in my opinion to be considered excessive, but may fairly and legally be stipulated for by contract. The corresponding ratein Engl and would be not £60 per cent. but [606] seven-and-a-half or seven-and-three-quarter per cent. per annum, and would not, I am satisfied, were the facts the same as in the present case, be considered excessive by any English Court. For these reasons the plaintiff is entitled to our judgment reversing the decree of the Judge and restoring that of the Subordinate Judge, with costs in all the Courts.

SPANKIE, J.—The lower appellate Court holds that there is no provision in the bond as to the rate of interest to be charged after the date of payment has passed, and therefore interest must be allowed on the principle, not of implied contract, but of damages for breach of contract. Applying the case of *Deen Doyal Lall* v. *Het Narain Singh* (1) to the record before him, the Judge holds that the interest here demanded after the date of payment is excessive, and allows six per cent. only from the date when the bond fell due. It is contended that the terms of the contract have been misunderstood by the Judge, and that the appellant was, under the provisions of Act XXVIII of 1855, entitled to the interest agreed upon between the parties.

In my opinion the interest referred to in the bond as payable to the plaintiff alike during the term of the contract and until date of payment is Re. 1-12-0 per mensem. The bond recites that the obligor shall pay the amount of it with interest at Re. 1-12-0 per mensem within two years. This is the first condition. The second condition is that in case of default the obligee will be at liberty to recover the amount of debt including the principal and interest, by instituting a suit, or in any other way he pleases, both from the person of the obligor and from his moveable and immoveable property. The third condition is that, until payment of the entire amount including the principal and interest, the obligor hypothecates his four anna share in a particular village, and engages not to transfer it directly or indirectly.

Now it appears to me that, with respect to the interest "*post diem,*" there is here clearly a contract to pay the interest agreed between the parties when the principal was lent. Not only was it to [607] be paid during the continuance of the contract, but by the conditions of the bond the particular four-anna share mentioned therein was charged as security for the payment of the debt, both principal and interest. The principal and the interest are the sum for which the bond was executed, and the interest is the 21 per cent. agreed upon. I regard this case as being one free from doubt, and hold that there is no question here of an implied contract to pay the same rate of interest "*post diem*" that was agreed upon "*ante diem.*" If I could not construe the contract in this light, I should admit that the Judge was right in applying the precedent cited, that, in the absence of any defined rate of interest to be paid after the period of the bond had expired, the suggestion of an implied contract to pay at the same rate that the obligor was to pay during the term of the bond could not be allowed. The question then would be what would be a reasonable rate of interest to be allowed. In coming to a conclusion on this point, I should be unable to accept the Judge's finding that

(1) *Deen Doyal Lall* v. *Het Narain Singh*, 2 C. 41 = 25 W.R. 189. See also *Joy Ram* v. *Nobin Chunder Doss*, 25 W.R. 318; *Luchmee Narain* v. *Het Narain Singh*, 18 W.R. 322; and *Sitanath Bose* v. *Mathuranath Roy*, 2 B.L.R. Ap. 10.

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6 per cent. was sufficient. The ordinary rule would appear to be that the creditor is entitled to the interest payable during the term of the bond, this amount being regarded as a fair measure of the rate to be allowed as a penalty for breach of contract, provided of course that the original interest claimed is not excessive. In this particular case the bond was executed on account of a former debt, and of a fresh advance of Rs. 566 to pay Government revenue, and it must not be forgotten that the defendant was allowed time. He had only paid Rs. 210 on account of the bond, and it is probable that it was at his own request that the plaintiff allowed the debt to stand over. He himself (defendant) states that he wanted to pay the debt due to plaintiff by borrowing the money from another banker, that he had asked the plaintiff to charge interest at Re. 1-12-0 per mensem up to the date of the term of the bond, and after that date to charge 1 per cent., *i.e.*. 12 per cent per annum, but the plaintiff did not agree to this nor would he take his money. It is to be observed that defendant's story is not reliable, and is inconsistent with the fact that plaintiff took payment of Rs. 210 on the 20th January 1874. If defendant was in a condition to borrow the money elsewhere why did he not do so? He assigns no reason why the rate demanded is excessive, and his own defence suggests that he was [608] quite aware that the interest to the date of payment was 21 per cent., and he desired to alter the terms after the date expired. The Subordinate Judge allowed 21 per cent. to date of institution of the suit and 6 per cent. afterwards. This was an equitable judgment, and I would affirm it on that ground did I not also hold that, under the terms of the contract, the plaintiff was entitled to charge 21 per cent. after the date of payment of the bond had expired. I would decree the appeal, and modify the judgment of the lower appellate Court so as to restore the decree of the Subordinate Judge with costs.

Appeal allowed.

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1 A. 608.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

BAIJNATH (*Defendant*) *v.* MAHABIR AND ANOTHER (*Plaintiffs*).*
[19th February, 1878.]

Hindu Law—Inheritance—Succession of Daughters—Reversioners.

So long as a daughter not disqualified, or in whom a right of inheritance has once vested, survives, a daughter's son acquires no right by inheritance in his maternal grandfather's estate. *Amritolal Bose* v. *Rajoneekant Mitter* (1) followed.

Where, therefore, *R* died leaving issue two daughters, *B* and *P*, and *P* died shortly after *R* leaving sons, and while *B* was alive her sons and the sons of *P* sued as the heirs of *R*, to set aside a mortgage of his real estate made by *B* as the guardian, of her minor sons, and by *A*, the father of *P*'s sons, as their father and guardian, such suit was held not to be maintainable.

[D., 8 A. 365 = A.W.N. (1886), 129.]

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* Second Appeal, No. 1086 of 1877, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 31st July 1877, affirming a decree of Munshi Kishori Lal, Munsif of Rasra, dated the 3rd May 1877.

(1) 2 I. A. 113 = 15 B.L.R. 10 = 23 W.R. 214.

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1 A. 608.

THIS was a suit for the possession of certain immoveable property, being the estate of one Ram Jiawan, deceased. Ram Jiawan left issue two daughters, Batasi Kuar and Phulra Kuar. Phulra Kuar died shortly after her father leaving issue two sons, Rang Bahadur and Mahabir. Subsequently to her death Batasi Kuar, as the guardian of her minor sons, Kaulesar, Deo Narain and Rup Narain and Arjan Rai, as the father and guardian of Rang Bahadur and Mahabir, minors, joined in a conditional mortgage of the property to Baijnath. Baijnath obtained possession of the property by foreclosure of this mortgage. The present suit was **[609]** brought against him by the sons of Batasi Kuar, who was alive, and by the sons of Phulra Kuar, jointly, to set aside the mortgage and recover possession of the property. The plaintiffs claimed as the heirs of Ram Jiawan. The Court of first instance dismissed the suit in so far as the sons of Batasi Kuar were concerned, on the ground that they had no right in the estate of their maternal grandfather while their mother was alive, but gave the sons of Phulra Kuar a decree in respect of a moiety of the property. On appeal by the defendant, the lower appellate Court affirmed this decree.

The defendant, on second appeal to the High Court, contended that the whole suit should have been dismissed, inasmuch as under Hindu law the sons of Phulra Kuar had no right in their maternal grandfather's estate while their mother's sister, Batasi Kuar, was alive.

Munshi *Hanuman Prasad*, and Shah *Asad Ali*, for the appellant.

Lala *Lalta Prasad*, for the respondents.

The Court delivered the following

JUDGMENT.

The decision of the lower appellate Court appears to be open to the objection taken by the special appellant. It has been held by the Judicial Committee of the Privy Council in the case of *Amirtolal Bose* v. *Rajoneekant Mitter* (1) that a daughter's son is not entitled by Hindoo law to succeed as heir to his maternal grandfather's estate, so long as any daughter not disqualified, or in whom a right of inheritance has once vested, survives. This precedent applies to the present case in which Batasi Kuar, on the death of her sister, became the sole owner of their father's property. Batasi Kuar still survives; therefore neither the Munsif nor the Subordinate Judge should have decreed the claim of the plaintiffs with respect to the share of Phulra Kuar, the second daughter. The Court below should have dismissed the claim of the plaintiffs *in toto*, and should not have decreed it with respect to Phulra Kuar's share. We accordingly decree the appeal and modify the decision of the Court below so as to dismiss this portion of the claim.

Appeal allowed.

(1) 2 I. A. 113=15 B. L. R. 10=23 W. R. 214.

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APPELLATE CIVIL.

1 A. 610.

1 A. 610.

[610] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MULCHAND (*Defendant*) *v.* BALGOBIND (*Plaintiff*).*
[22nd February, 1878.]

Mortgage—Condition against Alienation.

J gave B a bond for the payment of money in which he hypothecated certain immoveable property as security for such payment, covenanting not to sell or transfer such property until the mortgage debt had been paid. In breach of this condition he granted M a lease of his rights and interest in such property for a term of twelve-and-a-half years. B having sued on such bond and obtained a decree charging such property with the satisfaction of the decree, sued M and J for the cancelment of the lease and a declaration that it would not be binding on the purchaser at a sale in the execution of the decree, alleging that the lease had been granted to defeat the execution of the decree. The High Court refused, in view of its decision in *Chunni* v. *Thakur Das* (1), to interfere with the decree of the lower Court giving B such a declaration.

[R., 10 A. 414 (417); 24 M. 523 (535) = 2 Weir 346; Expl., 4 A. 518.]

THIS case being in all respects similar to *Chunni* v. *Thakur Das* (1), a detailed report of it seems unnecessary.

1 A. 610.

CRIMINAL JURISDICTION.

Before Mr. Justice Pearson.

IN THE MATTER OF THE PETITION OF NARAIN DAS.
[27th February, 1878.]

Acquittal of Accused without asking Assessors their opinion—Error or Defect in proceedings—High Court Powers of Revision of—Act X *of* 1872 *(Criminal Procedure Code)*, ss. 255, 283, 297, 300.

Held, where without asking the opinion of the Assessors a Court of session acquitted an accused person, after his defence had been heard, that such omission, although a serious irregularity, was not such an error or defect in the proceedings as was, with reference to the provisions of ss. 283 and 300 of Act X of 1872, a ground for revisional interference (2).

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872.

[611] One Durga Prasad was tried for certain offences by Mr. C. J. Daniell, Sessions Judge of Mainpuri, with the aid of Assessors, and acquitted, after his defence had been heard, without the opinion of the Assessors being asked. The first ground in the application for revision of this judgment of acquittal took exception to this procedure of the Sessions Judge.

Mr. *J. E. Howard*, for the petitioner.

*Second Appeal, No. 1274 of 1877, from a decree of R.F, Saunders, Esq., Judge of Farukhabad, dated the 8th August 1877, modifying a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 18th May 1877.

(1) 1 A. 126.

(2) When a judgment of acquittal is recorded under s. 251 of Act X of 1872, it seems that it is not necessary to ask the Assessors their opinion—see *Reg.* v. *Parvati*, 7 B.H.C.R.C.C. 82, where it was so ruled with reference to the corresponding section (372) of the old Code of Criminal Procedure.

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CRIMINAL JURISDICTION.

1 A. 610.

JUDGMENT.

The judgment of the High Court, so far as it related to such ground, was as follows:—

PEARSON, J.—The opinion of the Assessor does not appear to have been taken as it is not found on the record. The omission to take it was a serious irregularity and must be pointed out to the Judge, and he must be cautioned to avoid a similar irregularity in future. At the same time I cannot hold that it affected the conduct of the prosecution or prejudiced the prisoner in his defence, and it is not therefore, with reference to the provision of ss. 283 and 300 of Act X of 1872, a ground for revisional interference.

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1 A. 611.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

GANGA PRASHAD (*Defendant*) v. KUSYARI DIN (*Plaintiff*).*
[27th February, 1878.]

Suit for money charged on immoveable property—Mortgage.

The obligor of a bond for the payment of money gave the obligee a moiety of the profits of a certain mauza up to the end of the current settlement, and charged the other moiety of such profits, with the payment of such money. It was also stipulated in such bond that the obligee should take the management of such mauza, rendering accounts to the obligor and that, if the obligor failed to pay such money when due, the obligee should remain in possession of the entire mauza until payment of all that was due. The original obligor having died, his heir gave the obligee a second bond, in which he admitted the creation of the original charge and certain further debt. A portion of such further debt he undertook to pay on a certain date, and he agreed that the balance due should be realized by the obligee from a moiety of the profits of the mauza, according to the terms of the first bond, and that the mauza should remain in the obligee's possession until the amounts due under both bonds were realized by him, and that he the obligor, should have no power to sell, mortgage, or alienate the mauza. *Held*, in a suit by the obligee on the bonds, that the bonds created a mortgage [612] only of the profits of the mauza and not of the mauza itself, and accordingly they did not entitle the obligee to a decree for the sale of the mauza.

THIS was a suit to bring to sale a certain mauza for the satisfaction of the debts due under bonds dated the 17th April 1860, and the 6th February 1873, respectively. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendant appealed against the decree of the Court of first instance, on the ground that the bonds in suit created no charge upon the mauza but only on its profits.

Munshi *Hanuman Prashad* and Pandit *Bishambhar Nath*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Babu *Jogindro Nath Chaudhri*, for the respondent.

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* Regular Appeal No. 112 of 1877, from a decree of Maulvi Ali Bakhsh Khan, Subordinate Judge of Banda, dated the 28th September 1877.

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APPELLATE CIVIL.

1 A. 611.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—In our judgment, on the proper construction of the two deeds on which the respondent relies, by neither of them was such a security created as would entitle the mortgagee to call for the sale of the mauza.

By the first deed, executed on the 17th April 1860, in consideration of a loan of Rs. 710, the mortgagor gave the mortgagee one-half of the profits of the mauza up to the end of the then current settlement, and he charged the remaining one-half share of the profits with the payment of the mortgage-debt and interest. It was also stipulated that the mortgagee should take the management of the mauza, rendering accounts to the mortgagor, and that, if the mortgagor should fail to pay the debt therein mentioned, or should take another loan and fail to pay it within the term therein mentioned, the mortgagee should remain in possession of the entire mauza until payment of all that might be due. This deed clearly created no hypothecation of the mauza itself. It assigned one-half of the profits to the mortgagee for the period of the then current settlement, and charge the residue of the profits with the mortgage.

The original mortgagor having died, his heir executed a second deed on the 6th February 1873, in which he admitted the creation of the original charge and the existence of a further debt of Rs. 1,000. The further debt of Rs. 1,000 he undertook to discharge [613] by payment of Rs. 500 in Chait, 1920 Sambat, and he agreed that the balance should be realized by the mortgagee from half the profits of the mauza in his possession *according to the terms of the bond for Rs.* 710, dated the 17th April 1860, and that, until the realization of the amounts entered in both bonds as well as of any amount borrowed in future, the mauza should continue in the possession of the mortgagee, and that the mortgagor should have no power to sell, mortgage, nor alienate it. Had this last condition stood alone, it may be conceded that it would have been sufficient to constitute a simple mortgage of the estate (1), and the respondent would have been entitled to an order for sale, but the clause must be read with what preceded it, and so read it is to our minds clear that the parties intended to mortgage the profits and not the mauza itself nor any share in it. This construction is favoured by the direction which immediately follows the agreement not to alienate, and which is to the effect that an arrear of revenue which had been defrayed by the mortgagee should be realised from the profits. We must therefore hold that the respondent is not entitled to the relief he seeks in this suit, and reversing so much of the decree of the Court below as decreed the claim in part we must dismiss the suit with costs.

Appeal allowed.

(1) See *Raj Kumar Ramgopal Narayan Sing v. Ram Dutt Chowdhry*, 5 B. L. R., F. B., 264=13 W. R., F. B., 82, where it was held that a bond for the payment of money containing an agreement by the obligor not to alienate certain lands until such money was paid, operated as a mortgage of such lands. See also *Martin v. Parsram*, H.C.R., N.W.P. (1867), 124.

1 A. 613.

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APPEL-LATE CIVIL.

1 A. 613.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SUNDAR AND OTHERS (*Plaintiffs*) v. KHUMAN SING (*Defendant*).* [4th March, 1878.]

Record-of-Right—Jurisdiction of Civil and Revenue Court.—Act XIX of 1873 (*North-Western Provinces Land Revenue Act*), ss. 62, 91, 94, 241.

The Civil Courts are not competent to try suits to alter or amend a record-of-rights, or to give directions in respect of the same, but they are not debarred from entertaining and determining questions of right merely because such questions may have been the subject of entries in the record-of-rights and because such determination may show that such entries are wrong and need correction. Consequently, a claim in the Civil Court for a [614] declaration of the right to make certain collections of rent and to defray therewith certain village-expenses, though such right had been the subject of an entry in the record-of-rights adverse to the person claiming such right, was held to be maintainable.

[Ap., 9 A. 429 (431).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs in the suit appealed against the decree of the lower appellate Court.

Munshi *Hanuman Prasad* and Lala *Har Kishen Das*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Pandit *Ajudhia Nath*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—The plaintiffs brought this suit originally for the cancelment of the orders of the Deputy Collector and Settlement Officer relating to the formation of the record-of-rights, over which the Civil Court has no jurisdiction, at the same time asking that they might disburse the village-expenses as before. The Court of first instance rejected the plaint, and the lower appellate Court reversed this order and remanded the case for trial, with an intimation that the plaintiff was at liberty to amend the plaint, and in special appeal this Court did not interfere with this order. The plaint was not amended till the 24th July, and on the same day the Court of first instance decided the case, after directing that the amended plaint should be filed with the record, and after the defendant had filed an answer to the amended plaint, and after evidence had been taken, which, however, was taken before amendment of the plaint. The Court of first instance held that, notwithstanding the amendment of plaint, the suit was not cognizable by the Civil Court. The plaint as amended is for establishment of the plaintiff's right as hitherto to make collections of rent from certain cultivators, and to defray the village-expenses themselves on their share of the estate ; this right having, it appears, been interfered with by the Settlement Officer's order, by which the defendant's right was recognised to collect these rents and to take them for defraying village-expenses. The lower appellate Court

* Second Appeal, No. 1375 of 1877, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 7th September 1877, affirming a decree of Maulvi Muhammad Abdul Basit, Munsif of Chibraman, dated the 24th July 1877.

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also held the suit on the amended plaint not to be cognizable. Both Courts seem to consider that in substance there is no difference [615] in the two plaints in the relief sought, that the object of the amended plaint is substantially to cancel an order of the Settlement Officer affecting the record-of-rights, although not stated in so many words, and that such a suit cannot be entertained under s. 241 of Act XIX of 1873; and the Judge seems further to consider that, inasmuch as the plaintiffs appealed from the Deputy Collector's orders to the Settlement Officer and failed, they are debarred from bringing this suit.

The view which the lower Courts have taken is erroneous. In the order of this Court in special appeal the Court pointed out the distinction which exists between that portion of the plaintiffs' claim in which they ask for the Court's interference with the formation of the record-of-rights, and that portion in which they ask to have declared their right to make certain collections of rent and defray village-expenses themselves.

The law enacts (s. 241) that no Civil Court shall exercise jurisdiction in "the matter" of the "formation of the record-of-rights;" but the matter of the formation of a record is clearly not the same thing as the question of the rights which its entries record. The Civil Court may not alter or amend the record or give directions in respect of it, because the formation and maintenance of the record and correction of errors in it has been made by ss. 62 and 94 of Act XIX of 1873, a matter peculiarly within the province of the Revenue Court. That was the object with which that part of s. 241 above cited was enacted, but it was not intended to debar Civil Courts from entertaining and deciding questions of rights between parties merely because those questions may have been made the subject of entries in the record, and because the decision of the Civil Court may show that they are wrong and need correction. S. 62 and following sections detail what the contents of the record-of-rights shall be; and the principle on which is to be prepared, and the powers which the Settlement Officer shall exercise in its preparation; and s. 91 goes no further than to declare that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." To so much weight the entries are entitled by a Civil Court, and s. 241 has been misinterpreted by the lower appellate Court, and was not intended to bar the jurisdiction of the Civil Courts in respect of the determination [616] of question of right merely by reason of the record-of rights treating of them. How far the question raised in this suit has been determined in the Settlement Department, and how far any such determination may be binding, we are not in a position to say, as the case has not been tried at all by the Court of first instance. We reverse the decrees of both Courts and remand the suit to the Court of first instance for retrial. Costs to abide the result.

Cause remanded.

1 A. 616.

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APPEL-LATE CIVIL.

1 A. 616.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ZAIB-UN-NISSA (*Plaintiff*) v. JAIRAM GIR (*Defendant*).* [4th March, 1878.]

Attachment of property in execution of decree—Private alienation after such attachment—Act VIII of 1859 (*Civil Procedure Code*), *s.* 240.

Where certain immoveable property having been attached, the execution case was subsequently struck off the file, and the judgment-debtor applied again for attachment of the same property, *held*, looking to the particular circumstances of the case, that a private alienation of the property after the date of such application but before attachment was not void under the provisions of s. 240 of Act VIII of 1859. The principle of the High Court's decision in *Ahmud Hossein Khan* v. *Mahomed Azeem Khan* (1) followed.

[R., 5 A.W.N. (1885) 57.]

[617] THIS was a suit to establish the plaintiff's right to certain immoveable property. This property was attached on the 2nd May 1871, in the execution of a money-decree held by the defendant in this suit against Ghaus Ali and certain other persons. On the 22nd July 1871, the execution-case was struck off the file by the Court executing the decree. On the 28th August 1873, the defendant again applied for the execution of the decree by the attachment and sale of the property. On the 12th September 1873, the Court directed notice to issue to the judgment-debtors, under the provisions of s. 216 of Act VIII of 1859. On the 17th September 1873, the judgment-debtors sold the property to the plaintiff in this suit. On the 28th November 1873, the Court ordered the property to be attached. The plaintiff preferred a claim to the property in virtue of her purchase, but her claim was disallowed on the 23rd January 1875, and she accordingly brought the present suit to establish her right to the property. The Court of first instance dismissed the suit, holding, with

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* Second Appeal, No. 1458 of 1877, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 2nd August 1877, affirming a decree of Pandit Har Sahai, Subordinate Judge of Azamgarh, dated the 12th May 1876.

(1) H.C.R.N.W.P. (1869) 51. See also *Jagannath* v. *Ghasee Ram*, H.C.R.N.W.P. (1869) 32. In this case certain shops had been attached in the execution of a decree and directed to be sold. On the decree-holder applying that, as the judgment-debtor wished to mortgage the shops, they might be exonerated from liability for her decree, the sale was postponed by the Court *sine die*. The shops were subsequently mortgaged. It was held that the attachment must be considered to have been withdrawn, and the mortgage was therefore not invalid.

Striking an execution-proceeding off the file is an act which admits of different interpretations according to the circumstances under which it is done—*Puddomonee Dossee* v. *Roy Muthooranath Chowdhry*, 12 B.L.R.P.C. 411. In that case the Privy Council were of opinion that, where a very long time had elapsed between an execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained. In *Da Costa* v. *Kalee Pershad Singh*, 12 W.R. 260, where after attachment had issued, the decree-holder asked the Court to stay further proceedings for six weeks, praying at the same time that the attachment might be continued, and the Court struck the case off the file for its own convenience, and the decree-holder allowed a year to elapse before taking further proceedings, Loch, J., held, Jackson, J., *dissenting*, that there was no abandonment of the attachment. It cannot be presumed that an attachment has been abandoned merely because the execution-case has been struck off the file, or because subsequently applications for attachment have been made—*Jhatu Sahu* v. *Ramcharan Lal*, 3 B.L.R. Ap. 68 = 11 W.R. 517 ; *Mahatab Chand* v. *Surnomoyee Dossee*, 12 B.L.R. 414 note = 15 W.R. 222. See also *Gholam Habeye* v. *Shama Sundari Kuari*, 3 B.L.R. Ap. 134 = 12 W.R. 142.

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1 A. 616.

reference to the provisions of s. 240 of Act VIII of 1859, that the sale to the plaintiff was void, the same having been made while the property was under attachment. On appeal by the plaintiff the lower appellate Court also held that the plaintiff had purchased the property while under attachment, and that the sale was consequently void, and further that, as the sale was made with notice of the attachment and in order to defeat the execution of the defendant's decree, it was made in bad faith.

The plaintiff appealed to the High Court, contending that, as the attachment on the property had been virtually removed in July 1871, by the order striking the execution-case off the file, the property was not under attachment when it was sold, and the sale was consequently not void; and that, as consideration for the sale had passed, the lower appellate Court had erred in holding that the sale was made in bad faith.

Pandit *Ajudhia Nath* and Shah *Asad Ali*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court, so far as it related to this contention, was as follows:—

[618] OLDFIELD, J.—Nor are we of opinion that plaintiff's purchase is void by reason of there being subsisting an attachment of the property at the time of his purchase. There had been an attachment in May 1871, but it appears to us to have been removed when the proceedings in execution came to an end in the following July, for we find the defendant in 1873 applying again to have the property attached, which he would not have done if it was then under attachment; and in the reports made on his application no mention is made that there was an attachment subsisting, but on the contrary we find that the Court, on the 28th November 1873, issued orders for attachment. We must give effect to what appears to have been the object and intention of the orders in the former proceedings, and this is the principle laid down in the Full Bench ruling of this Court—*Ahmud Hossein Khan* v. *Mahomed Azeem Khan* (1).

The Judge's finding that the plaintiff purchased in bad faith, which is based on the error that he knew at the time that there was a subsisting attachment, necessarily falls to the ground, for there is no reason to suppose that it was not a *bona fide* purchase for valuable consideration. We decree the appeal and reverse the decrees of the lower Courts, and decree the claim with costs in all Courts.

Appeal allowed.

(1) H. C. R. N. W. P. (1869) 51.

1 A. 618.

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APPEL-LATE CIVIL.

1 A. 618.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

LAKMICHAND (*Plaintiff*) v. TORILAL AND OTHERS (*Defendants*).*
[5th March, 1878.]

Agreement—Consideration—Act IX of 1872 *(Contract Act)*, ss. 23, 25.

By a written instrument duly registered, *T* agreed, in consideration of the recognition by his two brothers of his rights in the joint and undivided property of the three brothers, not to sell, transfer, or mortgage his share except to them, and should he desire to dispose of it, to dispose of it to them for a certain sum. In breach of this agreement he gave a usufructuary mortgage of his share to *L*. *Held* in a suit by *L* to enforce the mortgage, that the agreement was valid, and that the mortgage was bad against *T*'s brothers.

THIS was a suit to enforce a usufructuary mortgage. An eight-anna share in a certain village and certain land was the joint and [619] undivided property in equal shares of three brothers, Tori Lal, Sham Lal, and Baldeo Prasad. Sham Lal's name was, however, entered in the revenue register as the proprietor of two-thirds of the property, and Baldeo Prasad's name as the proprietor of the remaining one-third, Tori Lal's name not being entered as a proprietor. On the 18th September 1874, Tori Lal, by an instrument in writing, duly registered, entered into an agreement to the following effect: "Whereas Sham Lal and Baldeo Prasad, my brothers, have agreed that my name shall be entered in respect of one-third of the ancestral property, and that they will procure the entry of my name in respect of such share, and that I am to remain in possession of such share while I live, paying the Government revenue and enjoying the income and profits, subject, however, to this condition, *viz.*, that I am not to sell, mortgage, or transfer such share except to them, I therefore agree to remain in possession of such share while I live, paying the Government revenue and enjoying the income and profits, and not to sell, make a gift of, transfer, or mortgage such share. Should I desire to dispose of the share, I will dispose of it to Sham Lal and Baldeo Prasad, my brothers, and will only take Rs. 800 from them." On the 18th March 1875, Tori Lal's name was recorded as proprietor in respect of one-third of the property. On the 13th September 1876, he gave one Lakhmi Chand a usufructuary mortgage of his share for eighteen years. On the 16th June, 1877, Lakhmi Chand brought the present suit against Tori Lal to enforce this mortgage. Sham Lal and Baldeo Prasad, having been made parties to the suit, set up the agreement of the 18th September 1874 as a defence to it. The Court of first instance held that the agreement was valid, not being opposed to public policy or immoral, and having been made out of natural love and affection, to save Tori Lal's property from the effects of his extravagance, and dismissed the suit. On appeal by the plaintiff the lower appellate Court affirmed the decree of the first Court, observing as follows: "There is nothing immoral or contrary to public policy in the agreement which would render it void under s. 23 of the Contract Act: there appears to have been sufficient consideration for the agreement not to alienate or hypothecate, in assisting in getting the name of Tori Lal

* Special Appeal, No. 1243 of 1877, from a decree of E.B. Thornhill, Esq., Judge of Banda, dated the 29th August 1877, affirming a decree of Pandit Ram Narain, Munsif of Hamirpur, dated the 19th July 1877.

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entered as proprietor of one-third: the main object of Sham Lal and Baldeo Prasad was to [620] keep out interlopers, and considering that the parties are own brothers there is nothing abnormal in such an agreement."

The plaintiff appealed to the High Court, contending that the agreement was not binding, there being no consideration for it, and that it had been made in fraud on the plaintiff.

Munshi *Hanuman Prasad* and *Ram Prasad*, for the appellant.

Pandit *Bishambhar Nath* and Babu *Oprakash Chander* for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—In our judgment the agreement is binding. It is registered, and the settlor thereby agrees that, in consideration of the recognition by the brothers of his rights in the property to which the deed relates, he will not sell, transfer, or hypothecate his share, and that should he desire to dispose of it he would convey it to them for Rs. 800. There is no reason why such an agreement should not be enforced. If it was made out of natural affection it has been expressed in writing and duly registered. If the consideration was, as it purports to have been, the recognition of the settlor's right to share, there was a consideration. There is nothing to show that the agreement was made in fraud of the appellant. The appeal fails and is dismissed with costs.

Appeal dismissed.

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1 A. 620.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

KALIAN DAS AND OTHERS (*Plaintiffs*) *v.* NAWAL SINGH AND OTHERS (*Defendants*).* [7th March, 1878.]

Return of plaint—Appeal—Act VIII of 1859 *(Civil Procedure Code)—Act X of* 1877 *(Civil Procedure Code),* s. 584*—Suit for redemption of usufructuary mortgage—Jurisdiction.*

A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsif's Court. After the suit had been admitted and the parties [621] called on to produce evidence, the Munsif ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper Court, on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond the jurisdiction of a Munsif. *Held,* that, under Act VIII of 1859, the Munsif's order was appealable to the lower appellate Court, and, under Act X of 1877, the lower appellate Court's order to the High Court.

Where the question in dispute in such a suit is not only whether the property has been redeemed out of the usufruct, but whether the property and the right to redeem belongs to the plaintiff, and the value of the property exceeds Rs. 1,000, such suit is not cognizable by a Munsif.

[R., 11 B. 591 (594).]

THIS was a suit for "complete" possession of certain land by redemption of a usufructuary mortgage and ejectment of the defendants, valued

* Second Appeal, No. 1424 of 1877, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 18th September 1877, affirming a decree of Munshi Ganga Saran, Munsif of Khair, dated the 26th June 1877.

at Rs. 150, the principal money secured by the mortgage. The suit was instituted in the Munsif's Court on the 17th April, 1877. On its institution the Munsif made an order on the plaint fixing the 8th May 1877 for the hearing of the suit, and directing that the defendants should be summoned to appear on that day in person or by pleader, and that the pleaders for the plaintiffs should be ready to produce their evidence. The defendants appearing denied the mortgage and set up a proprietary title to the land. On the 26th June 1877, the Munsif ordered the plaint in the suit to be returned to the plaintiffs for presentation in the proper Court, holding that having looked to the nature of the defence, the suit must be regarded as one to recover possession of immoveable property, and that, therefore, as the value of the land exceeded Rs. 1,000, the suit was not cognizable by a Munsif. On appeal by the plaintiffs, the Subordinate Judge affirmed the decision of the Munsif.

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The plaintiffs appealed to the High Court, contending that the suit was one to redeem mortgaged property, to be valued according to the principal money secured by the mortgage, and not one for the possession of land, to be valued under cl v. (b), s. 7 of Act VII of 1870, and the mere assertion by the defendants of an adverse title could not alter the nature of the suit; and that the Subordinate Judge had no jurisdiction to hear an appeal from the Munsif's order, but should have directed the plaintiffs to institute the suit in his own Court.

Mir *Akbar Husain*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

[622] The judgment of the Court was delivered by

PEARSON, J.—A doubt was expressed at the hearing as to the admissibility of this appeal. We do not share that doubt. A case of exactly the same nature was entertained and disposed of on the 18th January last (1). The Munsif's order for the return of the plaint was passed after the suit had been admitted on the file and parties had been called on to produce evidence. His order finally disposed of the suit, and was the legitimate subject of a regular appeal under Act VIII of 1859. The present appeal from the appellate decree of the lower appellate Court has presumably been brought and admitted under s. 584 of Act X of 1877.

The lower appellate Court's decision is, in our opinion, right. The question is not one of institution-fee but of jurisdiction: and it appears that the subject-matter of dispute in this case is not only whether the property has been redeemed by payment of the debt out of the usufruct, but whether the property and the right to redeem belongs to the plaintiffs. As the value of the property is found to exceed Rs. 1,000, it has been rightly held that the suit was not cognizable by the Munsif. The plaint was returned to the plaintiffs for presentation in the proper Court. Instead of presenting it there, they elected to appeal from the Munsif's order and the lower appellate Court has properly disposed of their appeal. We dismiss this appeal with costs.

Appeal dismissed.

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(1) In the case referred to the question of the admissibility of a first or second appeal was not raised. Turner and Spankie, J.J., held in it that, as the mortgaged property was the matter in dispute and the value of the ownership was in excess of the pecuniary limits of the Munsif's jurisdiction, the Munsif could not entertain the suit.

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APPELLATE CIVIL.

1 A. 622.

1 A. 622.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

SHIB LAL AND OTHERS (*Plaintiffs*) *v.* HIRA LAL AND ANOTHER (*Defendants*).* [8th March, 1878.]

Cancellation of Document—Suit for a declaration that a document is not genuine—Reasonable apprehension of injury.

Where a void or voidable document cannot legally be used for the purpose which is apprehended, there is no such reasonable apprehension that [623] such document, if left outstanding, will cause injury as will entitle the person claiming the cancellation of such document to relief.

[N. F., U.B.R. Civil (1892-1896) 529 (534); R., A.W.N. (1889) 147.]

THIS was a suit for a declaration that a certain receipt was not a genuine document. Nek Ram and Naubat Singh gave Dharam Jit, the father of Hira Lal and Bhaggi Lal, on the 6th November, 1856, a bond for the payment of Rs. 5,000, in which they mortgaged certain immoveable property as security for such payment. Hira Lal and Bhaggi Lal brought a suit on this bond to recover the amount due thereunder from the obligors personally, which suit was dismissed as barred by limitation. On the 22nd September, 1875, the purchasers of Nek Ram's interests in the property and Naubat Singh brought the present suit for a declaration that an instrument, dated the 18th June, 1875, purporting to be an acknowledgment by Hira Lal of the receipt from Nek Ram and Naubat Singh of Rs. 1,925 and Rs. 350, in part payment of the debt due under the bond, was not a genuine instrument. The plaintiffs alleged that no such payments were made by Nek Ram and Naubat Singh, and that the receipt had been fabricated with the object of reviving the right of suit on the bond which had become barred by limitation. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court held that the suit was not maintainable, on the ground that the question as to the nature of the receipt could only be raised and determined when the receipt was used by the defendants as a genuine document.

The plaintiffs appealed to the High Court contending that, on proof that the receipt was not a genuine document, they were entitled to the relief claimed by them.

Pandit Ajudhia Nath, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), Munshi *Hanuman Prasad*, and Babu *Oprokash Chandar*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—The receipt cannot be used for the purpose which the appellants apprehend. To support a plea that a new period of limitation has accrued from part payment of principal, the fact of payment must appear in the handwriting of the person [624] making the same on the

* Second Appeal, No. 12 of 1878, from a decree of C. J. Daniell Esq., Judge of Mainpuri, dated the 19th September 1877, reversing a decree of Maulvi Muhammad Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 20th July 1876.

instrument on which the debt arises, or in his own books, or in the books of the creditor. The appellants cannot then be held to have reasonable ground to apprehend injury from the document. The appeal is dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

1 A. 622.

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APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

GOPAL (*Plaintiff*) *v.* NANKU AND ANOTHER (*Defendants*).*
[26th March, 1878.]

Execution of the decree of a Court of Small Causes against Immoveable Property—Act XI of 1865, *ss.* 20, 51.

The Judge of a Court of Small Causes, who has been duly invested with the powers of a Subordinate Judge under the provisions of s. 51 of Act XI of 1865, has "general jurisdiction" within the meaning of s. 20 of that Act, and can consequently, under the provisions of that section, enforce a decree under that Act, against the immoveable property of the judgment-debtor.

[Ex., 8 M. 8 (9).]

THIS was a suit to establish a right to certain immoveable property and for possession of the same. After the sale of the moveable property of one Nanku in the execution of a decree made by the Judge of the Court of Small Causes at Allahabad under Act XI of 1865, a certain portion of the judgment-debt remained due. The decree-holder, being desirous of issuing execution upon the immoveable property of Nanku, applied, under the provisions of s. 20 of Act XI of 1865, to the Judge for the certificate required by that section. Having obtained this certificate, he applied to the Judge for the enforcement of the decree against the immoveable property in suit. The Judge, in the exercise of the powers of a Subordinate Judge, with which he had been duly invested under the provisions of s. 51 of Act XI of 1865, proceeded to enforce the decree against the property. The property was sold in the execution of the decree on the 7th August, 1876, and was purchased by the plaintiff. The plaintiff was resisted in obtaining possession of the property by one Ishri Prasad, who claimed a right to such possession in virtue of a sale to him by Nanku. The plaintiff having complained to the Judge, the Judge inquired [625] into the matter, under the provisions of s. 269 of Act VIII of 1859, and holding that Ishri Prasad was in *bona fide* possession, declined to interfere. The plaintiff accordingly brought the present suit to establish his right to the property as auction-purchaser of it and for possession. The lower Courts concurred in holding that the plaintiff's title was invalid, as the Judge of the Small Cause Court was not competent to enforce the decree under s. 20 of Act XI of 1865.

The plaintiff appealed to the High Court.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Babu *Oprokash Chandar*, for the appellant.

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* Second Appeal, No. 1385 of 1877, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 17th September 1877, affirming a decree of Babu Mritonji Mukerji, Munsif of Allahabad, dated the 26th April, 1877.

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APPELLATE CIVIL.

1 A. 624.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—The Judge of a Small Cause Court, when duly invested with the powers of a Subordinate Judge, has, in the exercise of such powers, general jurisdiction. He was therefore competent to order a sale of immoveable property within his jurisdiction. The decree of the lower appellate Court must be set aside, and the case remanded for trial on the merits. The costs of the appeal will follow and abide the result.

Cause remanded.

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1 A. 625 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* KASHMIRI LAL. [22nd August, 1877.]

Act X of 1872 *(Criminal Procedure Code)*, ss. 435, 436, 467, 468, 469, 471, 472, 473—*False Evidence—Offence against Public Justice—Offence in contempt of Court—Act XLV of* 1860 *(Indian Penal Code)*, s. 193—*Prosecution—Procedure.*

Held (STUART, C. J., dissenting), that an offence under s. 193 of the Indian Penal Code, being an offence in contempt of Court within the meaning of s. 473 of Act X of 1872 (1) cannot, under that section be tried by the Magistrate before whom such offence is committed. *Queen* v. *Kultaram Singh* (2) and *Queen* v. *Jagat Mal* (3), overruled.

[626] *Per* STUART, C. J.—A Magistrate before whom such an offence is committed, if competent to try it himself, is not precluded from so doing by the provisions of s. 471 of Act X of 1872 (4).

[R., 14 A. 354 (355); D., 4 A. 322 (325, 327).]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872, in which the Court (Pearson, J.) referred to the Full Bench the questions (i) whether an offence under s. 193 of Act XLV of 1860 is a contempt of Court within the scope of s. 473 of Act X of 1872, and (ii) whether a Magistrate before whom such an offence is committed, being competent to try it himself, is precluded from doing so himself by s. 471 of Act X of 1872, and is bound to send the case for trial or commitment to another Magistrate.

Mr. *L. Dillon*, for the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

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(1) See also *Reg.* v. *Navranbeg Dulabeg*, 10 B.H.C.R. 73; *Reg.* v. *Gaji Kom Ranu*, 1 B. 311; 7 M.H.C.R. Rulings xvii and xviii. On the other hand see the case of *Sufatullah*, 22 W. R. Cr. 49.

(2) 1 A. 129. (3) I.A. 162.

(4) See also *Queen* v. *Jagat Mal*, 1 A. 162 and *Queen* v. *Gur Bakhsh*, 1 A. 193. On the other hand see *Queen* v. *Kultaram Singh*, 1 A. 129 and the case of *Sufat-ullah*, 22 W.R. Cr. 49.

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FULL BENCH.

1 A. 625 (F.B.).

JUDGMENTS.

The following judgments were delivered by the Full Bench :

STUART, C. J.—I have given the questions submitted by this reference and the authorities bearing upon them my anxious consideration, and I cannot hold that the offence defined by s. 193 of the Indian Penal Code is within the meaning and scope of s. 473 of the Criminal Procedure Code. I regret to say that I fail to appreciate the Madras and Bombay rulings which were referred to at the hearing. These rulings, as well as the argument that was maintained before us on behalf of the appellant, express, I must be allowed to say, somewhat loosely and inartificially the general view of the bearing of the Penal and Procedure Codes in regard to offences of this nature. But we must not generalise in such a matter. There can be no doubt that in a certain sense there is involved in the crime of perjury an offence both against the authority of Courts and of public justice ; but a more precise question is before us in this reference, and, arising as it does in a criminal case, it should be answered with as much precision and exactness as possible. The question then is, not whether the offence here is as one against the authority of a Court or against public justice, or of both kinds, but whether the precise and particular offence defined by s. 193 of the Penal Code is a contempt within **[627]** the meaning and scope of s. 473 of the Procedure Code. I am of opinion that it is not. With the exception of the law provided by ch. X of the Penal Code and ch. XXXII of the Procedure Code, no legal definition has been given, so far as I am aware, by any authority recognized by the law of India, Civil or Criminal, of the expression " Contempt of Court ; " and we can only arrive at a conclusion on such a question as this by comparing the terms of s. 193 of the Penal Code with the provisions of ch. X of that Code and ch. XXXII of the Procedure Code to which I have referred, and by considering whether s. 193 fairly comes within the scope of these provisions. Now the offence defined by s. 193 is distinct and precise in itself, and it forms part of ch. XI of the Penal Code, which deals with the subject of false evidence and of offences against public justice. On the other hand the immediately preceding ch. X treats of the contempts of the lawful authority of public servants, and within that chapter the excepted matters in s. 473 are to be found, and it appears to me that by no straining of language or meaning could the offence defined by s. 193 of the Penal Code be brought within the sanction of ch. X generally, or specially within the offences intended by the exceptions mentioned in s. 473 of the Procedure Code.

The other question in this reference is whether a Magistrate before whom the offence under s. 193 is committed, being competent to try it himself, is precluded from doing so by s. 471 of the Procedure Code and is bound to send the case for trial or commitment to another Magistrate. I have again carefully considered this question, and feel obliged to state that I deliberately and advisedly adhere to my judgment in the case of *Queen* v. *Jagatmal* (1), by which I ruled that, as the offence under s. 193 of the Penal Code was one of those included in the category contained in s. 471 of the Procedure Code, the Magistrate there, who was of the first class, had therefore power to try and commit, and could commit either to himself or to the Sessions Court, or send the case for inquiry and commitment to any other Magistrate with the like powers, but that the first mentioned

(1) 1 A. 162.

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Magistrate was not precluded by s. 473 from trying the offence himself, as he is not, I consider, in the present case.

[628] The offence under s. 193 of the Penal Code being included in the procedure provided by s. 471 of the Procedure Code is not merely a contempt in any general sense, but a distinct and substantive offence in itself, which, in my judgment, a Magistrate may commit to and try by himself.

PEARSON, J.—Section 473 of Act X of 1872 recognises the offences to which s. 472 refers as offences committed in contempt of the authority of a Court, and those are the same as are indicated in s. 471 as being mentioned in ss. 467, 468 and 469. Section 467 speaks of the offences described in ch. X of the Indian Penal Code not falling within ss. 435 or 436 of the Criminal Procedure Code. Section 468 speaks of the offences against public justice described in ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228 of the Indian Penal Code, when such offence is committed before or against a Civil or Criminal Court. Section 469 speaks of offences relating to documents described in ss. 463, 471, 475, 476 of the Indian Penal Code when the document has been given in evidence in any Civil or Criminal Court. It appears to me to follow as a necessary conclusion that the offences above-mentioned are all contempts of the authority of a Court within the scope of s. 473 and cannot be tried by the Court before or against which they may have been committed.

Under this view the answer to the reference must be that the Court in which the offence described in s. 193 of the Indian Penal Code has been committed cannot try the offender. It is unnecessary to determine whether he is precluded from doing so by s. 471 of the Indian Penal Code. Otherwise I should have been disposed to adhere to my ruling in the case of *Queen* v. *Gur Bakhsh* (1).

TURNER, J.—No good reason is assigned for limiting the term "offence committed in contempt of its own authority" in s. 473 of the Criminal Procedure Code to offences defined in and punishable under ch. X of the Indian Penal Code, and therein described as offences against the lawful authority of public servants. It must therefore be taken to embrace all offences which are recognized as contempts of the authority of a Court of justice. The offence of giving false evidence is such an offence, and reading s. 473 of the Criminal Procedure Code with the sections that immediately precede [629] it does not appear to admit of doubt that the Legislature intended that the offence of giving false evidence should be so regarded.

In ss. 435 and 436 the Code prescribes the procedure to be adopted for the punishment of contempts of Court when immediate action is called for by the nature of the offence. In ss. 464-473 it deals with offences of the same character which generally admit of more deliberate action. To prevent the oppressiveness of frivolous proceedings by hostile parties, it requires in ss. 467, 468 and 469 that a complaint of any offence specified in those sections shall not be entertained without sanction of the nature described in s. 470, and among the offences specified in s. 468 is the offence described in s. 193 of the Indian Penal Code. In s. 471 it declares the procedure to be followed when the Court before which any offence specified in ss. 467, 468 and 469 is committed itself takes action and declares the Court competent to *commit* or send the case for enquiry to any Magistrate having power to *try* or *commit*. In s. 472 it empowers a

(1) 1 A. 193.

Court of Session to charge a person for any "*such*" offence, if the offence be triable by the Court of Session exclusively, and to *commit or hold to bail and try* such person on its own charge; and lastly in s. 473 it declares in the most explicit language that, except as provided in ss. 435 436 and 472, no Court shall try any person for an offence committed in contempt of its own authority. It seems clearly to have been intended, so far as is consistent with public convenience, to secure to a person accused of any such offence a trial free from the prejudice which the Judge before whom the offence is alleged to have been committed would be likely to entertain. For these reasons I am of opinion that the Magistrate was incompetent to try the accused.

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SPANKIE, J.—I am prepared to accept the ruling of the Madras and Bombay High Courts on the points referred to us, cited during the argument. An offence under s. 193 committed before a Court appears to be not only an offence against public justice, but also a contempt of the Court's authority. Section 435 of the Criminal Procedure Code too does not limit the offences to which it refers to those only to be found in ch. X of the Penal Code, for an offence under s. 228, ch. XI, is imported into the section. Reading ss. 471, 472 and 473 of the Criminal Procedure Code together, I couclude that a Magistrate cannot try a charge under s. 193 of the [630] Penal Code if the false evidence has been given in his own Court, and that no Court other than the Court of Sessions can try any person for an offence committed in contempt of its own authority.

OLDFIELD, J.—I adhere to the opinion which I expressed in the case of *Queen* v. *Kultaram Singh* (1) that the Court before which an offence unde s. 193 of the Indian Penal Code is alleged to have been committed cannot try the case. I think the terms of s. 471 of the Criminal Procedure Code are sufficiently clear on this point. I so far modify the view I then took as to hold that an offence under s. 193 of the Penal Code may be considered an offence committed in contempt of the authority of the Court and therefore s. 473 of the Criminal Procedue Code will also operate to prevent the Court trying any person for such an offence committed before it.

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1 A. 630.

CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA v. SEYMOUR. [25th February, 1878.]

Act X of 1871 (*Excise Act*) *ch.* VI *and ss.* 57, 62—*Illicit Sale of Liquor—License.*

On the 30th October, 1877, *N* was granted a license for the sale of spirituous and fermented liquors by retail terminating on the 31st December 1877. On the 11th January, 1878, such license was renewed by the Collector for a period terminating on the 31st March 1878. On the 14th January 1878, *N*'s servant was convicted, under s. 62 of Act X of 1871, of the illicit sale of liquors between the 1st January 1878, and the 10th January 1878, both days inclusive. *Held*, that the renewal of *F*'s license was a condonation of the offence and the conviction was bad.

Semble that, inasmuch as *N* had given no notice of his intention not to renew the license, nor had the Collector recalled it, the license remained in force, and the conviction was consequently bad, under s. 32 of Act X of 1871.

[R., 1 A. 638 (639) ; D., 1 A. 635.]

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(1) 1. A. 129.

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FEB. 25.
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CRIMINAL JURISDICTION.
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1 A. 630.

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner had been convicted, under s. 62 of Act X of 1871, of the offence of selling spirituous and fermented liquors by retail without a license by Mr. J.B. Thomson, Magistrate of the first class. The facts of the case are sufficiently stated for the purpose of this report in the judgment of the High Court.

Mr. *Howard*, for the petitioner.

[631] The Junior Government Pleader (Babu *Dwarka Nath Banerji*), for the Crown.

JUDGMENT.

The following judgment was delivered by the Court:

STUART, C. J.—This is an application for revision of the conviction, under s. 62 of the Excise Act X of 1871, of Charles Seymour, an assistant employed in Newton's Hotel at Allahabad, and of the sentence passed on him to pay a fine of Rs. 100, or one month's imprisonment in the Civil Jail, although Mrs. Newton is the real party concerned.

I must, in the first place, remark that, even if the conviction could be supported, the prosecution of the defendant was in my opinion an extremely harsh and uncalled for proceeding, and I regret to say that the Assistant Magistrate appears to have acted with reprehensible precipitancy, and without considerate and thoughtful attention to the facts of the case, and the provisions of the Excise law, as embodied in Act X of 1871, and I have further to remark here that the sentence passed was out of all proportion to the very venial character of the offence, if offence there was, a nominal fine of say one rupee being quite sufficient.

But in my judgment the legality of the conviction is, to say the least, so doubtful that it ought not to be allowed to stand. On the 30th October 1877, the Collector of Allahabad granted a license to Walter Newton Mrs. Newton's husband (at present I understand in England), for the sale of spirituous and fermented liquors in the hotel, and this license bears that it was to have effect from the 30th October to the 31st December 1877. The expiry of the license on the latter date does not appear to have been noticed by the authorities themselves, and Mrs. Newton went on conducting the hotel, including of course the selling of spirituous and fermented liquors, unmindful of the license until the 11th January, when it suddenly occurred to her to obtain a renewal of it. For that purpose she applied at the Collector's office and obtained a renewal of the license up to the 31st March 1878. Nothing was said to her at the time about her having incurred any of the penalties of the Act, and this perhaps is not to be wondered at, for the neglect to renew the first license, when it expired on the 31st December, was not ascertained [632] by the authorities by means of any enquiries or watchfulness on the part of themselves or their officers, but was simply brought to the knowledge of the Collector by Mrs. Newton herself, and the license was handed back to her with this simple endorsement: "This license is extended up to the 31st March 1878." It is further to be noticed that one of the conditions of the license was that a monthly fee of Rs. 8-5-4 should be paid to Government in advance for every month of the term for which the license was granted, and that all claim in respect of this condition had been fully satisfied, and, indeed, more than satisfied by Mrs. Newton; the whole aggregate fee amounting to Rs. 25 for the three months from the 30th October to the 31st December 1877, having been paid up in

advance, and a similar aggregate fee of Rs. 25 for the term from the 1st January till the 31st March 1878, having been paid and accepted by the Government on the 11th January, when the renewal of the license was, without any objection or demur, granted. Now such being the state of the case, I really think that the Assistant Magistrate might have paused and considered whether it was necessary to prosecute Mrs. Newton for the slight illegality she had ostensibly been guilty of in selling spirituous and fermented liquors in her hotel for about ten days without formally renewing her license; and if he had so paused and considered, he might perhaps have seen that the renewal endorsement on the license without any objection stated, and the payment and acceptance in advance of the whole fee due under the license, were strong circumstances of condonement on the part of the Government of any little neglect Mrs. Newton may have been guilty of, and that they showed the possession by Mrs. Newton of a license with all the conditions fulfilled, and more than fulfilled, entitling her to sell spirits and liquors, from the 30th October 1877 to the 31st March 1878, uninterruptedly. Most reasonably therefore might she have believed that she had, although somewhat irregularly yet sufficiently, discharged her duty in the matter, and that she might go on conducting her hotel in peace. But it will secarcely be believed that three days afterwards her assistant, Seymour, was brought up before Mr. Thomson, the Assistant Magistrate, tried and convicted under s. 62 of Act X of 1871, and punished with a fine of Rs. 100 or one month's imprisonment in the Civil Jail, a sentence the [633] severity of which would seem to imply that, in the opinion of the Assistant Magistrate, Mrs. Newton had been guilty of a wilful attempt to defraud the revenue, a view of her conduct, however, which is simply ridiculous, for she and her assistant Seymour, had merely and unintentionally overlooked for a few days the necessity of renewing the license at the proper time, under the venial and excusable circumstances I have explained. And so far from defrauding the revenue, the Government had not only lost nothing at the *hands* of Mrs. Newton, but had in fact accepted from her more than they were entitled to under their own conditions.

Such being the true state of the case, is this conviction sustainable? I think not. Section 62 of the Excise Act X of 1871 provides, among other things, that, "every person other than a licensed vendor who sells any spirituous or fermented liquors shall for every such offence be punished with fine not exceeding Rs. 500." Now would it be reasonable to hold, on the facts and on a sound reading of the law, that Mrs. Newton was not a licensed vendor, that is, a vendor altogether unlicensed? At least, after the explanation I have given of the conduct of the authorities, it does not lie in their mouth to contend that between the 1st and 11th January Mrs. Newton was acting without any authority or license from them, and that she had no reason to believe that in their opinion she had violated the law and laid herself open to its penalties. But a careful examination of the Act will show that in no view of the case could Mrs. Newton be regarded as other than a licensed vendor for the whole period up to the 31st March, during which the license was in operation. The portion of the Act dealing with the subject of licenses is ch. VI including ss. 31 to 35. Sections 31 and 32 deal with licenses for a year. It may be remarked, however, in passing, that s. 32 supplies a strong argument by analogy against the conviction in the present case. By that section it is provided that, where there is an intention not to renew the license, notice of such intention shall be given to the Collector at least fifteen days *before the year expires;*

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and if such notice be not given, and the license be not recalled by the Collector, the license held and engagement entered into by every such person shall remain in force as if the same license and engagement had been formally renewed. There seems no reason why this should not hold good in the case of a license for less than a year, as indeed [634] as I shall presently show, it rather seems to do, and there is not a word in the Act, from beginning to end, showing it to be the intention of the Legislature that it shall be otherwise in the case of short licenses—a view of their position in this respect which is only too abundantly supported by the conduct of the parties in the present case, and especially on the part of the Government. Section 33 provides that the Chief Revenue Authority may regulate the form and condition of all licenses under the Act, and rules for these purposes appear to have been issued, but I do not observe among them any rule relating to the lapsing or renewal of a license for three months. I observe, however, that one of the rules provides that any party shall be at liberty to cancel such a license at the close of any quarter of the year, a provision which previously derives considerable force from that contained in s. 32 to which I have directed attention, and which therefore tells rather against than in favour of his conviction. Section 34 empowers the Collector to recall or cancel any license if the tax or duty therein specified be not paid, or in case o a violation of any other condition thereof, or of the holder being guilty of breach of the peace or any other criminal offence; and the same section proceeds to provide for the case where the Collector desires to recall a license, and s. 35 relates to the surrender of a license by the holder. Now, even if things were entire, and there were none of the peculiarities relating to the conduct of the Excise authorities to which I have adverted, I think it would be quite allowable to hold that the term "licensed vendor" in s. 62 must be taken to mean a vendor licensed or unlicensed within the meaning of the section of the Act I have pointed out on licenses generally, and constituting ch. VI, and a person not being in position, as Mrs. Newton plainly is not, cannot be said to have incurred the penalty of s. 62. The only section of the Act which appears to me to have the remotest bearing on such a case as the present is s. 57, which provides for the refusal to produce a license on the demand of an Excise officer, and also for a breach of any of the conditions of the license granted, neither of which circumstances apply to the case of Mrs. Newton, for she was never asked by any Excise officer to produce her license, nor has she committed any breach of any of its conditions. The present case therefore appears to me to be wholly unprovided for by the Excise Act X of 1871, and I must add that is very properly unprovided for, for I do not [635] believe it to have been the intention of the Legislature to punish an innocent person like Mrs. Newton, who was guilty of nothing but a very intelligible, and in my judgment excusable, little neglect or delay, which showed no intention on her part to cause any of the mischief against which the Excise Act is directed.

For these reasons I set aside the conviction and sentence in this case, and direct the fine of Rs. 100, if it had been paid, to be returned to the applicant.

Conviction quashed.

1 A. 635.

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1 A. 635.

CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA v. DHARAM DAS. [22nd March, 1878.]

Act X of 1871 (*Excise Act*), *ss.* 12, 62, *and ch. VI—Illicit sale of Liquor—License.*

D was the holder of a license for the sale of spirituous and fermented liquors by retail for a period terminating on the 31st December 1877. On the 10th January 1878, his license not having been renewed by the Collector *D* sold certain spirits by retail. On these facts he was convicted of illicit sale of liquor. Subsequently to his conviction, his license was renewed. *Held* that, under such circumstances his conviction was good. *Empress* v. *Seymour* (1) distinguished.

[R., 1 A. 638 (639).]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner was the holder of a license for the sale of spirituous and fermented liquors by retail for a period of three months terminating on the 31st December 1877. On the 10th January 1878, his license not having been renewed, he sold certain spirits by retail. On these facts he was convicted by Mr. J. B. Thomson, Magistrate of the first class, of illicit sale of liquor, and under s. 62 of Act X of 1871. The petitioner did not apply for a renewal of his license until after his conviction.

Babu *Jogindro Nath Chaudhri*, for the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

STUART, C. J.—The facts in this case are different from those in the case of *Charles Seymour* (*Mr. Newton*) (1), for there are none of the circumstances of condonement and estoppel which characterise [636] the latter, and the license had clearly and simply expired. In *Seymour's* case the lapsing of the first license was not noticed by the authorities, and was only brought to their knowledge by *Mrs. Newton* herself going to the Collector's office, they simply renewing the license and accepting the whole fee for the new period by anticipation; nor was there in that case anything to show any action on the part of the Collector as to the recalling the license or otherwise within the meaning and scope of ch. VI of Act X of 1871, or of the rules respecting the license for three months drawn up and issued by the Chief Revenue Authority, that is, in these Provinces, the Board of Revenue. I therefore held there that the defendant was not a person other than a licensed vendor within the meaning of s. 62 of the Excise Act.

The present case is quite different, for here we have the license simply expiring, and no attempt whatever on the part of the defendant to renew it, nor does he apply for renewal till after he had been convicted before the Magistrate for selling spirituous liquors without a license. He therefore violated s. 12 of the Excise Act, which provides that "spirituous liquors passed from distilleries according to the English method, fermented liquors manufactured at a licensed brewery, and spirituous and fermented liquors imported either by land or by sea, shall not be sold except under license from the Collector," and laid himself open to the penalty enacted by s. 62. His conviction must therefore stand. But as to the

(1) 1 A. 630.

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sentence, I do not think that the case is a flagrant or serious one and calling for a severe penalty. Nor can I help remarking on the peculiar nature of the evidence on which the conviction is based. It is not the evidence obtained simply by the testimony of ordinary customers from among the public frequenting the defendant's shop, but by that of a constable sent direct from the Collector's office for the express purpose of detecting or rather involving the defendant in a violation of the Excise law, and such evidence is, from its very nature, open to remark and even suspicion, although I do not mean to say that the constable who acted in this employment did otherwise than perform his duty fairly. The circumstance, however, in my view takes from the conviction the severe illegality which it otherwise might have shown, and renders a penalty of a fine of Rs. 100, or of one month's imprisonment [637] in the Civil Jail, excessive punishment, and I set that sentence aside, and in lieu of it I consider that one-fourth of the fine imposed by the Assistant Magistrate would be sufficient, and therefore while affirming the conviction, I sentence the defendant to pay a fine of Rs. 25 without the alternative of imprisonment; the fine, if necessary, to be recovered by distress in due course of law. But if the Rs. 100 has been paid by the defendant, the difference between that sum and the Rs. 25 must be returned to him.

Conviction affirmed.

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1 A. 637.

APPELLATE CRIMINAL.

Before Mr. Justice Turner.

EMPRESS OF INDIA *v.* MEGHA. [2nd April, 1878.]

Act XLV of 1860 (*Penal Code*), s. 75—*Punishment.*

Held that where a person commits an offence punishable under ch. XII or ch. XVII of the Indian Penal Code punishable with three years' imprisonment and, previously to his being convicted of such offence, commits another such offence, punishable under either of such chapters, he is not subject, on being convicted of the second offence, to the enhanced punishment provided in s. 75 of the Indian Penal Code.

[F., L.B.R. (1893—1900) 479 (480).]

ON the 22nd January 1878, one Megha was convicted by Mr. H. G. Keene, Sessions Judge of Agra, under ss. 109 and 328 of the Indian Penal Code, of abetting the administering to one Kushal of a stupefying drug with intent to commit theft. In addition to the offence of which he was convicted, he had been charged, under s. 379 of the Indian Penal Code, with theft. On the 29th January 1878, he was convicted, under s. 328 of the Indian Penal Code, of administering to one Ali Bakhsh a stupefying drug with intent to commit theft, and also, under s. 379, of theft. He was sentenced under s. 328 to rigorous imprisonment for ten years, and, with reference to his previous conviction on the 22nd January 1878, under ss. 75 and 379 to transportation for life. Against this second conviction Megha appealed to the High Court, contending that, inasmuch as he had not been found guilty of theft on the 22nd January 1878, s. 75 was not applicable; and that, assuming he had been found guilty of theft on that date inasmuch as he was not found guilty until after he committed the theft

of [638] which he was subsequently found guilty on the 29th January, he was not subject to enhanced punishment under s. 75. **1878 April 2.**

Mr. *L. Dilion*, for the appellant. **Appellate Criminal.**

1 A. 637.

JUDGMENT.

TURNER, J.—I am unable to support the enhanced sentence passed by the Judge under s. 75. That section declares that if any person *having been convicted* of any offence punishable under certain parts of the Indian Penal Code, *shall be* guilty of any offence punishable under those parts of the Code, he shall for every such *subsequent* offence be liable to the penalties therein declared. The section then prescribes enhanced punishments for particular offences committed after conviction of any one of such offences and not merely on a second conviction. In the present case it is shown that the appellant had, a few days before the trial of the present offence, been convicted, but it is not shown that he had been convicted of one of the offences mentioned in s. 75, nor that he had been convicted of any offence before the commission of the offence for which he has received an enhanced sentence under s. 75 of the Indian Penal Code. I must quash the sentence passed under ss. 379 and 75 of the Code, and as the appellant has received the full punishment that could be awarded for an offence falling at the same time under ss. 328 and 379 of the Indian Penal Code, it is unnecessary to pass a sentence under s. 379 of the Indian Penal Code. The conviction and sentence under S. 328 are affirmed and the appeal dismissed.

Appeal dismissed.

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1 A. 638.

CRIMINAL JURISDICTION.

Before Mr. Justice Turner.

EMPRESS OF INDIA *v.* MAHINDRA LAL AND ANOTHER. [4th April, 1878.]

Act X of 1871 (*Excise Act*), *ss.* 32, 57, 62—*Illicit Sale—License.*

A held a license for the sale of spirituous and fermented liquors by retail for a period of three months terminating on the 31st December 1877. Prior to the 8th January 1878, no notice was given by *A* of her intention not to renew the license, nor had the license been recalled by the Collector. Between the 1st January 1878, and the 8th January 1878 both days inclusive, *A*'s servant sold spirituous and fermented liquors by retail. On these facts *A*'s servants were convicted, under s. 62 of Act X of 1871, of the illicit sale of liquor. *Held* following the opinion expressed in *Empress* v. *Seymour* (1) that the convictions were bad, as *A*'s license, under the provisions of [639] s. 32 of that Act, remained in force until she gave notice of her intention not to renew it or it was re-called by the Collector. The principle of the decision in *Empress* v. *Seymour* dissented from.

A should have been prosecuted under s. 57 of the Excise Act for not paying her monthly fee in advance.

THIS was a reference by Mr. H. Lushington, Sessions Judge of Allahabad, under s. 296 of Act X of 1872, for the orders of the High Court. The Sessions Judge referred the proceedings of Mr. J. B. Thomson, Magistrate of the First Class, in the case of Mahindra Lal and Nilmoni Deh. These persons were convicted by the Magistrate, under s. 62 of Act X of 1871, of selling liquor without a license from the Collector.

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(1) 1 A. 630.

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1 A. 638.

The Sessions Judge referred the proceedings on the ground that the Magistrate's order was contrary to law.

Babu *Jogendro Nath Chaudhri*, for Mahindra Lal and Nilmoni Deb.

The Junior Government Pleader (Babu *Dwarka Nath Banarji)*, for the Crown.

JUDGMENT.

TURNER, J.—It appears that licenses for the sale of spirituous and fermented liquors by retail may be granted in the North-Western Provinces for any term not less than three calendar months and not exceeding one calendar year, and that in Allahabad they are usually granted for a period of three months. The fee leviable on such licenses in Allahabad is Rs. 8 per mensem, and it is a condition of the license that the fee should be paid in advance. The petitioners' mistress held a license for the sale of fermented liquors by retail for the period of three months, terminating on the 31st December 1877. The holder of the license did not give to the Collector any notice of her intention not to renew the license, nor had the license been recalled by the Collector prior to the 8th January 1878. From the 1st to the 7th January 1878, inclusive, the petitioners admit they sold by retail spirituous or fermented liquors. On these facts the Magistrate convicted them for that, not being licensed vendors, they sold spirituous or fermented liquors on divers dates from the 1st January to the 7th January 1878, inclusive, and under s. 62 of the Excise Act sentenced them to pay a fine of Rs. 100, or to undergo imprisonment for one month in the Civil Jail.

[640] It is contended that the conviction is wrong in that the petitioners were not unlicensed vendors, but sold under a license subsisting under the provisions of s. 32 of the Act, seeing that their mistress had given no notice of her intention not to renew it, and it had not been recalled by the Collector.

The pleader for the petitioners relies on *Empress* v. *Seymour* (1), decided by the learned Chief Justice of this Court on the 25th February last. The facts of that case are much the same as those of the present. The defendant was the servant of a person named *Newton* who held a license for a term of three months expiring on the 31st December 1877. The license was not formally renewed until the 11th January 1878, when the proper fee was paid. Sales had nevertheless been made between January 1st and January 11th, and on account of these sales the defendant *Seymour* was prosecuted and convicted. The learned Chief Justice considered that any breach of the Act committed by the defendant had been condoned by the action of the Collector in receiving the fee and renewing the license, but he doubted whether, in advertence to the terms of s. 32 of the Excise Act, the master of *Seymour* could be held to be unlicensed, and therefore whether any offence had been committed. His Honour called attention to the absence from the Act and the rules of any direction as to the period within which the license was to be renewed. In the result he quashed the conviction. On the other hand the Government Pleader relies on a subsequent ruling by the same learned Judge. In *Empress* v. *Dharam Das* (2) the facts differ from those of *Seymour's* case only to this extent, that it was not shown the license had been renewed and the fee paid subsequently to the sale which led to the conviction. It, however, appears that on the 11th January, the same day on which the fee was

(1) 1 A. 630.
(2) 1 A. 635.

1878 APRIL 4. — CRIMINAL JURISDICTION. — 1 A. 638.

accepted in *Seymour's* case, the defendant brought the fee into Court and tendered payment of it. In this case the learned Chief Justice supported the conviction. He distinguished it from *Seymour's* case, on the ground that in the latter there were circumstances of condonement in the acceptance of the fee and renewal of the license, while in the case of *Dharam Das* these circumstances were absent. Although in his petition *Dharam Das* urged that, in reference to the provisions of s. 32 of the Excise Act, he **[641]** could not be held to be an unlicensed vendor, it would seem that this argument was not pressed at the hearing for it is unnoticed in the judgment. The Government Pleader urges that inasmuch as the Collector had not accepted the fee in the case before me, the decision must follow the ruling in *Dharam Das's* and not the ruling in *Seymour's* case, but I am constrained to say that I cannot regard the acceptance by the Excise authorities of an excise fee in ignorance of a contravention of the law as a condonation of the offence if the offence had been committed. The acceptance of the fee would not warrant the quashing of a conviction for sales made prior to the acceptance of the fee, if those sales were in fact illegal; and if the sales on which the prosecution was founded were illegal in *Dharam Das's* case, I should have held them equally illegal in *Seymour's* case. Even assuming the excise fee had been received with a full knowledge of the circumstances, I should hold that this might be ground for inflicting a light penalty and not for quashing the conviction. But I entirely agree with the reasoning of the learned Chief Justice in that part of the judgment in *Seymour's* case in which he gives expression to his doubts as to the legality of the conviction in reference to the terms of s. 32 of the Excise Act. The section declares that, unless otherwise specially authorised by the Chief Revenue Authority, licenses for retail sales shall be granted for one year, and if continued to the holders thereof, shall be formally renewed from year to year, but that every person holding such a license who may intend not to renew it shall give notice of his intention to the Collector, at least fifteen days before the year expires, and that if such notice be not given and the license be not recalled by the Collector, the license held and engagement entered into by every such person shall *remain* in force as if the said license had been formally renewed. By the rules made by the Chief Revenue Authority in these Provinces licenses may and in practice are granted for periods of three months. To these licenses the provisions of s. 32 are clearly applicable. Notice must be given of the intention not to renew the license, and if no such notice is given and the license is not recalled, the license granted to, and the engagement taken from, the holder of the license remain in force as if they had been formally renewed. The Government Pleader has argued that this is to be read as implying that the holder of the license is to be held to his engagements, that he is responsible for the fee and for the performance of the conditions of the license, but that the authority conferred by the license no **[642]** longer subsists. I cannot accede to a construction which is at variance with the clear language of the Act,—" the license held shall remain in force as if the said license had been formally renewed." If it had been formally renewed it could not be doubted the holder would be a licensed vendor, and enjoy the privilege conferred by the license. Inasmuch as no notice has been given of an intention not to renew it and it has not been recalled, the holder still enjoys the privilege of selling in virtue of the authority conferred by it, while on the other hand he is liable to the payment of the fee and the performance of the other conditions imposed on him. On the facts found or allowed in this case, the petitioners

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cannot be convicted as unlicensed vendors. The sales admitted by them were made in virtue of the license which under the terms of s. 32 was still subsisting. The convictions must then be quashed and the fines remitted.

It would certainly be well that the Chief Revenue Authority should prescribe some period within which licenses should be brought for renewal, but as the law and rules now stand there is a remedy for any negligence on the part of the holder of the license. He is bound by a condition of his license to pay the monthly fee in advance. If he omits to do so he can be prosecuted for the breach under s. 57 of the Excise Act, and is liable to a fine of Rs. 50. In quashing the convictions under s. 62, I am urged to convict the petitioners under s. 57, but the petitioners are not the holders of the license, they are the servants of the holder.

Convictions quashed.

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1 A. 642.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

RAHMANI BIBI AND OTHER, (*Defendants*) *v.* HULASA KUAR AND ANOTHER (*Plaintiffs*).* [12th April, 1878.]

Redemption of Mortgage—Acknowledgment of the Mortgagor's Title signed by Mortgagee's Agent—Act IX of 1871 (*Limitation Act*), *sch. II*, *art.* 148.

Held following the decision of the Privy Council in *Luchmee Baksh Roy* v. *Runjeet Roy Panday* (1) under Act XIV of 1859, that an acknowledgment of **[643]** the title of the mortgagor or of his right of redemption signed by the mortgagee's agent is not sufficient, under art. 148, sch. II of Act IX of 1871 to create a new period of limitation.

[F., 1 A.L.J. 355 ; **R.**, 34 A. 109 (112)=8 A.L.J. 1272 (1275)=12 Ind. Cas. 604 (605) ; 17 B. 173.**]**

THIS was a suit to recover possession of a certain share in a certain village, which share the plaintiffs alleged had been mortgaged by their ancestor, Karim Dad Khan, to the ancestor of the defendants 42 years before suit. The defendants alleged that the property had been mortgaged 70 years before suit. The administration-paper framed at the fifth settlement of the village, bearing date the 29th June 1840, had been signed for the mortgagee by his Karinda, or agent, and contained the following clause :—"The share of Karim Dad Khan is mortgaged to me : when his heirs pay the mortgage-money they can redeem it from mortgage." The Court of first instance did not determine the date of the mortgage, as it held that the administration-paper contained an acknowledgment of the title of the mortgagor creating, under the provisions of art. 184, sch. II of Act IX of 1871, a new period of limitation, and gave the plaintiffs a decree, which was affirmed on appeal by the defendants to the lower appellate Court.

On appeal to the High Court by the defendants, they contended that the acknowledgment on which the lower Courts had relied was not sufficient in law to create a new period of limitation, inasmuch as it was signed by an agent only.

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* Second Appeal No. 1208 of 1877, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 31st May 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Fatehpur, dated the 25th November 1875.

(1) 13 B.L.R. 177.

Lala *Lalta Prasad*, for the appellants.
Pandit *Bishambhar Nath*, for the respondents.
The Court made the following

ORDER OF REMAND.

It having been ruled by the Privy Council (1) that signature by an agent is not sufficient to satisfy the analogous terms of Act XIV of 1859, we must hold that the acknowledgment in this case is insufficient. Of course we are now considering the acknowledgment required under Act IX of 1871 and not under the present law, of which the terms are more equitable.

The lower appellate Court must determine whether this suit has been instituted within 60 years from the date on which the mortgage was made It will try this issue and remit its finding to this Court, when ten days will be allowed for objections.

Issue referred.

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1 A. 644.

[644] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

JAWAHIR LAL AND OTHERS (*Defendants*) v. NARAIN DAS AND OTHERS (*Plaintiffs*).* [24th April, 1878.]

Application for leave to appeal to Her Majesty in Council—Limitation—Act X of 1877 *(Civil Procedure Code), ch. XLV—Act XV of* 1877 *(Limitation Act), ss.* 4, 12 *and sch.* ii, *art.* 177.

Held (per STUART, C.J., SPANKIE, J., *dissenting)* that, in computing the period of limitation prescribed by art. 177, sch. ii of Act XV of 1877, for an application for leave to appeal to Her Majesty in Council, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal is sought is founded cannot be excluded under the provisions of s. 12 of Act XV of 1877.

[F., 28 A. 391 (393)=3 A.L.J. 165=A.W.N. (1906) 55; 15 M. 169; R., 6 A. 250 (F B.); 36 M. 131 (133)=21 M.L.J. 1000=10 M.L.T. 254=(1911) 2 M.W.N. 221; D., 12 Ind. Cas. 58 (59).]

THIS was an application to the High Court for leave to appeal to Her Majesty in Council from a decree of the High Court, dated the 20th August 1877. The application was preferred on the 27th February 1878, or seven days beyond the time allowed by art. 177, sch. ii of Act XV of 1877 for preferring an application for leave to appeal to Her Majesty in Council.

Mr. *Colvin*, for the petitioners, contended that, in computing the period of limitation, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal was sought was founded should be excluded—s. 12 of Act XV of 1877.

Mr. *Conlan*, Pandits *Bishambhar Nath* and *Ajudhia Nath* and Munshi *Hanuman Prasad*, for the opposite parties.

JUDGMENT.

STUART, C. J.—An application for leave to appeal to Her Majesty in Council having been filed, the question we have to consider is whether the

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* Application No. 4 of 1878, for leave to appeal to Her Majesty in Council.
(1) See *Lachmee Baksh Roy* v. *Runjeet Roy Panday*, 13 B.L.R. 177.

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application is within the time (six months) provided by the Procedure Code, Act X of 1877, and by the Limitation Act, XV of 1877, sch. ii, No. 177, or whether it is beyond time. The limitation in such cases was previously that provided by s. 599 of the Procedure Code, but that section is repealed by the present Limitation Act, XV of 1877 and without any substitute for it other than **[645]** that contained in No. 177 of sch. ii. The date of the decree was the 20th August 1877, and if nothing could be shown to have interrupted the running of the limitation period, the six months expired on the 20th February, 1878. But the present application for leave to appeal to Her Majesty in Council was not filed till the 27th February, that is, as reported by the Office, it was seven days beyond time. It was not explained why this application had been delayed till the last moment, till indeed, after the expiry of the six months, but Mr. Colvin stated that the defendant was now anxious to appeal to the Privy Council, and he argued that he is entitled to seven days beyond the 20th February under s. 12 of the Limitation Act XV of 1877, inasmuch as he is entitled to have reckoned the time requisite for obtaining a copy of the judgment appealed against, as provided by that section. It appears that the defendant applied for a copy of the judgment on the 22nd September, and that it was ready for him on the 28th, although it was stated that he did not actually receive it till the 29th, but in either case, whether the 28th or 29th, he would be entitled to add seven additional days to the period, and his application would be within time. In fact, the seven days would bring him to the 27th February, the very day on which the application for leave to appeal to Her Majesty's Privy Council was made. Mr. Colvin enforced his argument by referring to s. 4 of the Limitation Act, which is in these terms: "Subject to the provision contained in ss. 5 to 25 (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence;" s. 12 is thus included among those sections. The portion of s. 12 of the Limitation Act relied on is as follows: "Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded." What is the meaning here of the expression "where a decree is appealed against?" In the sections of the Code of Procedure relating to appeals to the Privy Council, there is a clear distinction between applications or petitions to appeal and appeals themselves, *i.e.*, admitted appeals, and if this portion of s. 12 of the Limitation Act be taken literally, it applies to an appeal alone and not an application. But if that be **[646]** so, where is the necessity for a copy of a judgment? That document can only be required for the preparation of the reasons of appeal which are only appropriate to an application and are evidently not wanted in the case of an admitted appeal. The rather unfortunate and ambiguous expression, therefore, "where a decree is appealed against," must, I think, be understood to mean a proceeding in the way of appeal for which a copy of the judgment is required. It plainly is not required for an admitted appeal, while it is as plainly necessary to an application to appeal. Notwithstanding therefore the obscure and doubtful expression in this part of s. 12 of the Limitation Act, "where a decree is appealed against," I think we must understand by it an application, or proceeding in the nature of an application, to appeal, and therefore if this part of s. 12 applies to appeals to the Privy Council, Mr. Colvin's contention is right, and his application within time.

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But I am of opinion that this provision of s. 12 of the Limitation Act does not apply to Privy Council appeals. As for s. 4, even if relevant to some extent to the present case, it does not follow that it compels us to apply to the present case the *whole* provisions of s. 12, but only such one or more of them as are appropriate to an application to appeal to the Privy Council. Section 4 does not say subject to *all* the provisions, but simply to the "provisions," by which I think may fairly be argued is meant such provisions as are applicable and pertinent to the suit, appeal, or application, as it may be. For instance, the first part of s. 12, providing that the day from which the period of limitation is to be reckoned shall be excluded, may of course be applied to the present case. In this view of s. 4, the nature and legal character and conditions of the application or other proceeding must not be forgotten. And if in laying down this principle I am right, then we need not apply the provisions of s. 12 of the Limitation Act to such a case as the present, unless it can be shown that a copy of the judgment is essential to the necessary purpose of an application to appeal to the Privy Council. Now I think it must be conceded that a copy of the judgment is not needed for any such purpose. The procedure and all questions relating to Privy Council appeals ought to be determined solely with reference to the provisions contained in the section of the Code of Civil Procedure which regulate such appeals. These sections are **[647]** twenty-three in number and form, ch. XLV of the Code headed "Of Appeals to the Queen in Council," and it is quite distinct in itself, comprising within its provisions the whole particulars of procedure necessary in such cases. If a copy of the judgment appealed against had, in the mind of the Legislature, been considered essential, the Code no doubt would have been made so to provide, but neither in the Code itself nor in the Limitation Act is there any express provision of the kind, and it could not, I think, be urged that a copy of the judgment appealed is a requirement suitable to and called for in such an application as this. In an ordinary application to admit an appeal the record is not here, but in the district where the original suit was instituted, and a copy of the judgment is necessary to enable an appellant here to prepare his reasons. But for the purpose of an application to appeal from a judgment of a High Court to the Privy Council a copy of the judgment is plainly not wanted either by the parties or by the Court, for the record itself is here in the High Court, containing not merely a copy, but the judgment and order actually delivered, together with the whole proceedings in the original district and also in the High Court, and this record is therefore necessarily at hand for use by the parties or by the Judges, and the authentic instruction thus to be obtained must obviously be of greater service than a mere copy of the judgment. When, after admission by the High Court in India, the appeal gets to the Privy Council, it is subjected there to different ordeal altogether, the cases for the appellant and the respondent, with their reasons respectively, being prepared by their Counsel in London. Neither therefore on the true constructions of ss. 4 and 12 of the Limitation Act XV of 1877, nor by any provision of the Procedure Code, nor for any necessary purpose, does that section apply to Privy Council appeals.

I have observed that the limitation applicable to appeals of this nature was previously that provided by s. 599 of the new Procedure Code, but that section has been repealed by the present Limitation Act, and the limitation now substituted for it by No. 177, sch. ii, is distinct and imperative and cannot, in my opinion, be enlarged or in any way qualified by s. 12 of

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the same Act. The intention evidently was to allow the six months and no more, and that [648] long period was considered to be, as it assuredly is, sufficient for all purposes, and not, I am persuaded, that it was intended to add to the six months by the few days that might be occupied in obtaining a copy of the judgment appealed against.

I am therefore of opinion that the seven days, which it is contended ought to be deducted from the time that has run from the date of the decree till the date of this application, cannot be allowed; and the only question is whether the six months provided by the Limitation Act XV of 1877, sch. ii, No. 177, had expired when this application was presented. It clearly had expired. The date of the decree proposed to be appealed to the Privy Council is the 20th August, 1877, and the six months had therefore run out on the 20th of the following February. For these reasons I consider that the report of the Officer is right, and that this application must be refused, but under the circumstances without costs.

SPANKIE, J.—Section 599 of Act X of 1877 provided for the limitation of appeals to Her Majesty in Council, but the section was repealed by Act XV of 1877. The limitation now provided is that to be found at art. 177, sch. ii, third division, applications, of Act XV of 1877, and the application is thus described: "For the admission of an appeal to Her Majesty in Council, six months" and the "time from which the period of limitation begins to run" is "from the date of the decree appealed against." Act XV of 1877 amends the law relating to the limitation of (i) suits, (ii) appeals, and (iii) certain applications to Courts. By s. 4, subject, however, to the provisions contained in ss. 5 to 25, inclusive, every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule of the Act *shall* be dismissed. Every application made for which limitation is prescribed in the schedule is apparently brought under s. 4, and is subject to the provisions contained in ss. 5 to 25 inclusive. If we can find a place for the application before us in any one of these sections, its limitation is saved thereby, and it should be admitted, though after time. The second schedule, "appeals," provides the limitation in cases of appeals from the decrees and orders of the *local* Courts to Appellate Courts *within this country*. An appeal subject to such rules as may from time to time be made by Her Majesty [649] in Council regarding appeals from Courts in British India and to the provisions contained in ch. XLV of Act X of 1877 *shall* lie to Her Majesty in Council (s. 595 of Act X of 1877). Under the provisions of the Limitation Act application for leave to appeal to Her Majesty in Council, required by s. 598 of Act X of 1877, must be made within six months from the date of the decree appealed against. Therefore the application for leave to appeal is the first step in the appeal itself allowed by right, but subject to conditions. Its object is to appeal the decree, and limitation runs from the date of decree appealed against. The application for leave to appeal to Her Majesty in Council is the *petition* referred to in s. 598 of Act X of 1877 in the following words: "Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of." The petition then is the expression of the desire of the petitioner to appeal to the Queen. It is not an appeal to the Court whose decree is complained of, but it is the mode by which the appeal to Her Majesty in Council must be presented with a view of its being transmitted to England with the record, provided the petitioner fulfils the prescribed conditions. It is then, under s. 603, formally admitted as an

appeal; no further petition is required; the original petition is the appeal to Her Majesty. By s. 600 the petition must state the grounds of appeal from the decree, for the appeal allowed is from the decree (*vide* s. 595). The grounds of appeal from the decree must be looked for in the judgment, and by s. 594 of Act X of 1877, in the chapter relating to appeals to the Queen in Council, unless there be something repugnant in the subject or context, the expression "decree" includes the judgment and order. Thus the petition really is the appeal to the Queen in Council, and therefore the time requisite for obtaining a copy of the judgment on which it is founded must also be excluded. This appears from the third paragraph of s. 12 of the Limitation Act, and it is unaffected by paragraph 1 and paragraph 2 of the section, which deal with appeals generally and particular applications, whereas paragraph 3 is exclusively confined to *decrees* appealed against or sought to be reserved. I am therefore of opinion that Mr. Colvin is right in his contention and the petition is within time.

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1 A. 650.

[650] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

KALESHAR PRASAD (*Plaintiff*) v. JAGAN NATH AND ANOTHER (*Defendants*).* [25th April, 1878.]

Act VIII of 1859 (*Civil Procedure Code*), *s.* 7—*Relinquishment or omission of portion of claim.*

Held, where two suits were instituted simultaneously, and one of such suits had been determined, that, assuming that the claims in such suit arose out of the same cause of action and should have been included in one suit, the provisions of s. 7 of Act VIII of 1859 were no bar to the entertainment of the second suit.

[Overr., 16 A. 165 (172)=A.W.N. (1894) 165; F., 76 P.R. 1890; D., 9 M. 279 (280) (281).]

THIS was a suit under Act XVIII of 1873 for an account of the profits of the sir-land appertaining to a certain mahal for the years 1281, 1282, and 1283 Fasli. This sir-land was held by the plaintiff in the suit and the defendants, Jagan Nath and Bala Nand, as co-parceners in equal shares. The suit was instituted on the 9th July, 1877. On the same date, at the same time as it was instituted, the plaintiff also instituted a suit against Jagan Nath as lambardar of the mahal for his share of its profits for the years 1281 and 1282 Fasli. Having regard to this suit, which had been determined, the Court of first instance held that the present suit was barred by s. 7 of Act VIII of 1859. On appeal by the plaintiff the lower appellate Court also held that the suit was barred by s. 7 of Act VIII of 1859.

The plaintiff appealed to the High Court, contending that, as both suits were instituted simultaneously, s. 7 of Act VIII of 1859 was not applicable. Munshi *Sukh Ram*, for the appellant.

Pandit *Bishamhar Nath* and *Ajudhia Nath*, for the respondents.

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* Second Appeal, No. 85 of 1878, from a decree of R. F. Saunders, Esq. Judge of Farukhabad, dated the 9th November, 1877, affirming a decree of J. L. Denniston, Esq., Assistant Collector of Farukhabad, dated the 20th August, 1877.

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CIVIL.

1 A. 650.

The Court delivered the following

JUDGMENT.

The plaintiff instituted two suits at the same time, one against Jagan Nath, lambardar, for profits of the mauza for 1281 and 1282 Fasli, the other against Jagan Nath and another share-holder, Bala Nand, for a settlement of the account of sir-land held jointly by the parties for 1281 1282, and 1283 Fasli. This last suit is the subject of appeal, and was dismissed with reference to the pro- [651] visions of s. 7 of Act VIII of 1859. The provisions of this section do not appear to us to apply. The suit which is the subject of appeal is for an adjustment of the account of profits of sir-land between not only the plaintiff and Jagan Nath, but between them and a third shareholder who is also a defendant, and it is not clear that the accounts of this sir-land are included in the general account of the profits of the village for which the lambardar is responsible to account to the plaintiff, so as to give in both suits the same cause of action to the plaintiff against Jagan Nath. But were it so, the suit would not be necessarily unmaintainable against Bala Nand, and besides we should hesitate to rule that the provisions of s. 7 of Act VIII of 1859 are applicable to such a case as this. Here the plaints in the two suits were filed at the same time. We cannot say that one suit has a priority over the other in point of time. The claims were divided for the convenience of trial, but there was no relinquishment of a claim, and there will be no question of entertaining a suit after such relinquishment or omission within the meaning of s. 7. There was no institution and entertainment of a suit after one had been already instituted and determined. The suits were not successive, but simultaneous, and to allow the objection, which can only be one of form and not of substance, would be to strain the obvious object of s. 7, which is not to allow persons to be harassed by successive claims. If the Court in which the plaints were filed considered they should have been tried together, the proper course was to allow one of the plaints to be amended, so as to combine both claims. As this suit has not been tried, and is one for a Revenue Court to determine, we reverse the decisions of the Court and remand the case for trial on the merits to the Court of first instance. Costs to abide the result.

Cause remanded.

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1 A. 651.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

PITAM SINGH AND OTHERS (*Defendants*) *v.* UJAGAR SINGH (*Plaintiff*).* [30th April, 1878.]

Hindu Law—Joint and Undivided Ancestral Property—Separate Property—Compromise.

Certain ancestral estate was recorded as held in equal shares by four [652] brothers *A*, *B*, *C* and *D*. On *A*'s death, his son *E* was recorded as the holder of his share. On the deaths of *B* and *D*, *C* was at first recorded as the owner of their shares. Shortly afterwards *B*'s widow, *F* and *D*'s widow, *G*, were recorded as the holders of their husbands' shares. Again, at a later period, the names of *H* and *I*, the sons of *E*, were substituted for those of the widows. The estate was

* First Appeal, No. 122 of 1877, from a decree of Maulvi Hamid Hassan Khan, Subordinate Judge of Mainpuri, dated the 29th September, 1877.

subsequently sold for arrears of Government revenue, but a farm of it was given to *E,H,I*, and *C*. In 1853 the Government having purchased the estate proposed to re-grant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. It was reported that it appeared from the statements of *E* and *J*, the son of *C*, that the widows of *B* and *D* had made a gift of their shares to *H* and *I*. In 1853 *E, J, H*, and *I* were asked by the Collector in what manner they proposed to divide the estate if it were granted to them, and they replied that they would hold it in equal shares. The estate was eventually granted to these persons on payment of the arrears of revenue. Each of them contributed his quota in making such payment. In 1855 an administration-paper was framed in which they were entered, at their own request, as in possession each of equal shares. In 1864 they agreed to a partition of the shares by arbitration. These proceedings were stopped by *J* advancing a claim to a moiety of the estate In March 1867, *J* sued for possession of a moiety of the share originally held by B's widow, then deceased, and for a declaration of his right to a moiety of the share held originally by D's widow. In June 1867, the parties to the suit effected a compromise, agreeing to divide the estate into four lots on certain conditions. A decree was accordingly passed in the terms of the compromise. *K*, *J*'s son, sued in 1876, in his father's lifetime, to obtain the same relief as his father had sought in 1867, and a declaration that the arrangement effected by the compromise and the decree was ineffectual. *Held* that, assuming the estate was joint until 1867, *K*, was, in the absence of fraud, bound by the compromise entered into by his father, and his suit was not maintainable.

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Assuming that the estate was held in separate shares, the shares of *K*'s great uncles descended as inheritance liable to obstruction, and *K* could not have questioned his father's acts.

[**Affirmed**, 14 C.L.J. 188 (201) = 11 Ind. Cas. 481 (488); **F.**, 16 A. 231 (233); **Cited**, 20 Ind. Cas. 958 (962) = 14 M.L.T. 163 (168) = (1913) M.W.N. 661; **R.**, 27 A. 203 (250) = 2 A.L.J. 729 = A.W.N. (1904) 244; 9 B. 198 (217) (**F.B.**); 31 C. 111 (120); 1 C.L.J. 388; 12 C.W.N. 687.]

THIS was a suit for the possession of a certain share in a certain village. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendants in the suit appealed from the decree of the Court of first instance.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath* and *Nand Lal*, for the appellants.

Mr. *Conlan*, the Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—The common ancestor to the parties to this suit was Anand Singh, who had five sons, Chattar Singh who died without [653] issue, Darjan Singh who died in 1823 leaving a son, Chakarpan, Sundar Singh, who died in 1826 leaving a widow, Golab Kuar, Des Raj who died in 1852 leaving a son, Gandharp Singh, and Chattarpat who died in 1829 leaving a widow, Sahib Kuar. Chakarpan had three sons, who are the appellants; and Gandharp Singh had two sons, Ujagar Singh, the respondent, and Madho Singh, who is still a minor. The estates in suit was, after Chattar Singh's death, originally recorded as held in four shares of 5 biswas each, held respectively by Darjan Singh, Sundar Singh, Des Raj, and Chattarpat. On the death of Darjan Singh, Chakarpan was entered as the holder of his share, and after the deaths of Sundar Singh and Chattarpat, Des Raj was at first recorded as the owner of their shares, but shortly afterwards the names of the widows Gulab Kuar and Sahib Kuar were entered as the holders of their husbands' shares. Again, at a later period, the names of Ajudhia Prasad and Budh Singh, who were then aged four and two years old respectively, were substituted for

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those of the widows. The estate fell into arrears, and was eventually sold at auction for a balance of Government revenue, but a farm was given to Chakarpan, Ajudhia Prasad, Budh Singh, and Des Raj. In 1853 the Government having purchased the estate at auction-sale proposed to re-grant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. The tahsildar reported that it appeared from the statement of Chakarpan and Gandharp Singh, son of Des Raj, that the widows of Sundar Singh and Chattarpat had made a gift of their shares to Ajudhia Prasad and Budh Singh by deeds attested by the kanungo, and the kanungo confirmed the statement. On the 2nd May 1853, the Collector of Farukhabad inquired of Chakarpan, Gandharp Sing, Budh Singh, and Ajudhia Prasad in what manner they proposed to divide the estate among themselves if it was granted to them by the Government, and they replied that all four would hold five biswas each. The Government eventually agreed to grant the estate on condition that the arrears of revenue which had accrued when the estate was sold should be discharged. This offer was accepted, and each of the four persons above mentioned contributed his quota. On the 3rd April 1855, the same persons appeared before the Revenue officer, and requested that each of them might be recorded [654] as the owner of five biswas, and that Chakarpan and Gandharp Singh should be entered as lambardars, and Ajudhia Prasad and Budh Singh as pattidars. It was ordered that a village administration-paper should be prepared, and in that document, which is dated the 5th April 1855, they were entered as in possession each of five biswas. So matters continued until 1864, when, on the 15th November, they agreed to the appointment of arbitrators and an umpire to divide these shares. The arbitration proceedings lasted for upwards of two years, when Gandharp Singh advanced a claim to a ten biswas share, and the arbitrators refused to proceed with their award.

On the 29th March 1867, Gandharp Singh brought a suit to obtain possession of a two and a-half biswas shares out of the five biswas originally held by Gulab Kuar, then deceased, and for a declaration of his right to a two and-a half biswas share out of the five biswas originally held by Sahib Kuar. He alleged that each of the four sons of Anand Singh had, on the death of Chatter Singh, obtained a five biswas share; that the widows of Sundar Singh and Chattarpat had been recorded as the holders of their respective husband's shares to ensure their maintenance; that these ladies had in 1855 appointed Ajudhia Prasad and Budh Singh their agents to take the account of the profit and loss on these shares, and that in the lifetime of the ladies Chakarpan wrongfully procured the substitution of his sons' names for the names of the widows. He claimed that the estate of Sundar descended on the death of his widow to Chakarpan and Des Raj, and that on the death of Sahib Kuar he would become entitled to possession of one moiety of her share. On the 26th June 1867, the parties to the suit effected a compromise, agreeing to divide the estate into four lots on the conditions set out in their petition to the Court. A decree was accordingly passed in the terms of the compromise. The respondent now sues to obtain the same relief as was sought by his father in 1867, and a declaration that the arrangement effected by the compromise and the decree are ineffectual. The respondent's father is still alive. There is this difference between the claim asserted by the respondent and his father, that the latter treated the estate as held in separate shares, the former asserts the estate remained joint until 1867. If by "joint" he means undivided, there is no difference in

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[655] the claims. The Subordinate Judge has decreed the claim. It appears to us impossible to support the decree. Assuming, which is not certainly proved, that the family remained joint until 1867, the respondent's father for all intents and purposes represented the interest in the estate which devolved and would on partition fall to the separate share of himself and his children, and the respondent must be bound by his acts, unless he can show such fraud and collusion as would entitle him to relief on those grounds. Of this there is no evidence. On the contrary, Gandharp Singh asserted his claim, and if he forbore to press it in view of the circumstances to which we have adverted, it can hardly be doubted he prudently put an end to litigation which must have resulted in failure. There can hardly be a question that the shares of Sundar Singh and Chattarpat were entered in the names of Ajudhia Prasad and Budh Singh, then mere children, with the consent of Des Raj. Gandharp had by his declarations in 1853 and 1855 provided cogent evidence of his own acquiescence, and had this been absent, there was the difficulty in his way that the property had been granted to Ajudhia Prasad and Budh Singh by the Government. If as there is strong evidence to show, the property was held in separate shares, the shares of the great uncles of the respondent descended as inheritance liable to obstruction, and he could not question his father's acts. For the reason that there is no proof of any fraud or collusion on the part of Gandharp Singh in entering into the compromise of 1867, the suit cannot be maintained. The appeal is decreed and the suit dismissed with costs.

Appeal allowed.

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1 A. 655.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

ALI MUHAMMAD AND OTHERS (*Plaintiffs*) v. LALTA BAKHSH AND OTHERS (*Defendants*).* [30th April, 1878.]

Redemption of Mortgage—Adverse Possession—Act IX of 1871 (*Limitation Act*), *s.* 29, *and sch. II, art.* 148—*Limitation.*

The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse, or enable him to abbreviate the period of [656] 60 years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit. *Sheopal* v. *Khadim Hossein* (1), followed.

Where, accordingly, certain immoveable property was mortgaged in June 1854, for a term which expired in June 1874, and in July 1863, the equity of redemption of such property was transferred by sale to the mortgagees by a person who was not competent to make such transfer, and the mortgagees set up a proprietary title to such property in virtue of the sale, *held*, in a suit to redeem such property instituted in March 1877, that such suit was not barred because it was not instituted within twelve years from the date of the deed of sale.

[F., 37 M. 545=16 Ind. Cas. 694 (695)=23 M.L.J. 360=12 M.L.T. 330=(1912) M.W.N. 995; **App.**, 14 B. 279 (280, 281); 21 B. 793 (796); 11 Ind. Cas. 853; R., 21 B. 424 (426); 10 M. 189 (191); 35 M. 114 (120)=9 Ind. Cas. 289=21 M.L.J. 169=9 M.L.T. 286=(1911) 1 M.W.N. 113 (116); U.B.R. (1897—1901) 464 (466); U.B.R. Civil (1892—1896) 502 (505).]

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* Second Appeal, No. 258 of 1878, from a decree of Pandit Har Sahai, Subordinate Judge of Farukhabad, dated the 7th December 1877, affirming a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 11th September 1877.

(1) H.C.R. N.W.P. 1875, p. 220.

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THIS was a suit to recover the possession of certain immovable property by redemption of mortgage. This property originally belonged to one Kali Khan, whose sons after his death in June 1854, mortgaged it for 20 years to Lalta Bakhsh and Lakhan Singh. On the 31st July 1863, Munni, Kali Khan's widow, sold the property as her own to the mortgagors Raghu Nath and Khuman Singh. This suit was instituted on the 19th March 1877, by the heirs of the mortgagees, and Raghu Nath and Khuman Sing were made defendants in the suit after its institution, but they did not appear to defend it. The remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which certain of the plaintiffs appealed from the decree of the lower appellate Court. That decree dismissed the suit of these plaintiffs as barred by limitation. The plaintiffs contended that the suit was within time.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad* and Pandit *Bishambar Nath*, for the respondents.

The Court delivered the following

JUDGMENT.

The estate of which redemption is sought in this suit belonged to Kali Khan, and had before his death been in mortgage, and in June 1854, was re-mortgaged for a term of 20 years to Lalta Bakhsh and Lakhan Singh, the sons of the former mortgagee by his sons Azmat and Niamat. On the 31st July 1863, it was sold to the respondents by his widow, Munni as her own property, and the sale transaction is said to have been followed by mutation of registry, notwithstanding an objection preferred by the present appellants in the registry department. Shortly before the expiry of [657] the term of the mortgage, his daughter, Imaman, sued to establish her right to a share of the estate as one of the heirs of her father and brothers. On the 18th September 1874, the Court of first instance passed in her favour a decree which was upheld in special appeal by this Court on the 22nd June 1875. She and other heirs of Azmat and Niamat aforesaid have now joined in this suit for the redemption of the mortgage. Her claim is not disputed, but the claim of the plaintiffs, appellants, is resisted by the defendants, respondents, Lalta Bakhsh and Lakhan Singh, the original mortgagees, on the ground that, as more than twelve years have elapsed between the date of the deed of sale executed by Munni and the date on which the present suit was instituted, their rights have ceased to exist. The defence has been accepted by the Lower Courts as a complete and conclusive answer to the suit. The Court of first instance holds their claim to be barred by the general limitation of twelve years. The lower appellate Court concurring, expresses its opinion that, as the plaintiffs, appellants here, did not sue within twelve years from the 31st July 1863, to avoid the sale deed of that date, the defendants, respondents, must be considered to have been in adverse possession from that date of the property which those plaintiffs claim to redeem as belonging to them.

The suit as brought is simply a suit of the nature described in art. 148, sch. II of Act IX of 1871. Sixty years is the period of limitation fixed for such a suit. The ruling of the Court below that the suit is barred by limitation is obviously wrong; but of course the suit is liable to be dismissed if the plaintiffs, appellants here, have really lost their rights by reason of not having sued to set aside the sale-deed of the 31st July 1863, within twelve years from that date. S. 29 of Act IX of 1871 declares that,

at the determination of the period limited to any person for instituting a suit for possession of any land, his rights to such land shall be extinguished; but it does not appear that the plaintiffs, appellants, have lost their rights under the operation of this section, inasmuch as the right of redeeming and recovering possession of the landed property in suit only accrued to them in June 1874, on the expiry of the term of mortgage. The possession of Lalta Bakhsh and Lakhan Singh, under the date of mortgage of June 1854, of the rights conveyed to them thereby was certainly not adverse to the mortgagors of their repre- **[658]** sentatives, who still remained possessed of the equity of redemption, or the right of re-entry on their property after the term of mortgage on repayment of the mortgage-debt. It does not appear that the plaintiffs, appellants, were divested of this right by the sale-deed of the 31st July 1863, to which they were not parties. Munni, by whom it was executed, could transfer or surrender her own rights, but was not legally competent to transfer or surrender the rights remaining in the property of the plaintiffs, appellants, and those rights consequently could not pass to her vendees by means of that instrument. How then the possession of the original mortgagees, which was not adverse before the 31st July 1863, became after that date adverse to the plaintiffs, appellants, it is not easy to understand. The possession of a mortgagee does not become adverse whenever a mortgagee chooses to style himself or is styled proprietor of the mortgaged property. One does not see then why the plaintiffs, appellants, were bound to sue for the evidence of what was actually void. The sale-deed by which their rights were illegally disposed of did not practically effect them, for their rights of re-entry by redemption could not practically be enforced until the expiry of the term of mortgage in June 1874, and therefore, although its execution would doubtless have justified them in suing for its avoidance, had they deemed such a precaution expedient, such a proceeding was not necessary or obligatory upon them. They required no immediate relief. Now that they are asserting their right of redeeming the property from those to whom it was mortgaged by persons whom they represent and to whom they have succeeded in title, it is surely for the mortgagees, if they dispute the right in reliance on the deed of sale of the 31st July, 1863, to show that it destroyed that right. The mere exhibition of their names as the vendees of the property in the proprietary registers of the Revenue Department cannot create a proprietary title in them: such a title must be proved to have a legal origin. The ruling of the Lower Courts is in direct contravention of the Full Bench ruling in *Sheopal* v. *Khadim Hossein* (1), to the effect that the mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the period of 60 years which the law allows to a mortgagor to prosecute his right to redeem and **[659]** seek his remedy by suit. There is no evidence that the defendants, Raghu Nath and Khuman Singh, who have not defended the suit, have ever been in possession of the property in suit under the sale-deed of the 31st July, 1863. The defence which the lower Courts accepted must be rejected as untenable. Reversing the decree of the lower Court in so far as it dismisses the claim of the plaintiffs, appellants, we decree this appeal and claim with costs in both Courts.

Appeal allowed.

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(1) H.C.R.N.W.P. 1875, p. 220.

1878
APRIL 30.

APPEL-
LATE
CIVIL.

1 A. 659.

1 A. 659.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

MUHAMMAD ALI (*Plaintiff*) *v.* KALIAN SINGH (*Defendant*).* [30th April, 1878.]

Suit for Profits—Sir-land—Ex-proprietary Tenant—Rent—Act XVIII of 1873 (*North-Western Provinces Rent Act*), ss. 7, 14.

A certain mahal, of which the plaintiff in this suit claimed a one-third share of the profits for a certain year, belonged in equal shares to the defendant (lambardar), and *S* and *R*, his two brothers, who held certain sir land in partnership. The plaintiff had acquired the share of *S* by auction-purchase, *S* thus becoming an ex-proprietary tenant. The sir-land was not included in the rent-roll of the mahal, but was admitted by the defendant to be assessable with rent at a certain rate per bigha. *Held* that, whatever might be the course proper, to be taken for the purpose of assessing such sir-land or *S*'s share of it with rent, and notwithstanding that such course had not been taken. the plaintiff was entitled to this suit to claim and obtain his share in the profits of the sir-land.

THIS was a suit under Act XVIII of 1873 for profits. Sultan Singh, Kalian Singh, and Rodra Singh were the owners of a certain mahal in equal shares. They held the sir-land appertaining to the mahal, upon which no rent had been assessed, as co-parceners in equal shares. Sultan Singh's interest in the mahal had been purchased by the plaintiff in this suit, who now claimed from Kalian Singh, as lambardar, a one-third share of the profits of the mahal for the year 1283 Fasli. In determining what was due to the plaintiff the Court of first instance held that the plaintiff was entitled to a one-third share of the rent assessable upon the sir-land. **[660]** This land the defendant admitted to be assessable with rent at the rate of five rupees per bigha, and the Court accordingly allowed the plaintiff one third of the assessable rent less four annas in the rupee, a deduction which it made, with reference to s. 7 of Act XVIII of 1873, in view of the fact that Sultan Singh was an ex-proprietor. On appeal by the defendant the lower appellate Court held that, as the sir-land had not been assessed under s. 14 of Act XVIII of 1873, no allowance could be made to the plaintiff on account of it in determining the profits due to him.

The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and Shah *Asad Ali*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—It appears that the mahal of which the plaintiff claims one share of the profits of 1283 Fasli belonged in equal shares to the defendant and his two brothers, who held 159 bighas and 9 biswas of land as sir in partnership. The plaintiff recently acquired the share of one of the brothers by name Sultan Singh by purchase at auction. The sir-land is not included in the rent roll, but is admitted by the defendant to be assessable at five rupees per bigha. The Court of first instance considered the plaintiff to be entitled to a third of the assessable rent, after

* Second Appeal, No. 192 of 1878. from a decree of S. Melville, Esq., Judge of Meerut, dated the 1st December, 1877, modifying a decree of M. S. Howell, Esq., Assistant Collector of Bulandshahr, dated the 25th April 1877.

1878 APRIL 30.

APPELLATE CIVIL.

1 A. 659.

making the deduction of four annas per bigha required by s. 7 of Act XVIII of 1873 in favour of an ex-proprietary tenant. The lower appellate Court has ruled that he is not entitled to claim a share of the profits from the sir-land aforesaid because it has not been assessed with rent under s. 14 of the Act above-mentioned. The special appeal calls in question the correctness of the ruling. The section on which it purports to be based provides for the enhancement or determination of the rent of an ex-proprietary tenant. How it would possibly be applied in a case like the present in which Sultan Singh has no separate holding but holds jointly with his brothers the sir-land aforesaid, it is not now necessary to discuss. There is some show of reason in the appellant's contention that, if action in the matter should be taken under the section, it ought to be taken by the defendant who is the lambardar of the mahal. [661] But whatever may be the course proper to be taken for the purpose of assessing the sir-land or Sultan Singh's share of it with rent, we are not prepared to admit that, because such course had not been taken, the plaintiff is debarred from claiming and obtaining his fair share in the profits of the sir-holding. To this he seems entitled in reason and equity, and we decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

Appeal allowed.

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1 A. 661=3 Ind. Jur. 33.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

PHUKAR SINGH AND OTHERS (*Plaintiffs*) *v.* RANJIT SINGH AND OTHERS (*Defendants*).* [9th April, 1878.]

Hindu Law—Mitakshara—Inheritance—Stridhan.

Immoveable property inherited by the paternal grandmother from the grandson does not rank as *stridhan*, and on her death devolve as such on her heirs, but devolves on her death on the heirs of the grandson.

[R., 22 A. 353 (357); 3 O.C. 129 (135).]

THIS was a suit for the possession of certain immoveable property being the estate of one Sardar Singh, who died on the 25th October, 1861, without leaving any issue. His paternal grandmother, Muna Kuar, succeeded to his estate in the absence of nearer heirs. She died on the 30th September, 1873. This suit was instituted on the 14th July, 1876, in which the plaintiffs claimed as heirs of Sardar Singh. The lower appellate Court reversed the decree which the Court of first instance gave the plaintiffs, and dismissed the suit on the ground that it was barred by limitation. The plaintiffs appealed against the decree of the lower appellate Court to the High Court. The remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Chatterji* and Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellants.

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* Second Appeal, No. 151 of 1878 from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 26th January, 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 19th April 1877.

1878 APRIL 9.

APPELLATE CIVIL.

1 A. 661 = 3 Ind. Jur. 33.

[662] The Senior Government Pleader (Lala *Juala Prasad*), the Junior Government Pleader (Babu *Dwarka Nath Banarji*), and Munshi *Sukh Ram*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—The property in suit belonged to Sardar Singh, and at his death he was succeeded in 1861 by his paternal grandmother, Muna Kuar, in the absence of nearer heirs. She died in 1873, leaving a daughter, Phul Kuar, still living. Some of the defendants are her sons, and the defendant, Ranjit Singh, is a son of a sister of Sardar Singh also living. The plaintiffs are grandsons of the full brother of Mohabbat Singh, great-grandfather of Sardar Singh, and they claim the estate as heirs of Sardar Singh. Another plaintiff, Ganjam Singh, has purchased part of their rights and interests. The Judge has dismissed the suit and reversed the decree of the first Court. The plaintiffs have preferred a special appeal. It is clear that Muna Kuar succeeded Sardar Singh in the ordinary course of succession, and her possession has not been adverse to the plaintiffs, to whom the succession only opened out at her death. There is therefore no bar by limitation, as the Judge appears to think; but it has been contended before us that the Judge's decree should be maintained on the ground that Muna Kuar succeeded to the property as *stridhan*, and that the plaintiffs would not be her heirs, but her daughter, Phul Kuar, for whom the defendants hold.

The question we have to determine is whether property inherited by the paternal grandmother from the grandson will rank as *stridhan* and devolve as such; and, to support the affirmative, Mitakshara, ch. ii. s. xi, v. 2, is referred to, where property which a woman has acquired by inheritance is included in the category of "woman's property;" and Sir T. Strange has included this sort of property in the several kinds of *stridhan* —Strange's Hindu Law, 4th ed., p. 28. But on this subject Sir W. Macnaghten observes: "In the Mitakhshara, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*."—Macnaghten's Hindu Law, 3rd ed., p. 88; and this distinction between woman's property generally and *stridhan* proper, which alone [663] devolves on her relations, was noticed by the Privy Council in *Thakoor Deyhee* v. *Baluk Ram*(1), at the time that they decided that one class of inherited property, *viz*., that inherited by a widow from her husband, does not rank as *stridhan* devolving on her heirs. The enumeration in Manu of woman's property has been held not to be exhaustive, and it is unnecessary for us in this suit to give an opinion as to what extent property acquired by inheritance will be *stridhan*. The question was discussed by the Privy Council in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (2) and left undetermined, but we are disposed to hold that property inherited by paternal grandmother from her grandson is not *stridhan*. It may be gathered from the text-books on the Hindu law that property must be held unconditionally, and subject to no restrictions, to constitute *stridhan* devolving on a woman's heirs. "That alone is her peculiar property which she has power to give, will or use independently of her husband's control"—Dayabhaga, ch. iv, s. i, v. 18. The property inherited by the grandmother from the grandson will not bear this test, since it is like property inherited

(1) 11 M.I.A. 139. (2) 5 I. A. 1.

by the mother from the son, subject to the same restrictions as to its disposal as that inherited by the wife from her husband. It has been held that the rules concerning property devolving on the widow equally affect property devolving on a mother from her son—note to *Bijya Dibeh* v. *Unpoorna Dibeh* (1)—and it has already been decided by the Privy Council—*Thakoor Deyhee* v. *Baluk Ram* (2) and *Bhagwandeen Doobey* v. *Myna Baee* (3)—that property inherited from the husband by the widow will not rank as *stridhan* and the ground on which that decision rests appears to us to apply equally to the case before us. This is the view of the law of succession taken by Sir T. Strange and Sir W. Macnaghten.—"Had the property been the mother's in the Hindu sense of 'woman's property,' it would descend on her death to her daughters, but having been inherited by her from her son, it passes according to the law as practised in Bengal, not to her heirs, but to his."—Strange Hindu Law, 4th ed., p. 144. "On her death (*i.e.*, mother's) the property devolves on the heirs of the son, and not on her heirs."—Macnaghten's Hindu Law, 3rd ed., [664] p. 26; and the rulings of the Courts record with this view (4), though there appears some conflict of decisions in the Bombay High Court. We decree the appeal with costs, and reverse the decree of the lower appellate Court and restore that of the Court of first instance.

1878 APRIL 9. — APPELLATE CIVIL. — 1 A. 661 = 3 Ind. Jur. 33.

Appeal allowed.

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1 A. 664.

APPELLATE CRIMINAL.

Before Mr. Justice Turner, Officiating Chief Justice.

EMPRESS OF INDIA *v.* BHAWANI AND ANOTHER. [6th May, 1878.]

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872 (Evidence Act), s. 30—Conviction on uncorroborated confession.

A conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons (5).

[F., 1 A. 675; R., 15 Bom. L.R. 975 (984) = 21 Ind. Cas. 673 = 10 Cr. L.J. 625.]

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(1) 11 M.I.A. 139. (2) S.D.A. Rep. vol. i, 164. (3) 11 M.I.A. 487.

(4) See *P. Bachirajee* v. *V. Venkatappadu*, 2 M. H. C. R. 409; *Venayak Anandrav* v. *Lakshmibai*, 1 B.H.C.R. 117; *Pranjivandas Tulsidas* v *Devkuvarbar*, 1 B.H.C. R. 130 and *Narsappa Lingappa* v. *Sakharam Krishna*, 6 B.H.C.R. A.C.J. 215.

(5) As to the necessity of corroboration, see *Queen* v. *Chunder Bhuttacharjee*, 24 W.R., Cr. 42; *Queen* v. *Naga*, 23 W.R., Cr. 24; *Queen* v. *Sadhu Mundul*, 21 W.R., Cr. 69; *Queen* v. *Jaffir Ali*, 19 W.R., Cr. 57; 1 Mad. 163.

The Calcutta High Court appear to have decided, under a series of rulings, that the statement of a person being tried jointly with other persons cannot be used in evidence against such other persons, unless such statement implicates himself as well as such other persons and to the same extent. See *Queen* v. *Baijeo Chowdhree*, 25 W.R., Cr. 43; *Queen* v. *Keshub Bhoomia*, 25 W.R., Cr. 8; *Queen* v. *Bilat Ali*, 10 B.L. R., 453 = 19 W.R., 67; *Queen* v. *Mohesh Biswas*, 10 B.L.R. 455, note = 19 W.R. 16. See also *Reg.* v. *Amrita Govinda*, 10 B.H.C.R. 497.

It has also been ruled that such statement cannot be used as corroborating the evidence of an accomplice—*Queen* v. *Jaffir Ali*, 19 W.R., Cr. 57; *Reg.* v. *Malapa bin Kapana*, 11 B. H. C. R. 196. Also that such a statement cannot be used in evidence where one party is being tried for the abetment of the offence for which the other is on his trial—*Queen* v. *Jaffir Ali*, 19 W.R., Cr. 57. See also *Reg.* v. *Amrita Govinda*, 10 B.H.C.R. 497.

Also that such a statement cannot be used in evidence after the person making it has been convicted and sentenced—*Reg.* v. *Kallu Patil*, 11 B.H.C.R. 146.

1878 MAY 6. — APPELLATE CRIMINAL. — 1 A. 664.

CERTAIN persons were tried by Mr. J. S. Porter, Deputy Commissioner of Jhansi, on a charge of dacoity. Eleven of these persons were residents of the same village. Certain of those eleven persons, including persons named severally Baij Nath, Damru, and Gandharp, who had made confessions, pleaded guilty to the charge. The remainder, of whom two were named respectively Bhawani and Pheran, pleaded not guilty. The Deputy Commissioner, on the 18th January 1878, convicted Pheran and Bhawani on the confessions of Baij Nath, Damru, and Gandharp; the portion of his judgment [665] relating to these two accused being as follows: "Pheran and Bhawani are sons to Moji, the lambardar of Purenia. The evidence against them is the statements of the other dacoits. Baiji Nath states that Bhawani carried a gun. According to Damru, it was Pheran, Puna, and Garna, with whom he settled preliminaries when he went to Purenia. Gandharp himself names Pheran. Manu, *ghosi* of Semri, is not likely to implicate Bhawani and Pheran falsely, *ghosis* like himself. In defence Pheran sets up an *alibi*. The witness he calls, Gobinda, *kachi*, however, contradicts him on every point. Bhawani calls two witnesses who gave him a good character and state he is a man of some substance. There can be no doubt that both men were in the dacoity, and they at least were not forced by want to join in it. Pheran, however, is a very young man." Bhawani was sentenced to seven years' rigorous imprisonment, Pheran to five years. These sentences were affirmed by the Commissioner of Jhansi.

Bhawani and Pheran appealed to the High Court.

Pandit *Anandi Lal*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

TURNER, O. C. J.—It is to be regretted that, in a case of this magnitude, no evidence was obtained by inquiry to support the charge against the accused. Had none of them confessed, not one of them could have been convicted. But where the police inquiry (if indeed there was one) so completely fails, it was competent to the Deputy Commissioner to have tendered a pardon to such of the accused as he considered were the least guilty, and then to have obtained some evidence better than the mere statements of accused persons to bring to justice those whom he regarded as the most influential among the accused. Although the law allows a Court to consider statements made by accused persons when dealing with the case against other accused persons who are tried with them, I know of no instance in which on such evidence only a conviction has been affirmed, and I should hesitate to establish a precedent. It appears to me that if, as has been established by experience, the evidence of an approver examined on oath and liable to cross-examination ordinarily should not be accepted without corroboration on a material point, *a fortiori* such [666] corroboration should be required to support the statement of a person naturally desirous of earning the favour of the Court in the hope of a lenient sentence, who makes a statement which does not expose him to the penalties of perjury, and who cannot be cross-examined by the other accused in turn. There existing against the appellants no other evidence than such statements, I do not consider them by themselves sufficient to place the guilt of the appellants beyond reasonable doubt, and I therefore acquit them.

Convictions quashed.

1878
MAY 20.

CRIMINAL JURISDICTION.

1 A. 666.

1 A. 666.

CRIMINAL JURISDICTION.

Before Mr. Justice Spankie.

EMPRESS OF INDIA *v.* PARTAB. [20th May, 1878.]

Punishment—Whipping—Act VI of 1864, *ss.* 2, 3—*Act XLV of* 1860 (*Penal Code*), *ss.* 378, 411—*Theft—Dishonestly receiving stolen Property—Act X of* 1872 (*Criminal Procedure Code*), *ss.* 504, 505—*Security for good behaviour.*

P was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and, on the exoiration of the term of imprisonment, to furnish security for good behaviour. *Held* that, the offence of theft not being the same offence as that of dishonestly receiving stolen property, the punishment of whipping was illegal.

Held also, with some hesitation, that there was evidence as to general character adduced before the Magistrate which justified him in dealing with *P* under s. 505 of Act X of 1872.

Held also, that the order requiring security should not have formed part of the sentence for the offence of which *P* was convicted. A proceeding should have been drawn out representing that the Magistrate was satisfied, from the evidence as to general character adduced before him in the case, that *P* was by repute an offender within the terms of s. 505 of Act X of 1872, and therefore security would be required from him, and an order should have been recorded to the effect that on the expiry of the imprisonment, *P* should be brought up for the purpose of being bound (1).

[F., 9 C. 215 (216).]

ONE Partab was convicted on the 1st February 1878, by Mr. L. S Porter, Assistant Magistrate of the first class, under s. 411 **[667]** of the Indian Penal Code, of dishonestly receiving stolen property. He admitted on his trial that he had twice previously been convicted of theft. The sentence passed on him was as follows: "The sentence of the Court upon the prisoner is that he receive thirty stripes and be kept in rigorous imprisonment for the space of two years, including three months' solitary confinement; and the Court further directs that, on the expiration of this term of two years, the accused Partab shall furnish security, himself in Rs. 100, with two sureties of Rs. 100 each, to be of good behaviour for the further term of one year. In default of furnishing such security, he shall be kept in rigorous imprisonment for such further term of one year."

Partab applied to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872, contending that the sentence of whipping was illegal, inasmuch as he had previously been convicted of theft, a different offence from the offence of dishonestly receiving stolen property; and that the order requiring security from him was also illegal, as there had been no proceedings under s. 505 of Act X of 1872, and, irrespective of the proceedings in which he had been convicted, there was no evidence as to his general character as would justify the Magistrate in dealing with him under that section.

Mr. *Niblett*, for the petitioner.

(1) See also *Queen* v. *Shona Digee*, 24 W. R. Cr. 14, where it was held that when a conviction of an offence is contemporaneous with an order for taking security for good behaviour, ss. 504—506 of Act X, 1872, contemplate that the sentence for the offence shall first be carried out, and the person to be bound shall then be brought up for the purpose of being bound.

1878
MAY 20.

CRIMINAL JURISDICTION.

1 A. 666.

JUDGMENT.

SPANKIE, J.—The whipping in this case might have been awarded *in lieu* of the punishment to which the accused was liable under s. 411, and if previously convicted of an offence under this section, he might have been punished with whipping *in lieu of or in addition* to any other for which he would have been liable for the offence. But there is no record of the previous convictions of accused. He does not admit that he was twice before punished for a similar offence to that with which he was now charged. He stated that he had been twice punished for theft, but the offence of theft is not the same offence as that of dishonestly receiving stolen property, knowing the same to have been stolen. Whipping therefore should not have been added as a punishment, and that portion of the sentence is annulled.

[668] In making an order for security for good behaviour I presume that the Magistrate holds the powers of a first class Magistrate, and that he was acting under s. 505 of the Criminal Procedure Code. I have some doubt whether the Magistrate had adduced before him such *evidence as to general character* as to justify his dealing with the accused as a person known by repute to be a thief or receiver of stolen property. He had already sentenced the accused for the offence of which he was found guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which accused was convicted. There should have been a proceeding drawn out representing that the Magistrate from the evidence as to general character adduced before him in this case, was satisfied that Partab was by repute an offender within the terms of s. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (cl. 2, s. 504).

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1 A. 668 (F.B.).

FULL BENCH.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

THAKUR PRASAD (*Decree-holder*) *v.* AHSAN ALI AND ANOTHER (*Judgment-debtors*).* [27th May, 1878.]

Execution of Decree—Appeal—Act VIII of 1859 *(Civil Procedure Code)—Act X of* 1877 *(Civil Procedure Code)—Repeal—Pending Proceedings—Act I of* 1868 *(General Clauses Act)*, *s.* 6.

The holder of a decree for money applied for the attachment in the execution of the decree of certain monies deposited in Court to the credit of the **[669]**

* Miscellaneous Second Appeal, No. 27 of 1878, from an order of H.D. Willock, Esq., Judge of Azamgarh, dated the 4th August 1877, affirming an order of Maulvi Muhammad Hussain Khan, Munsif of Azamgarh, dated the 4th June, 1877.

1878 MAY 27. — FULL BENCH. — 1 A. 668 (F.B.).

judgment-debtor. On the 4th June 1877, the Court of first instance refused the attachment on the ground that the decree directed the sale of certain immoveable property for its satisfaction, and awarded no other relief. The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August 1877. Act X of 1877, repealing Act VIII of 1859 and Act XXIII of 1861, came into force on the 1st October, 1877. On the 13th November 1877, the decree-holder applied to the High Court for the admission of a second appeal from the order of the lower appellate Court on the ground that the decree had been misconstrued.

Held, that an appeal was admissible under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

Held also, that the order of the lower appellate Court was also appealable under Act X of 1877.

[Diss., 2 A. 74; F., 2 A. 91; Ap., 13 C. 86 (89); R., 1 A. 745 (747); 1 A. 748 (750); 12 B. 449 (452); 16 C. 267 (273); (F.B).]

THIS was a reference to a Full Bench by Turner, J. The circumstances under which this reference was made and the questions referred are stated in the judgment of Turner, Spankie, and Oldfield, JJ., concurring.

Pandit *Anandi Lal*, for the petitioner.

Munshi *Kashi Parsad* and Shah *Asad Ali*, for the opposite parties.

JUDGMENT.

TURNER, O. C. J., and SPANKIE and OLDFIELD, JJ., concurring—In the case in which this application is presented, the decree-holder applied for execution of his decree by the attachment of moneys deposited in the Court to the credit of the judgment-debtor. On the 4th June 1877, the Court of first instance refused attachment on the ground that the decree directed the sale of certain immoveable property for the satisfaction of the sum decreed, and awarded no other relief. The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August 1877. The new Code of Civil Procedure came into operation on the 1st October 1877. On the 13th November 1877, the decree-holder applied for the admission of a special appeal from the order of the lower appellate Court on the ground that the decree had been misconstrued. The Judge to whom the application was made referred it to the Full Bench. Two questions are raised in this reference: whether the application is governed by the provisions of the repealed Code of Civil Procedure or by those of the existing Code; and if by those of the existing Code, whether the second appeal lies from the order of the lower appellate Court.

[670] The 3rd section of the Code now in force, Act X of 1877, declares that the enactments mentioned in the second schedule in that Act (which includes so much of Acts VIII of 1859 and XXIII of 1861 as had not been theretofore repealed, were thereby repealed, subject to the proviso that nothing in that section contained should affect the procedure prior to decree in any suit instituted or any appeal presented before that Code came into force. The proviso does not go on to exclude in express terms the operation of the General Clauses Act, but by implication it does exclude the operation of the 6th section of that Act in respect of the procedure after decree in suits or appeals. While then it is not denied that proceedings in execution of decree initiated after the existing Code came into operation must be governed by the provisions of that Code, the question remains whether such proceedings initiated before the Act came into operation are affected by that law, so that thereafter they must be governed by it, or whether they are not to be prosecuted and brought to a conclusion as if the law under which they were instituted were still in

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force. By the 6th section of the General Clauses Act it was enacted that the repeal of any Act should not affect any proceedings commenced before the repealing Act shall have come into operation.

That the provisions of s. 6 of the General Clauses Act operate on proceedings in execution of decree has been already held by the High Court of Bombay (1), and we agree with the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with execution of decree is prospective and does not affect proceedings already commenced. We may refer to several sections in support of the view. Section 311 empowers the decree-holder or any person whose property has been sold *under that chapter* to take objection to the sale on the ground of a material irregularity in publishing or conducting it, but it makes no reference to sales which have taken place under the repealed Code, though the period allowed for such objections under that Code might not have expired when Act X of 1877 came into operation. Section 312 declares orders passed under the preceding section final, but it does not refer to similar orders [671] passed under the repealed Code. Section 283 declares any party affected by an order passed under ss. 280, 281, 282 entitled to institute a suit to establish his right to the property in dispute, but it is silent as to similar orders passed under the provisions of the repealed Code. Lastly s. 588 declares that an appeal shall lie from certain orders under "this Code." Among the orders specified as appealable are some which would be passed after decree, and which, if passed under the repealed Code, would under that Code have been appealable. It is not unreasonable then to conclude that, in abstaining from making provision for cases arising under the repealed Code in the instances to which we have alluded, and in giving prospective effect to the chapter relating to execution of decrees, the Legislature had in view the provisions of the General Clauses Act.

However this may be, unless the 6th section of the General Clauses Act is excluded by the Code, and, as we shall presently show, it is not in our judgment excluded, in respect of proceedings in execution, it cannot be disregarded, and its effect is to leave such proceedings initiated before the repealing Act came into force to be dealt with under the provisions of the repealed Code. For the position that the saving of "proceedings commenced" from the operation of a repealing Act extends also to appeals from such proceedings we find authority in *Ratanchand Srichand* v. *Hanmantrav Sheivbakas* (2). An appeal is in fact a stage of a proceeding and if, as it might happen, the right of appeal was taken away by a repealing Act, and a proceeding theretofore appealable converted into a final proceeding, it cannot be doubted that the proceeding, would be affected by the alteration of the law. If in such a case it be intended to deprive the parties of the right of appeal, the intention to exclude the operation of s. 6 of the General Clauses Act should appear clearly in the repealing Act.

For the reasons we have stated we arrive at the conclusion that proceedings in execution of decrees instituted under Act VIII of 1859 are to be governed by the provisions of that Code, and that an appeal should be entertained from all orders passed in such proceedings which under the provisions of that Act were appealable. [672] But it has been suggested that, inasmuch as by s. 647, Act X of 1877,

(1) *In the matter of the petition of Ratansi Kalianji*, 2 B. 148.
(2) 6 B. H. C. R. A.C.J. 166.

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the procedure in that Act prescribed is to be followed, so far as it can be made applicable in all proceedings other than suits and appeals, the provisions of the last paragraph of s. 3 declaring that nothing in the Act contained shall affect the procedure prior to decree in any suit instituted, &c., apply also to proceedings in execution, so that the procedure in such proceedings (whether instituted before the passing of the Act or not) subsequently to the formal order of the Court wherein the result of the proceeding is embodied is governed by the provisions of Act X of 1877.

That proceedings in execution of decree are among the proceedings other than suits or appeals to which s. 647 applies may be admitted. The Code, following the usage in this country, does not treat appeals as mere stages in suit; and similarly, under Act VIII of 1859, proceedings in execution of decree have in accordance with the same usage been treated, not as stages in a suit, but as miscellaneous proceedings. The provisions of the analogous section in the former law, s. 38, Act XXIII of 1861, were held by this Court applicable to proceedings in execution of decree (1), on the same ground on which it must be held that the provisions of s. 647 are applicable to such proceedings, namely, that otherwise no procedure is provided for such proceedings. It does not, however, follow from the admission that the provisions of s. 647 are applicable to proceedings in execution of decree, that we must be compelled to the conclusion that the last paragraph of s. 3 is also applicable to the proceedings, or to all the proceedings, to which s. 647 applies. While had such been the intention of the Legislature, it could have been made to appear clearly by the introduction of a few words in s. 3, we find cogent evidence to the contrary in the prospective character of the sections relating to execution of decree to which we have already adverted. We would then reply that the last paragraph of s. 3 is not to be extended to proceedings in execution of decree. Should, however, our opinion on this point be erroneous, it would be necessary to consider what are the orders passed in execution of decree referred to in s. 588, cl. (*j*), and whether other orders passed in execution of decree are appealable under the Code [673] save such as are referred to in s. 588, cl. (*j*) ; and inasmuch as these questions are necessarily raised in a number of references which are now before the Court arising out of proceedings instituted after the Act came into operation, it will be convenient to dispose of them on the reference now before us. By the provisions of the first paragraph of s. 588 read with cl. (*j*) appeals are allowed from orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit. The first observation that arises on this section is that, if, as we have held, the provisions of s. 647 apply to proceedings in execution of decree cl. (*j*) is unnecessary, unless it was intended to restrain the larger right of appeal that would be given by s. 647. Yet unless we import a limitation which the terms do not warrant, the clause declares no more than is implied in s. 647, for, under s. 647 the procedure prescribed by the Act is to be followed in proceedings other than suits, and consequently the orders passed in such proceedings would be open to appeal when of the same nature as appealable orders made in the course of a suit. It is then argued that the term "orders" made in the course of a suit is to be restricted to orders passed in the course of a suit

(1) *In the matter of the petition of Harshankar Parshad*, 1 A. 178. See *also Gaya Parshad* v. *Bhup Singh*, 1 A. 180.

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prior to decree, and that, inasmuch as the Code distinguishes between appeals from orders and appeals from decrees, the Court is constrained by the declaration that an appeal shall lie from those orders and no other such orders, to hold that no orders passed under s. 244 are open to appeal save such as are of the same nature with appealable orders passed in the course of a suit prior to decree.

On referring to s. 244, it will be seen that all the questions therein mentioned are to be determined by the "order" of the Court. They embrace not only the minor questions which may arise prior to determination of a proceeding, but the determination of a proceeding itself, which may be a matter of the utmost importance to the parties. It is scarcely to be supposed that no appeal would be provided from such orders, while an appeal is given from interlocutory orders of comparatively minor importance.

Again, orders passed after decree as well as orders passed before decree may be properly termed orders passed in the course of a suit, and indeed the decree itself is in one sense an order **[674]** and is so defined in the Code. By adopting the construction which has been urged, we import a limitation which, as we have said, the terms of the clause do not warrant. We are then compelled to the conclusion that the provisions of s. 588 do not embrace all the directions on the determination of proceedings which are termed in the Code "orders," and that in declaring that an appeal should lie from the orders therein mentioned and from no other such orders, we must understand orders of a similar nature to those specified, and not to all "orders" that might be passed under the Code. The expression "orders" under s. 244 as to questions relating to execution of decree of a similar nature to appealable orders made in the course of a suit would be awkward if it were intended to apply to orders determining such questions; and again orders made in the course of a suit may fairly be understood as not embracing the order which is also the decree. While then the provisions of cl. (*j*) allow an appeal from the orders made in the course of execution proceedings where an appeal is allowed from similar orders passed in the course of a suit, the provisions of s. 647 declare that the procedure prescribed by the Act shall be followed (so far as it is applicable) in all proceedings other than suits and appeals. It follows that an appeal will lie in such proceedings from the order which is analogous to a decree in a suit.

The definition of the term "decree" supports the conclusion at which we have arrived. "A 'decree' means the formal order of the Court in which the result of the decision of the suit or *other judicial proceeding* is embodied." Applying this definition to proceedings in execution of decree, we feel ourselves at liberty to hold that the formal order of the Court in which the result of the proceeding is embodied is a decree within the meaning of that term in the Code. It is therefore appealable in all cases in which a decree is appealable, and the procedure must in such cases be governed by the provisions of the chapters which relate to appeals from decrees.

It is true that the definition of the term "decree" is so large as to embrace some of the orders which are appealable under s. 588, but we are not on that account at liberty to reject it. It is also true, as we have shown, that cl. (*j*), is, on our construction of s. 647, superfluous, but the clause does not appear in any draft of the **[675]** Code submitted to the Council save the last Bill, No. 5, and it may be that the effect of s. 647 escaped attention.

We reply to this reference that the application is governed by the provisions of the repealed Code, but that, if it be governed by Act X of 1877, an appeal would lie from the order.

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1 A. 668 (F.B.).

PEARSON, J.—The appealed order falling within the definition of a decree contained in s. 2 of Act X of 1877, is, in my opinion, appealable under s. 584 of that Act.

The appeal appears to be admissible also under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

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1 A. 675.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson.

EMPRESS OF INDIA *v.* RAM CHAND. [28th May, 1878.]

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872, Evidence Act, s. 30—Conviction on uncorroborated confession.

A conviction of a person, who is being tried together with other persons for the same offence, cannot proceed merely on an uncorroborated statement in the confession of one of such other persons (1).

[R., 25 C. 594 (F.B).]

THIS case is not reported in detail, as Pearson, J., took in it the same view as Turner, J., in *Empress* v. *Bhawani* (1).

Conviction quashed.

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1 A. 675.

APPELLATE CIVIL.

Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

BEHARI LAL (*Decree-holder*) *v.* SALIKRAM (*Judgment-Debtor*). * [3rd June, 1878.]

Execution of Decree—Act VIII of 1859 (Civil Procedure Code) ss. 212, 216—Limitation—Application to enforce or keep in force a decree—Act IX of 1871 (Limitation Act), sch. II, art. 167.

On the 3rd March 1875, an application was made by a decree-holder to the Court executing the decree which did not, as required by s. 212 of Act VIII of 1859, state the mode in which the assistance of the Court was required, whether by the arrest and imprisonment of the judgment-[676] debtor or attachment of his property, but prayed that the Court would, under section 216 of that Act, issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. Under this application, notice was issued to the judgment-debtor on the 28th March 1875. On the 27th April 1875, the execution case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. *Held per* PEARSON and OLDFIELD, JJ., that for the purposes of art. 167 sch. ii of Act IX of 1871 the application was one to

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* Miscellaneous Second Appeal, No. 73 of 1877, from an order of R. Saunders, Esq., Judge of Farukhabad, dated the 14th July 1877, reversing an order of Pandit Har Sahai, Subordinate Judge, dated the 5th June 1877.

(1) See *Empress* v. *Bhawani*, 1 A, 644 and note to that case.

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1 A. 675.

enforce or keep in force the decree (1) and further that limitation should be computed from the date the notice to the judgment-debtor was issued.

Franks v. *Nunch Mal* (2) impugned.

Per SPANKIE J. *contra.*

[F., 8 Ind. Cas. 377 (378)=13 O.C. 303; 57 P.R. 1905=22 P.L.R. 1905; R., 25 C. 594 (599) (F.B.); 11 C.P.L.R. 157 (159 and 160).]

APPLICATION for the execution of a decree for money by attachment and sale of certain property was made on the 9th December 1872. The attachment was made and a sale of the property took place, and a portion of the money due under the decree was realised. On the 24th February 1873, the execution case was struck off the file. On the 3rd March 1875, the decree-holder again made an application relating to the decree. This application contained in a tabular form the particulars required by s. 212 of Act VIII of 1859, with the exception of the mode in which the assistance of the Court was required, *viz.*, whether by the arrest and imprisonment of the judgment-debtors or the attachment of their property. In the application the decree-holder prayed that notices might be issued to the judgment-debtors under s. 216 of the Act. The Court made an order on the 20th March 1875, directing notices to issue, and notices were issued on the 28th March. On the 27th April 1875, the execution case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. On the 30 April 1877, the decree-holder applied for the execution of the decree by the arrest and imprisonment of Salik Ram, one of the judgment-debtors. The judgment-debtor objected that this application was barred by limitation. The Court of first instance held that the application was not barred by limitation, as it was made within three years from the 28th March 1875, when notices issued to the judgment-debtors. On appeal by the judgment- [677] debtor the lower appellate Court held that the application was barred by limitation, on the ground that the application made on the 3rd March 1875 was informal, and consequently did not keep the decree in force. The lower appellate Court relied on *Franks* v. *Nunch Mal* (2), and Misc. S. A. No. 60 of 1876, dated the 14th December, 1876 (3).

The decree-holder appealed to the High Court, contending that the present application was within time, as that made on the 3rd March 1875 was sufficient to keep the decree in force.

Munshi *Hanuman Prasad* and Shah *Asad Ali*, for the appellant.

Lala *Har Kishan Das*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court (PEARSON and SPANKIE, JJ.)

PEARSON. J.—The precedent to which the Judge refers supports his decision. But I am not myself able to assent altogether to the ruling in the precedent. In the first place, I doubt whether the notice issued by the Court can be regarded as good for nothing and a mere nullity, because it was issued on the strength of an application not strictly in the form

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(1) See also *Chunder Coomar Roy* v. *Bhogobutty Prosonno Roy*, 3 C. 235 and *Jamna Das* v. *Lalitaram*, 2 B. 294; from which cases it appears that the "application" spoken of in art. 167, cl. 4, sch. ii of Act IX of 1871 need not necessarily be an application under s. 212 of Act VIII of 1859, but includes any application to keep in force the decree. See also *Husain Buksh* v. *Madge*, 1 A. 525.

(2) H.C.R.N.W.P. (1875) 79.

(3) See 1 A. 678 note (2).

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and of the nature prescribed by s. 212 of Act VIII of 1859. Probably the Court should have rejected the application for the issue of a notice and required an application of the kind required in s 212 specifying the particular relief sought, although no relief could be granted until the notice had been issued, and the omission might have been supplied afterwards. But it did, upon the application presented to it, issue a notice, and art. 167 sch. ii of Act IX of 1871, allows an application to be made for the execution of the decree in case where a notice under s. 216 of the Code of Civil Procedure has been issued within three years from the date of issuing such notice. In the next place I conceive that the application for the issue of a notice under s. 216, though not an application on which such a notice could properly issue, was still an application to keep in force the decree. The Procedure Code, it is true, provides only for application for the execution of decrees under s. 212, but the limitation law recognises applications having for their object to keep decrees in force. An application which [678] might be irregular in reference to s. 212 might still be an application of the other kind, and I cannot conceive that the decree-holder had any other object in view in making his application of the 3rd March 1875, than to keep the decree in force by warning the judgment-debtor that its enforcement was contemplated. The present application is within three years from that date. I am therefore disposed to uphold the order of the Court of first instance and to reverse that of the lower appellate Court. Apparently Chuni Lal (1) has been improperly made a respondent to this appeal, as he was not a party to the proceedings in the lower appellate Court, the subject of the appeal.

SPANKIE, J.—I am still of the same opinion as that expressed in the decision of this Court dated the 14th December 1876 (2) to which I was a party.

The terms of s. 216 of Act VIII of 1859 are precise and clear. "If an interval of more than one year shall have elapsed between the date of the decree or the application for its execution, or if the enforcement of the decree be applied for against the heir or representative of original party to the suit, the Court shall issue notice to the party against whom execution may be applied for, &c., &c.;" but there must be an application for execution, alluding to the provisions of s. 212. It precedes and does not succeed the Court's issue of notice under s. 216 to the heir or representative of an original party to this suit, and where no application for execution has been made within three years from the date of the decree, I do not think that the decree-holder can fall back upon the notice issued under s. 216. If the application under s. 212 were bad, it seems to me that the Court had no power to issue the notice, and under such circumstances the mere issue of the notice cannot be regarded as giving the decree-holder a fresh period of limitation. The old procedure

(1) The second judgment-debtor.

(2) Misc. S. A. No. 60 of 1875. In this case, decree-holder applied on the 23rd November 1875, for the execution of his decree dated the 25th January 1872, relying on an application dated the 22nd January 1875, as one from which limitation ran. This application prayed that notice might issue, and stated that application would subsequently be made to the Court for its assistance in bringing the property of the judgment-debtor to sale. A notice was issued, but the decree-holder took no further steps and the execution-case was struck off the file. Stuart, C.J., and Spankie, J., held that as no application for execution was made within three years from the date of the decree, the decree-holder could not fall back upon the notice issued under s. 216 of Act VIII of 1859 as bringing his application of the 23rd November 1875, within time.

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[679] applies to this case. The order affirmed by my Honourable colleague would, I suppose, issue. But this appeal was filed on the 9th November, and, therefore, perhaps Act X of 1877 applies. If so, I should wish to refer the point of law to another Judge.

The learned Judges differing in opinion on the point of limitation, the appeal was referred to Oldfield, J., under the provisions of s. 575 of Act X of 1877. The following judgment was delivered by

OLDFIELD, J.—I am of opinion that the execution of the decree is not barred by limitation.

The decree-holder filed an application on the 3rd March 1875, accompanied by a copy of the decree, asking that, after service of notice on the judgment-debtor, steps might be taken to realise the amount of the decree. Most of the particulars required by s. 212 were entered in the application, but it was silent as to the mode in which the assistance of the Court was required, whether by delivery of property specifically decreed, the arrest and imprisonment of the judgment-debtor, or attachment of his property or otherwise; but this defect in the application will not, I consider, render it of no legal effect for the purposes of limitation. All that the law of limitation enacts is that the limitation shall run from the date of applying to the Court to enforce or keep in force the decree, and all that would seem to be required is that there shall have been an application with the object of enforcing or keeping in force the decree. We should strain the language of the law by putting any other construction on it. If the application is such as to show that it was made with that object, though informal, it will be an application within the meaning of the law of limitation, and there can be no doubt in this case that the application had the object of enforcing and keeping in force the decree.

But the law of limitation also provides that the time shall run from the date of issuing a notice under s. 216 of the Code of Civil Procedure. A notice was issued in this case by the Court acting under s. 216 upon the application above referred to, and it appears to me, too, that the date of the notice will give a period from which the limitation will run. The issue of such a notice is incumbent on the Court where an application has been made under the circumstance [680] stated in s. 216. The issue of the notice is the act of the Court apart from any requisition by the decree-holder to issue it, and I think it cannot be held that this act of the Court, when purporting to be done under the authority of s. 216, is illegal, and notice issued of no legal effect in consequence, merely because the application filed by the decree-holder, with reference to which the Court acted, may have been irregular in form, or defective in some of the particulars required by s. 212. The fact that the Court treated the application as one for enforcing the decree and issued the notice upon it under s. 216 of Act VIII of 1859 appears to me sufficient.

I find that the rulings of this Court have been conflicting on the points raised in this case. While two rulings (1) have been pointed out against the view now taken, a later one (2) is in favour of it.

The order of the lower appellate Court is reversed and that of the Court of first instance restored, and this appeal is decreed with cost.

Appeal allowed.

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(1) *Franks* v. *Nunch Mal*, H.C.R. N.W.P. 1879, p. 75; Misc. S.A. No. 60 of 1876, dated the 14th December 1876.

(2) Misc. S.A. No. 35 of 1877, dated the 26th June 1877. In this case the decree-holder applied, on the 31st August 1870, in the form required by s. 212 of Act VIII of

1 A. 680=2 Ind. Jur. 864.

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APPEL-LATE CRIMINAL.

1 A. 680= 2 Ind. Jur. 864.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* KARAN SINGH. [10th June, 1878.]

Summary trial—Record in appealable case—Judgment—Error or defect in proceedings—Act X of 1872 (*Criminal Procedure Code*), ss. 228, 283.

K was tried by a Magistrate in a summary way and convicted. He appealed to the Court of Session, which quashed his conviction on the ground merely that the substance of the evidence on which the conviction was held was not [681] embodied in the Magistrate's judgment. *Held*, that the Court of Session should not have quashed the conviction merely by reason of such defect, but if it found it impossible to dispose of the appeal because of such defect, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a re-trial with that view.

ONE Karan Singh was tried in a summary way for the offence of receiving stolen property, under s. 411 of the Indian Penal Code by Mr. C. W. Whish, Joint-Magistrate of Basti, and convicted. On appeal by Karan Singh to Mr. J. C. Daniell, Sessions Judge of Gorakhpur, the conviction was set aside by the Sessions Judge on the ground that the Magistrate had failed to comply with the provisions of s. 228 of Act X of 1872, and record a judgment embodying the substance of the evidence on which the conviction was had. The Sessions Judge's judgment was as follows: "In this case the subordinate Magistrate has disregarded the provisions of s. 228, Criminal Procedure Code, and has not placed on record a judgment embodying the substance of the evidence on which the conviction was had. His judgment contains the points required by s. 227, but omits the additional matter required by the next section. The subordinate Magistrate says that the evidence the defendant sold the bullocks is 'thoroughly reliable' and 'very respectable eye-witnesses' proved the transaction, that the proof that both the bullocks were stolen is established by 'undoubted proof,' but as no detail or description of the evidence is given by the subordinate Magistrate as is required by law, and without which this Court can form no independent opinion on the character of, or weight which should be attached to, the evidence thus eulogised by the subordinate Magistrate, his proceedings cannot but be held to be at variance with the law and prejudicial to the prisoner. The sentence appealed against must therefore be quashed, and the appellant is ordered to be released."

The Local Government appealed to the High Court against this judgment.

1859, except that he did not state what was the assistance he desired from the Court. He stated in his application as follows: "Let a notice be issued, and then other applications will be made." A notice was accordingly issued, but as the decree-holder took no further steps in the matter notwithstanding that the Court called on him to do so within three days, the execution-case was struck off the file. Similar applications were made by the decree-holder in March 1872, and on the 22nd January 1875, under which notices were issued. The first of these was struck off the file because the decree-holder failed to comply with the Court's order to make any application he had to make within five days. The second was struck off on the decree-holder's application. He applied on the 1st September 1876 for the execution of the decree by the arrest of the judgment-debtor, Stuart, C.J., and Present, J held that the decree was capable of execution, observing that "all the applications appear to have been designed to keep in force the decree: the present application was within three years of the last application and *a fortiori* within three years of the notice issued thereunder."

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1 A. 680=
3 Ind. Jur.
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The Junior Government Pleader (Babu *Dwarka Nath Banarji*) for the appellant, contended that, as the defect on account of which the Sessions Judge had set aside the conviction did not prejudice the accused in his defence, the conviction should not have been set [682] aside—s. 283 of Act X of 1872. The Magistrate has recorded a judgment in accordance with the provisions of s. 228 of Act X of 1872. If the Sessions Judge considered that the Magistrate's judgment was not in accordance with law, he should have ordered a new trial and not have quashed the conviction.

Babu *Dwarka Nath Mukarji* for Karan Singh.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—From the judgment of the Magistrate it may be gathered that it was stated by more than one of the witnesses for the prosecution, first, that the bullocks in question had been stolen: secondly, that they were brought for sale by the prisoner into mauza Amlea; and, thirdly, that he did actually sell them for a very good price. Neverthless the Sessions Judge is of opinion that the substance of the evidence on which the conviction was had is not embodied in the judgment, apparently because it does not set forth in detail the deposition of each several witness. It is no doubt important that the evidence should be so set forth in the judgment as to enable the appellate Court to perform its functions in appeal. The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of the evidence. On the other hand, it does not appear necessary to cancel a conviction and sentence not otherwise apparently exceptionable by reason of such a defect. The Sessions Judge may have found authority in precedents (1) for the course adopted by him in this case; but we think that, if he found it impossible to dispose of the prisoner's appeal because the substance of the evidence for the prosecution was not sufficiently embodied in the judgment of the Magistrate, it would have been better to have required that officer to repair the defect in his judgment by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a re-trial with that view. We therefore cancel the Sessions Judge's order of the 28th January last, and direct him to dispose of the appeal afresh in advertence to the foregoing remarks.

Appeal allowed.

(1) The only reported case touching the matter seems to be *Queen* v. *Kheraj Mullah*, 11 B.L.R. 33, which is apparently opposed to the one under report.

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APPELLATE CIVIL.

1 A. 683.

1 A. 683.

[683] APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice and Mr. Justice Pearson.

MATHURA DAS (*Plaintiff*) *v.* BABU LAL (*Defendant*).* [14th June, 1878.]

Acknowledgment in respect of a debt—Limitation—Act XI of 1871 (*Limitation Act,* s. 20.)

B's agent, under the orders of *B*, wrote a letter to *S* containing an acknowledgment in respect of a debt. This letter was headed as follows; "Written by *B* to *S*." The concluding portion of the letter was written by *B* in his own handwriting.

Held that, under these circumstances, there was sufficient evidence that the heading of the letter was written by an agent duly authorized.

Held also, looking at the heading of the letter, that the letter was "signed" by *B* within the meaning of s. 20 of Act IX of 1871.

[F., 10 B. 71 (73).]

THIS was a suit for money payable for money lent by the plaintiff to the defendant. With reference to certain items of his claim, the plaintiff relied on a certain letter, dated the 18th December 1874, as containing an acknowledgment in respect of such items taking them out of the operation of the limitation law. The defendant contended that the letter did not contain any acknowledgment in respect of a debt, and that it was not signed by him within the meaning of s. 20, Act IX of 1871. The Court of first instance held that the letter did not contain any such acknowledgment, and that it was not signed by the defendant within the meaning of that section, and dismissed the plaintiff's claim in respect of such items.

The plaintiff appealed to the High Court, impugning the decision of the Court of first instance on the question of limitation. The letter on which the plaintiff relied and the material fact of the case are set forth in tho judgment of the High Court.

Mr. *Conlan* and Pandit *Bishambar Nath*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), Lala *Lalta Prasad* and Shah *Asad Ali*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, O. C. J.—The plaintiff, appellant, carries on the business of a banker in the Lashkar of Gwalior, and the defendant, [684] respondent, is resident of Allahabad who for some years accepted contracts in the Lashkar. In the course of his business the respondent had monetary dealings with the appellant, and in respect of those dealings the appellant asserts that a sum of Rs. 14,812-8-3 is due to him for principal and interest, and to recover this sum he has instituted the present proceedings. It is admitted that several of the items of the claim are barred by limitation, unless the appellant can establish that, by an acknowledgment of the debt or payment of interest, a new period of limitation accrued. In proof of an acknowledgment, the appellant relies on a letter he received from the

* First Appeal No. 127 of 1877, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 27th September, 1877.

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respondent, bearing date Mansgar Sudi, 10th Sambat 1931, corresponding with the 18th December 1874, and which is in the following terms:

"Written by Babu Lal to Shah Benarsi Das, Camp Gwalior, dated Mansgar Sudi, 10th Sambat 1931.

"After tendering my compliments, I beg to say that your letter came, and I know the contents thereof. I received my account in which you have struck a balance of Rs. 17,679-2-0 of the Chandauri coin. You have written me to debit and credit the same, and I have known it. The account is correct, but it has not been running for the last two or three years, and my papers are at Lashkar. Now-a-days a marriage is to be celebrated in my house. I shall send for the papers from Lashkar in Phagun, and after examining them, I shall make pucka debit and credit entries in my accounts, and shall write you to do the same; then I shall make arrangement for the payment of the money. If I fail to procure the money till Phagun, then, according to our agreement at Cawnpore, I shall give you some property yielding a monthly rent of Rs. 150. You will deduct your interest at $7\frac{3}{4}$ annas per cent., and the balance you may credit in my account. In our account of customs and tank there appears some difference in interest, &c. The letter written by me is with you. You should send the same to me. I shall examine the accounts according to the terms agreed upon by us. We shall give credit for any mistake on either side. You have not charged interest on the item relating to the tank, but I shall charge it. I had drawn a hundi for Rs. 5,000 on you, for which you have got a *rukka* written by me and Babu Sahib. You should send the same to me—all right. Mansgar Sudi, 10th Sambat 1931. If there be any mistake, credit shall be given or taken."

It appears that Bhikhari Das, gomashta of the appellant, accompanied by Gaj Mal, came to Allahabad to obtain from the respondent the payment of the amount then due to the appellant, which was shown by an account then delivered to the respondent to [685] amount to Rs.17,679-2-0. The respondent stated that he was unable at once to satisfy the demand, but undertook to pay it within two or three months, and that if he failed to do so he would give security. For the satisfaction of the appellant it was arranged that the respondent should send him a letter expressing the terms he had offered, and a draft was prepared by Bhikhari Das of which the respondent did not approve, and he then dictated to Bhikhari Das the draft which was subsequently faired out by his own gomashta and is the letter dated Mansgar Sudi, 10th Sambat 1931, to which we have referred. The respondent has admitted, in his deposition taken on the 19th July 1877, that this letter was written by his directions, and it is proved that the concluding words "all right, &c.," to the end of the letter, are in his handwriting. The effect of this letter is to admit the existence of a debt due by the sender to the person addressed. While admitting that the account rendered is on the face of it correct, the sender of the letter reserves to himself the right of testing the account by his own books before finally allowing it to be correct, and he then promises to pay what may be due at a time stated, and in the event of default to give security for the debt.

It cannot be doubted that, if this letter has been "signed" by the respondent or his agent duly authorised in that behalf, it constitutes a sufficient acknowledgment to satisfy the Limitation Act.

It is not the practice of Hindu bankers to sign their letter at the foot. Their letters are ordinarily headed, as is the letter on which the respondent relies, with an intimation of the person to whom the letter is addressed

and of the person by whom it is sent. The admission of the respondent that the letter was written by his gomashta by his orders, and the circumstance that he added a paragraph at the conclusion, is sufficient evidence that the heading was written by an agent duly authorised. There remains the question—Is this heading a signature within the meaning of the Limitation Act? The Act does not require that the signature should be at the foot or in any particular part of the document, and in our judgment, whenever the maker of an instrument of his agent acting with authority introduces the name of the maker with a view to authenticate the instrument as the instrument [686] of the maker, such an introduction of the name is a sufficient signature. We do not mean to say that every introduction of the name of the maker into an instrument is a signature. As expressed in an English decision on the Statute of Frauds, the introduction of the name must amount to an acknowledgment by the party that it is his instrument, and if the name does not give such authenticity to the instrument, it does not amount to what the Statute requires, Addison on Contracts, 7th Ed., 159. In the heading of such a letter as that which is before us it is clear the name of the sender is introduced to authenticate the letter, or, in other words, to assure the person to whom it is addressed that the letter is sent by the person named. We consequently find that the letter is "signed" by the sender within the meaning of the Limitation Act, and that it constitutes a sufficient acknowledgment of the debt to satisfy that Act. The claim is therefore in no particular barred by limitation. (The learned Judge then proceeded to determine the appeal on its merits.)

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1 A. 683.

Appeal allowed.

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1 A. 686.

APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

KARAM ALI (*Decree-holder*) v. HALIMA AND OTHERS (*Judgment-debtors*). [24th June, 1878.]

Execution of Decree—Transfer of Decree by Operation of Law—Act XXVII of 1860—*Certificate to collect Debts—Act VIII of* 1859 (*Civil Procedure Code*), *s.* 208.

To enable the heir of a deceased person to apply, under s. 208 of Act VIII of 1859, for the execution of a decree held by such person, a certificate under Act XXVII of 1860 is not indispensable.

KARAM ALI, the son of Mir Ali, deceased, applied for the execution of a decree for money which had been held by his father. The Court of first instance rejected the application for the reason that Karam Ali had not obtained a certificate under Act XXVII of 1860 in respect of his deceased father's debts. On appeal by Karam Ali, the lower appellate Court affirmed the order of the Court of first instance.

[687] Karam Ali appealed to the High Court.

Mir *Akbar Husain*, for the appellant, contended that Karam Ali was entitled to apply for execution of the decree, being admittedly the son

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* Miscellaneous Second Appeal, No. 12 of 1878, from an order of H. Lushington, Esq., Judge of Allahabad, dated the 19th December 1877, affirming an order of Babu Mritunjoy Mukerji, Munsif of Allahabad, dated the 13th August 1877.

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of original decree-holder, deceased. He relied on *Ikram Hossein* v. *Kirtee Chunder* (1) ; and *Gopal Singh Deh* v. *Gopal Chunder Chukerbutty* (2); and *Kalee Churn Singh* v. *Ram Surun Singh* (3).

Babu *Ram Das*, for the respondent.

The Court delivered the following

JUDGMENT.

The Munsif appears to think that obtaining a certificate is indispensable to the competency of an heir to apply for execution under s. 208 of Act VIII of 1859. This is erroneous. A person who has not obtained a certificate may apply under that section. It will of course be open to the Court, in the exercise of the discretion vested in it, if there is any doubt that the person applying for execution is entitled by inheritance to the rights decreed, to refuse the application until a certificate has been obtained (4). The Munsif appearing to consider himself precluded from exercising his discretion, we must set aside his order and the order of the Judge, and remit the case to the Munsif that the discretion may be exercised. Each party will bear his own costs of the proceedings in the Judge's Court and in this Court.

Cause remanded.

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1 A. 687.

APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

HAIDRI BAI (*Plaintiff*) *v.* THE EAST INDIAN RAILWAY COMPANY (*Defendant*).* [27th June, 1878.]

Act X of 1877 *(Civil Procedure Code)*, s. 549—*Procedure in Appeal from Decree—Security for costs.*

Where the Appellate Court demands from an appellant security for costs the Court may extend the time within which it orders such security to be furnished, but if no application is made for such extension of time and such security is not furnished within the time ordered, it is imperative on the Court to reject the appeal.

[**Overr.**, 17 C. 512 (513,514) (**P.C.**)=17 I.A. 1=5 Sar. P.C.J. 493; **N.F.**, 16 B. 263 (266) ; **F.**, 11 C. 716 (717) ; 11 M. 197 ; **R.**, 21 B. 574 (579) ; 8 O.C. 241 (244).]

[688] THIS was an appeal to the High Court from an original decree in which the Court had, under s. 549 of Act X of 1877, demanded certain security from the appellant for the costs of the appeal, on the ground that the appellant was residing out of British India and was not possessed of any sufficient immoveable property within British India. The appellant failed to furnish such security within the time fixed by the Court.

Mr. *Hill* for the respondents, defendants in the suit, applied for the rejection of the appeal, contending that, under s. 549 of Act X of 1877, it must be rejected.

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* First Appeal No. 45 of 1878 from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 21st December 1877.

(1) 3 W. R. Mis. 9. (2) 7 W. R. 393. (3) 11 W. R. 204.

(4) Where important questions arise, such as the legitimacy or illegitimacy of the heir, the Court executing the decree ought not to decide them—*See Abidunissa Khatoon* v. *Amirunissa Khatoon*, 2 C. 334.

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1 A. 687.

The Junior Government Pleader (*Babu Dwarka Nath Banerji*), for the appellant, contended that the Court had discretion to extend the time fixed by it for the deposit of security.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, O. C. J.—Security not having been filed within the time ordered by the Court, the law is imperative that the Court shall reject the appeal.

If an application for an extension of time had been made before the expiry of the time within which it was ordered the deposit should be made, the Court might have extended the time; it cannot do so afterwards.

The appeal is rejected with costs.

Appeal rejected.

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1 A. 688 (P.C.)=2 C.L.R. 193=5 I. A. 87=3 Sar. P.C.J. 807=3 Suth. P.C.J. 529=2 Ind. Jur. 396.

PRIVY COUNCIL.

PRESENT:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.

SHEO SINGH RAI (*Defendant*) v. DAKHO AND MURARI LAL (*Plaintiffs*). [5th, 6th and 8th March and 13th April, 1878.]

Usage of Jains—Estate of Sonless Widow—Her power to adopt—Position of adopted son—Rights of Widow during Son's minority—Declaratory decree when to be given—Obstruction to title—Nuncupative will—Special leave to Appeal.

On the evidence given in this case, *held* that, according to the usage prevailing in Delhi and other towns in the North-Western Provinces, among [689] the sect of the Jains known as Saraogi Agarwalas, a sonless widow takes an absolute interest in the self-acquired property of her husband, has a right to adopt without permission from her husband or consent of his kinsmen; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten.

Quære whether on such an adoption the widow is entitled to retain possession of the estate either as proprietor or as manager of her adopted son.

A declaratory decree ought not to be made unless there is shown to be a right to some consequential relief, which, if asked for, might have been given by the Court, or unless a declaration of right is required as a step to relief in some other Court. *Kattama Natchiar. v. Dorasing Tevar* (1) approved.

A right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

Semble:—Where a defendant sets up a nuncupative will as entitling him to property in respect of which the plaintiff asks for a declaration of his right a right, to have such will declared null and void arises in cases where property legally passes by a will of that nature, since a claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred.

A defendant obtained special leave to appeal to Her Majesty in Council on the ground that the case involved questions of law of great importance to the Jain sect, of which he was a member. On the appeal coming on for hearing, he

(1) 15 B.L.R. 83=2 I.A. 169.

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1 A. 688
(P.C.)=2
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5 I.A. 87=
3 Sar. P.C.J.
807=3
Suth. P.C.J.
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396.

contended that the suit should have been dismissed by the Courts below as a claim for a declaration of right in respect of which no consequential relief was sought or could be given. *Held* that, considering the special grounds on which the defendant had obtained leave to appeal, the somewhat technical character of the defence he now put forward, and the general circumstances of the case, he ought not to be allowed to insist on this objection.

[F., 8 A. 319 (322)=A.W.N. (1886) 118; 8 A. 365=A.W.N. (1886) 129; R., 3 A. 55; 16 A. 379 (381)=A.W.N. (1895) 123; 29 A. 495 (511)=4 A.L.J. 407=A.W.N. (1907) 121; 30 A. 197 (223)=5 A.L.J. 200=A.W.N. (1908) 79=19 B. 428 (459); 4 C. 744 (752) (P.C)=3 C.L.R. 465=6 I.A. 15=3 Sar. P.C.J. 880; 27 C. 379 (386); 31 C. 11 (30) (P.C.)=5 Bom. L.R. 845=7 C.W.N. 895 (901)=30 I.A. 249=13 M. L.J. 381=8 Sar. P.C.J. 543; 16 M. 182 (185); 11 Bom. L.R. 797 (805); 7 O.C. 187 (190); 84 P.R. 1903=135 P.L.R. 1903; 95 P.R. 1909=212 P.L.R. 1910; U.B.R. Civil (1892—1896), 529 (534); U.B.R. Civil (1892—1896), 623 (625).]

THE facts out of which this appeal arises are as follows:

Ishq Lal a Jain of the sect known as Saraogi Agarwalas, died in 1867, without male issue, leaving self-acquired moveable property. After his death, his widow, Dakho, purchased from the Government, with funds forming part of her husband's estate, the absolute interest in certain lands which he had held from Government under a grant for his life. After the purchase her name was entered on the register as proprietor. On a settlement of these lands in 1871, the settlement officer required Dakho to declare who was to succeed her in the property, when she requested that the name of Murari Lal, the son of her daughter, should be entered in the *wajibularz* as her adopted son and successor. To this Sheo Singh Rai, surviving brother of Ishq Lal, objected that Dakho, not [690] having obtained her husband's permission to adopt, could not make a valid adoption without the consent of her husband's relatives, which had not been given. In consequence of this objection, the parties were referred by the settlement officer, under an order dated the 15th July 1871, to the Civil Court for a settlement of the questions in dispute between them.

On the 28th September 1871, the present suit was brought by Dakho, as sole plaintiff, against the present appellant, Sheo Singh Rai, as defendant. In her plaint she asked to be "maintained in possession as hitherto by establishment of her exclusive right of inheritance to her husband's estate" and to have the adoption by her of Murari Lal upheld, and his right "permanently to succeed her after her death" declared in opposition to the objection raised by the defendant before the settlement officer; and also for a declaration that the defendant had no right of inheritance as against the plaintiff according to the tenets of the Jain religion.

Sheo Singh Rai, by his written statement, objected that the suit would not lie as Murari Lal was not a party, and the object of the suit was to establish his future right; and that the plaintiff herself had no cause of action. As to the validity of the adoption, he contended that, adoptions among the Jains being governed by the ordinary Hindu law, a widow could not adopt any one unless with the permission of her husband or the consent of his kinsmen, and in no case could she adopt the son of her daughter. The fifth paragraph of the defendant's written statement was in these words: "The plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The defendant, the brother of the deceased, is, under the Shastras, as well as *a verbal declaration* of Ishq Lal, the owner and possessor of his whole estate. The plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the defendant will be entitled to it as a reversioner."

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PRIVY COUNCIL.

1 A 688 (P.C.)=2 C.L.R. 193=5 I.A. 87=3 Sar. P.C.J. 807=3 Suth. P.C.J. 529=2 Ind. Jur. 396.

The case was heard by the Subordinate Judge of Meerut, by whom the following issues were recorded: (i) Has the plaintiff disclosed sufficient cause of action to enable her to seek relief in the Civil Court? (ii) Is the plaintiff legally competent to sue in her [691] own right after she has divested herself of the right of inheritance derived from her husband, and having invested it in an adopted son? (iii) By what Shastras or text-book are Jains governed? (iv) Did Ishq Lal, by a verbal declaration, constitute the defendant (his brother) his heir-at-law, leaving only a life interest in his estate to his widow? (v) If not by usage and custom of the Jain sect, did the widow legally succeed to her husband's estate in absolute and exclusive right, and is she competent to adopt a son in her own right?

Witnesses were examined for the plaintiff who gave evidence that the Saraogi sect of Jains were not governed by the Hindu law, and that, according to their usages, a widow had full power of alienation over her husband's estate, and could adopt without his authority or the consent of his kinsmen, and that a daughter's son might be validly adopted. On the other hand witnesses were called by the defendant who deposed to a directly opposite effect.

On the 31st May 1872, the Subordinate Judge dismissed the suit on the defence raised on the second issue, holding that, according to her own case, the plaintiff had put herself out of Court by adopting a son, and so divesting herself of any right in respect of which she could ask for a declaratory decree.

On appeal to the High Court this decision was, on the 27th March 1873, set aside, and the suit remanded to be heard on the merits, with directions that Murari Lal should be made a party, and for taking further evidence as to the law of the Jains bearing on the questions in dispute. With regard to the plaintiff's right to maintain the suit, the High Court held as follows:

"Assuming the widow's right after an adoption to be qualified and limited, we consider that she would be entitled to maintain such a suit as that out of which this appeal arises. She is entitled, her right being disputed, to require the Court to determine whether she takes by Jain law an absolute interest in the property of her husband. She is entitled, her right being disputed, to have a declaration of her right to make an adoption, and of the validity of the adoption made in the exercise of that right. The Court, if it be satisfied that an adoption has been duly made, would of course declare the effect of such an adoption on the widow's estate. The [692] enjoyment of the interest which she alleges she possesses in the estate of her deceased husband having been threatened by the negation of her rights by the defendant, it appears to us that she has a cause of action which entitles her to maintain this suit.

No appeal was made from this judgment, and the suit was subsequently dealt with on remand by the Subordinate Judge, who added the infant Murari Lal as a plaintiff in the suit, and issued interrogatories to the district officers of Delhi, Muttra, Benares, and Jeypore, with the request that they would obtain an exposition of Jain law and customs on the questions in issue from members of the Jain community. In reply to these interrogatories answers were received to the same effect as the evidence given by the witnesses for the plaintiff at the original hearing. In accordance with these answers the Subordinate Judge, on the 22nd December 1873, held that the plaintiff was entitled to be maintained in the lands in question on the ground of her exclusive and absolute right thereto as heir to her husband, and to have a declaration of the validity

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of the adoption made by her, and of the right of her adopted son to succeed to the estate. The Judge also held that a nuncupative will by the deceased in favour of his brother would not be valid against the widow, but he observed that this last point was immaterial, there being no evidence of such a will having been made

The defendant, in appealing to the High Court, objected that the answers to the interrogatories issued by the Judge had not been given on solemn affirmation, and should not have been admitted as evidence. The High Court admitted the objection and issued fresh commissions to the Commissioner of Delhi, the Judge of Benares, and the Collector of Muttra, which were returned duly executed. On the evidence thus obtained the High Court, on the 27th November 1874, affirmed the decree passed on remand by the Subordinate Judge. The judgment of the High Court will be found printed at length at page 382 of the sixth volume of the North-Western Provinces' High Court Reports. With reference to the alleged nuncupative will, the High Court observed :

"That a parol bequest is invalid against the widow, when made for secular purposes, is generally admitted by all the witnesses [693] whose evidence we have been considering, though two witnesses allow that small gifts may be so made and that such a bequest, when duly proved, is valid if made for religious purposes, so that it bear a moderate proportion to the means of the husband. We need not, however, determine the Jain law on this point in this suit, as the appellant has failed to prove that any such bequest was made."

The defendant being dissatisfied with this decision applied to the High Court for leave to appeal to Her Majesty in Council on the ground that the law of the Jain in no respect differed from the ordinary Hindu law, and that the High Court had been wrong, on the evidence before it, in holding the contrary. On the 7th May 1875, the High Court granted a certificate that the case was a fit one for appeal, but the appellant having failed to make a deposit within six weeks as required under s. 2 of Act VI of 1874, the Court, on the 1st July 1875, declined to admit the appeal. Against this order the defendant subsequently appealed to the Privy Council, and on the 24th March 1876, on a representation that the case involved questions of great importance to the Jain community, obtained special leave to appeal.

Mr. *Doyne* and Mr. *W. A. Raikes*, for the appellant.—The case of Dakho as stated in her plaint disclosed no cause of action. Two things were asked for in the plaint ; first, a declaration of the plaintiff's right to be maintained in possession as heiress of her husband ; second, that the adoption by her of her daughter's son should be upheld as a valid adoption to her husband and herself. But the widow's right to present possession and to enjoy for her life the lands in suit was not really disputed by the defendant. The defendant had never sought to disturb her possession. The suggestion of an oral will having been made by Ishq Lal in the defendant's favour seemed to have been an after-thought of the defendant's pleader when drawing up the written statement of defence. It was a mistake to set up on the part of the defendant an absolute title as heir. The defendant has not put forward any such claim before the settlement officer, nor had he sought to establish it by evidence in the proceedings in the present suit. It was apparent that the defendant had never seriously relied on his heirship under an oral will. The remonstrance which the defendant [694] had made against the irregular entry of Murari Lal's name in the settlement papers as the widow's

adopted son and successor could not afford hera cause of action. She had no *locus standi* to maintain a suit for the declaration of the future and contingent rights of Murari Lal. The objection to such a suit was not removed by making Murari Lal himself a plaintiff. The rule as to declaratory actions was that, when no relief could be given, there should be no declaration of abstract right. The cases of *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee* (1), *Raja Nilmony Singh* v. *Kalee Churn Bhattacharjee* (2), and *Kattama Natchiar* v. *Dorasinga Tevar* (3), established that the Courts ought not to make declaratory decrees, where no right had been shown to consequential relief, arising on the facts alleged and disclosed in the case. The defendant's right of appeal on the ground that the suit could not be maintained was not lost through his not having appealed when the High Court, on the 27th March 1873, remanded the case for trial on the merits, since that was an interlocutory order to which it was competent to object on the final appeal. *Forbes* v. *Ameeroonnissa Begum* (4), *Shah Mukhun Lal* v. *Sree Kishen Singh* (5).

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[Their Lordships intimated that, before entering on the question as to Jain law and custom raised in the case, they desire to hear the respondents' counsel on the question, whether the suit ought not to have been dismissed, as one in which consequential relief could not be given.]

Mr. *Cowie*, Q. C. and Mr. *Herbert Cowell*, for the respondents.—The High Court had acted rightly under the provisions of s. 15 of Act VIII of 1859. The test in such cases is whether relief might not be given on what appears in the suit—*Sadut Ali Khan* v. *Khajeh Abdul Gunney* (6). The acts of the defendant amounted to a hostile invasion of the plaintiff's rights affording ground for an action. The defendant disputed a present right either of the widow or of her adopted son, by lodging what was practically a *caveat* gravely affecting their right of alienation. [*Sir Barnes Peacock.*—Is the defendant's act more distinctly hostile than the **[695]** acts alleged in the Rajah of Pachete's case? (2)]. There is more here than a mere assertion. On the defendant's objection, the Settlement Officer refuses to make out a paper in which the widow was entitled to have her rights recorded, and instead makes an entry requiring legal steps to be taken to clear the matter. It therefore became necessary for the widow to come forward. Moreover, the defendant had set up a nuncupative will, which he alleged had been made in his favour by Ishq Lal. He had persisted in that pretension, making it a ground for his appeal to the High Court that the Subordinate Judge had incorrectly held that there was no evidence of such a will. The attempt to set up such a will was a sufficient ground for a declaratory decree. In the case of *Kattama Natchiar* (3), the acts alleged were inoperative to effect title, but here it was otherwise. The defendant had obtained special leave to bring this appeal on the ground that questions of law of the greatest interest and importance to the Jain community were raised by it. When the case comes on for hearing, he takes an objection on a point not raised in his petition for special leave to appeal, on which, if he succeeds, those important questions which he desired should be considered will be altogether cut out from consideration. Leave to appeal having been accorded on special

(1) 11 B. L. R. 171.
(2) 14 B.L.R. 382=2 I. A. 71 (83).
(3) 15 B. L.R. 83=2 I. A. 169.
(4) 10 M. I. A. 340 (359).
(5) 12 M. I. A. 184.
(6) 11 B.L.R. 203 (227).

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grounds, the appeal should have proceeded on these grounds. The observations of the Privy Council in the case of *Ram Sabuk Bose* v. *Kaminee Koomaree Dossee* (1) were applicable to his case.

Mr. *Doyne*, in reply, contended that the expression "lodging a *caveat*" did not correctly describe the defendant's proceedings. The effect of the '*caveat*' was not in any way to disturb the widow's previous possession. She retained the same possession as before. Her claim to have Murari Lal's name inserted in the *wajibularz* was clearly *ultra vires*. The Settlement Officer's duty was to make an entry of existing rights, not of future rights. An entry of the latter kind would tend more than anything else to cloud title. The plaintiff could not have sued for a declaration in respect of the alleged oral will, since the assertion of its existence was first made in the defendant's written statement.

[696] Sir *Montague Smith* intimated that their Lordships would reserve their decision on the point which had been argued until they had heard the whole case.

Mr. *Doyne*, for the appellant, admitted that, on the evidence before it, the High Court was justified in holding that, according to Jain usage, the widow of a sonless Jain has power to adopt a son to herself and to her husband, such son on his adoption standing in the position of a son begotten, without authority from her husband and without the consent of his kinsmen, and that it is legal for her to adopt a daughter's son. On that evidence, assuming the widow to have taken an absolute estate on her husband's death, she became divested of that estate by the adoption, and had no longer any interest entitling her to a declaration. The Subordinate Judge was right when, in his original judgment, he dismissed the suit on this ground. The decision of the Judge on the remand that the widow was entitled to be maintained in possession as proprietor was wrong on the evidence, and the High Court did not mend the matter by substituting the alternative declaration that she was entitled to retain as proprietor, or as manager on behalf of her adopted son. Such a decision was bad from uncertainty. The declaration really sought in the plaint was a declaration of the future rights of Murari Lal, whereas on the evidence it appeared that Murari Lal's rights had vested. A declaration in the terms of the plaint would be prejudicial to him.

Mr. *Raikes* followed on the same side.

Mr. *Cowie*, Q. C., for the respondents.—There had been some discrepancy in the evidence given as to the rights of the female plaintiff. One set of witnesses affirm that she has a life interest; another that the plaintiff Murari Lal has a present immediate right. The Court does not consider it necessary to pronounce which evidence is correct. It finds alternatively. This is all that is needed for the present suit. The defendant objects to the interest of both plaintiffs. The Court decides in favour of the plaintiffs as against the defendant, but does not think it proper to decide as between the plaintiffs.

Mr. *Doyne* replied.

JUDGMENT.

[697] Their Lordships took time to consider their judgment, which was delivered by

SIR MONTAGUE E. SMITH.—This is an appeal from a judgment of the High Court of the North-West Provinces, which substantially affirmed

(1) 14 B. L. R. 382 (394)=2 I A. 71.

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a decree of the Subordinate Judge of Meerut. The suit was originally brought by the respondent Dakho, the sonless widow of Ishq Lal, in her own name; Murari Lal, her daughter's son, whom she had adopted, being afterwards added as co-plaintiff. The defendant (the appellant) was a younger brother of Ishq Lal. The family were Saraogi Agarwalas, one of the divisions of the sect of Jains, whose laws and customs with regard to a widow's estate and her power of adoption differ, as the respondents allege, from the ordinary law by which Hindus are governed. The difference gives rise to the principal questions to be decided in the present suit. Ishq Lal died in 1867. He left considerable property, including Government notes, to the value of upwards of five lakhs of rupees. The widow took out the certificate of administration of his estate, and obtained possession of it. It is admitted that the adoption by the Musammat of her grandson was made without any authority expressly derived from her deceased husband, and without the consent of his kindred—an adoption, therefore, which on that ground, as well as by reason of the relationship of the parties, would be invalid by ordinary Hindu law. The immediate occasion of the suit arose in the following manner: Ishq Lal, who had been an army contractor, received from the Government as a reward for services rendered during the mutiny a grant for his life of the zamindari of mauza Nabali, in Pargana Bagpat, an estate to which Government had acquired title by forfeiture. After his death the Government offered to sell the mauza to his widow, and she purchased it at the price of Rs. 6,206. It has been assumed that the purchase-money was paid out of the proceeds of her deceased husband's estate. It appears that, whilst making up the *wazibularz* (a document called by the Subordinate Judge "the village administration-paper") the Settlement Officer called upon the widow to name her successor to the mauza, with a view to enter the name in this paper, and that in answer to this requisition she requested that the name Murari Lal should be recorded as her adopted son and successor. The appellant objected [698] to this being done, and the Settlement Officer thereupon ordered the following special entry to be made in the *wazibularz*:

"Para IX.—Regarding special tribes and customs of adoption, second marriage, or succession.

"Musammat Dakho desired that Murari Lal, her daughter's son, whom she adopted, should succeed her after her death. But Sheo Singh Rai, the younger brother of her husband, on hearing this, objected that it is illegal that an adoption should take place without the permission of the husband's near relations. 'The Settlement Officer therefore passed the following order on the 15th July 1871: 'The parties may get this point decided by the Civil Court, and all points of the paragraph shall be decided by order of the Civil Court.' ".

Both the Courts in India have stated that the Settlement Officer in calling upon the Musammat to name her successor, acted in excess of his powers. It has not been shown what is the precise object of the *wajibularz*, nor what are the regulations or orders under which it is made. The reference to "Paragraph IX.—Regarding special tribes and customs of adoptions, second marriage, or succession," seems to indicate that, when these special customs are found to exist, it is desired that they should be recorded for the information of the settlement authorities. The Settlement Officer directed that the order he had made for the above entry should be communicated to the Musammat by the tahsildar, and that she should be advised to have the question of adoption settled by the Civil Court. The

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present suit was thereupon brought; and, in consequence of an objection which has been taken to its maintenance, as being a declaratory suit only, it will be necessary to advert to the proceedings in it.

The plaint (the widow being sole plaintiff) asserts in a general and somewhat informal manner her claim to be maintained in possession, "by establishment of plaintiff's exclusive right of inheritance to the estate of her husband, composed of the mauza above described, and to uphold the adoption of Murari Lal, plaintiff's daughter's son, as well as his right permanently to succeed her after her death, by voiding the defendant's pretensions, under the usages and customs of the Saraogi-religion." It then alleges that the defendant, during the progress of the late settlement raised the objection that the widow cannot, unless with the consent [699] of the relations of the family, make an adoption, and that the plaintiff was referred to the Court by the settlement department.

The defendant, in his written statement, after objecting to the suit on the grounds that the adopted son was not made a party to it, that the entry in the *wajibularz* did not give a cause of action, and that the suit was unnecessary and premature, stated in his defence on the merits as follows:—

"(iii) The law of inheritance applicable to the Jains is nothing different from the Shastras. They are all subject to the common Hindu Law. Therefore, both according to law and custom, the adoption of a daughter's son is invalid; moreover the custom of adoption is not universally recognised among the people of this sect.

"(iv) Among the Jains, a widow is not competent herself to adopt a son unless with the permission of her husband or the consent of the near heirs.

"(v) The plaintiff, as heiress of her husband, possesses only a limited interest. Her right is not permanent, and she has no power to alienate the property. The defendant, the brother of the deceased, is, under the Shastras as well as a verbal declaration of Ishq Lal, the owner and possessor of the whole of his estate. The plaintiff only possesses a portion of the property by way of maintenance for her life. She will hold it as long as she lives, and then the defendant will be entitled to it as reversioner."

Evidence having been taken respecting the customs and tenets of the Saraogi Agarwala Jains, the Subordinate Judge, without specially deciding upon these customs, dismissed the suit on the ground that the plaintiff, by adopting a son who, upon adoption, would become, if his adoption were valid, heir to his father, "had raised a barrier" to her own claim of absolute right. Upon appeal to the High Court, the Judges were of opinion that the Subordinate Judge had not sufficiently inquired into and ascertained the special customs of the Jains, and that he was wrong in dismissing the suit. The Court, therefore, remanded the suit under s. 351 of the Civil Procedure Code, and directed that an opportunity should be given for making the adopted son a party to the suit.

The following passage of the judgment contains the view of the Court with regard to the nature and scope of the inquiry to be made by the Subordinate Judge:—

"We are invited by the pleaders of the parties in this Court to give directions to the Court below on the questions of Jain law which are raised in this suit.

[700] "The Jains have no written law of inheritance. Their law on the subject can be ascertained only by investigating the customs which prevail

among them; and for the ascertainment of those customs we think the Court below would exercise a wise discretion if it issued commissions for the examination of the leading members of the Jain community in the places in which they are said to be numerous and respectable, *viz.*, Delhi, Muttra, and Benares. The questions to be addressed to these gentlemen would be the following:

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"'What interest does the widow take under Jain law in the moveable and immoveable property of her deceased husband, and does her interest differ in respect of the self-acquired property and the ancestral property of her husband? Is a widow under Jain law entitled to adopt a son without having received authority from her husband, and without the consent of her husband's brother? May a widow adopt the son of her daughter? By the adoption of a son, does the adopted son succeed as the heir of the widow or as the heir of her deceased husband? Has the adoption of a son by a widow any effect, and (if any) what effect in limiting the interest which she takes in her husband's estate? And if the Subordinate Judge considers that the verbal gift which the respondent alleges is established by proof, he might further inquire whether such a gift is valid as against the widow?'"

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Upon the suit being thus remanded, Murari Lal, the adopted son, was made a co-plaintiff, the Musammat being appointed his guardian.

Commissioners to take evidence as to the customs of the Saraogi Agarwala Jains were then issued to Delhi, Jeypore, Muttra, and Benares, and several leading members of that division of the Jain community were examined under them at each of these places. The Subordinate Judge has thus summarised their evidence.

"With the exception of one from Delhi, the others unanimously declare (i) that in the absence of any son, a Jain widow succeeds to the estate of her husband moveable and immoveable, in the absolute right. (ii) That she can deal with it at pleasure and without restriction. (iii) That she can adopt her daughter's son, without requiring any consent or authority from her deceased husband or relative, of such deceased; and that such adopted son would succeed to her deceased husband's estate in the same manner as her own begotten son would have done, with a slight restriction. (iv) That a nuncupative will by her husband would not be valid against her; but this last point does not at all bear on the case, seeing that there is no evidence as to any such will having been pronounced."

[701] The Subordinate Judge then made a decree in favour of the plaintiff in the following terms:

"That the plaintiff is entitled to a decree to be maintained in possession of the zemindari property in question, on the ground of her exclusive and absolute right thereto as heir of her husband, and for a declaration of the validity of the adoption made by her, and of the right of her adopted grandson by her daughter, there being nothing to prevent his succession to the estate."

The defendant again appealed to the High Court, one of his grounds of appeal being that the witnesses, except at Jeypore, had not been examined on oath. Another ground was, "That the finding of the Subordinate Judge as to there being no evidence regarding the nuncupative will by the deceased husband of the plaintiff in favour of the appellant was incorrect."

On this appeal coming on to be heard, the Judges of the High Court held that the evidence objected to had been irregularly taken, and being of

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opinion that it would not be proper to decide the important questions of Jain Law involved in the case upon the evidence of the Jeypore witnesses alone, they determined, before finally disposing of the appeal, to issue fresh commissions from their own Court to Delhi, Muttra, and Benares. These commissions were accordingly issued, and under them the original and new witnesses were examined, whose testimony was given at greater length than that on the first occasion. Upon the return of these commissions, the cause was finally heard by the High Court, and the judgment now under appeal pronounced. It contains the following general account of the history and religious tenets of the Jains :

"The parties are Saraogi Agarwalas, one of the numerous sub-divisions of the sect of Jains. What little is known of the history of that sect is to be found collected in the learned judgment of the Chief Justice of Bombay in *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 241. For upwards of eleven or twelve centuries they have seceded from the creed of the Vedas, and their religious tenets have more affinity with the precepts of the Buddhists than with those of the Brahmins. They recognize the caste system of the Brahminical Hindus, and in such ceremonies as they retain generally avail themselves of the assistance of a Brahmin.

"They differ particularly from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of his progenitor, and, consequently, adoption is a merely temporal arrangement and has no spiritual object."

[702] The Judges then proceed to an elaborate review of the decisions in India in which the laws and customs of the Jains have been considered. It appears to have been contended before them, to use the words of the Court, "that the applicability to Jains of the laws of the Brahminical Hindus, or what is generally termed Hindu law, had been established by so many rulings that the Court was bound to apply it to this case;" and, further, that no uniform and consistent body of customs and usages existed among the Jains which would enable the Court to affirm that the general law was modified by them. It certainly appears that, in most of the decisions referred to by the Judges, the Courts had held that there was no sufficient proof of the existence of special customs among the Jains to displace or modify the general law, though in others, where sufficient proof of special customs appeared, effect had been given to them. Their review of these previous decisions led the Judges to the conclusion that they were not opposed to the view that the Jains might be governed, as to some matters, by special laws and usages, and that, where these were satisfactorily proved, effect ought to be given to them. The learned counsel for the appellant who argued the case at their Lordships' Bar felt himself unable to dispute the correctness of this conclusion.

It would certainly have been remarkable, if it had appeared that in India, where, under the system of laws administered by the British Government, a large toleration is, as a rule, allowed to usages and customs differing from the ordinary law, whether Hindu or Muhammadan, the Courts had denied to the large and wealthy communities existing among the Jains, the privilege of being governed by their own peculiar laws and customs, when those laws and customs were, by sufficient evidence capable of being ascertained and defined, and were not open to objection on grounds of public policy or otherwise.

It no doubt appears from the judgment of the High Court of Bombay delivered by Westropp, Chief Justice, in *Bhagvandas Tejmal* v. *Rajmal* (1) that the Judges of that Court were not satisfied that in the Presidency of Bombay usages had been established to exist among the Jains at variance with ordinary Hindu law. "Hitherto," they say," so far as we can discover, none but [703] ordinary Hindu law has been ever administered either in this island or in this Presidency, to persons of the Jaina sect.". This view was expressed by the Judges after considering and commenting upon several extracts from historical and text writers. They also remark upon the impolicy of introducing departures from the general law. Their Lordships, however, do not understand the Judges to say that customs having such an effect may not lawfully be given effect to, if established by sufficient evidence. On the contrary, their judgment contains this passage:

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" But when amongst Hindus (and Jains are Hindu dissenters) some custom different from the normal Hindu law of the country in which the property is located and the parties resident is alleged to exist, the burden of proving the antiquity and invariability of the custom is placed on the party averring its existence."

Reference was also made to the observations of this Board respecting the proof required to establish customs in the case of *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (2).

The facts in the case before the High Court of Bombay were that, after the death of both husband and wife, the brothers of the deceased husband, with the consent of the "*Panch*" (3), chose a nephew of the husband to be his son by adoption. The evidence given in support of such a custom of adoption was slight, and the Court held that it was not sufficiently proved. It is said in the judgment, "not a single *yati*, or *pandit* or priest, or other expert, either in the lore of the Jainas or of the Brahmans, has been called to prove the alleged custom." Undoubtedly such a custom being, as the Judges point out, opposed to the spirit of the Hindu law of adoption, would require strong evidence for its support, and such evidence appears to have been wholly wanting in that case.

In the present case their Lordships consider that the Judges of the High Court were right in thinking that their decision should be governed by the evidence taken in this suit. This evidence, particularly that taken at Delhi, is entitled to great weight, having regard both to the status of the witnesses and to the consistent manner in which they describe the custom. It is stated in the judgment below that " Delhi is the chief seat of the Jains in the north-west of India, and is the adjoining district to that in which the property is situate." The manner in which the witnesses were [704] called together to be examined, and their position in the Jain community, are thus described in the judgment.

" The Commissioner reports that, on receipt of the Court's commission, he called upon the Deputy Commissioner to furnish him with a list of the names of the principal members of the Jain community residing in Delhi; that out of 125 persons whose names were so furnished, he selected 26 persons, whom he summoned to attend his Court, and that out of the 26, he examined six, of whom two, Zora Mul and Gyan Chand, were elders of the council of the sect at Delhi appointed to determine all questions of religious and social importance arising in the sect, while the other four persons selected were all of a rank that entitled them to admission to te

(1) 10 B.H.C.R. 241. (2) 14 M.I.A. 570, see at p. 585.
(3) '*Panch*' the senior members of the community acting as arbitrators.

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Lieutenant-Governor's Darbar. Of these also, one Baldeo Singh, deposed he was a member of the council before-mentioned. Furthermore, the Commissioner, at the instance of the appellant, took the evidence of two others out of the 26 persons summoned. As all the witnesses so selected by the Commissioner must be presumed to have been impartial, and as either party was at liberty by the terms of the commission to produce any witnesses he desired should be examined, and the appellant availed himself of this privilege only so far as to examine two of the witnesses summoned by the Commissioner, it is hardly going too far to say that no better parol evidence could be obtained than was taken under the Delhi commission."

Their Lordships are relieved from an examination of this evidence in detail, since the learned counsel for the appellant felt constrained to admit that the conclusions drawn from it by the Court were in the main correct. These findings are thus stated in the judgment, and their Lordships entirely concur in them:

" Contrasting this evidence with that given by the independent witnesses examined under the several commissions and having regard to the position which several of the Delhi witnesses hold as expounders of the law of the sect, it cannot be doubted that the weight of evidence greatly preponderates in favour of the respondents. It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a Saraogi Agarwala takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband (and as we have said, it is not necessary for us to go further in this suit, for the property in suit was purchased by the widow out of self-acquired property of her husband); that she enjoys the right of adoption without the permission of her husband or the consent of his heirs: that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears [705] proved by the more reliable evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family."

The Court adds:

" We do not, however, desire to be understood as ruling this point in this suit for the widow, and the adopted son has not been separately represented at the bar, and we have not had the benefit of such assistance from the bar on this point as on the other issues, there being at present no contest between the widow and her adopted son as to their respective rights. We shall affirm the decree of the Subordinate Judge declaring the validity of the adoption and the right of the adopted son to succeed to the estate in suit as a begotten son, but we shall vary the decree of the Subordinate Judge so far as it declares the widow entitled to be maintained in possession as proprietor, by inserting the alternative, or as manager on behalf of her adopted son."

Their Lordships will advert hereafter to the form of the decree. They will now proceed to consider the objections raised to the suit, on the ground that it is merely declaratory, and can lead to no relief. It is scarcely necessary to say that their Lordships desire to adhere to the opinion declared in several decisions of this Board that s. 15 of the Indian

Act VIII of 1859, relating to declaratory decrees, ought to receive the same construction as s. 50 of the English Act, 15 and 16, Vic,, c. 86, which is similarly worded, has received from the English Courts. In the last of these decisions the English and Indian cases on the subject were reviewed, and it was laid down that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court, or unless in certain cases a declaration of right is required as a step to relief in some other Court—*Kattama Natchiar* v. *Dorasinga Tevar* (1).

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The question whether a right to some consequential relief exists must therefore arise in all suits in which a declaration of title is sought. It is enough for the present purpose to observe that a right to come to the Court to have a document or act which obstructs the title or enjoyment of property cancelled or set aside, or for an injunction against such obstructions, would be sufficient to sustain a declaratory decree.

[706] It was contended on behalf of the respondents that the intervention of the appellant in the proceedings of the Settlement Officer, and his objection to the entry in the *wajibularz* of the name of Murari Lal as the adopted son of the Musumat, on the ground that the adoption was illegal, was an act of obstruction against which they were entitled to relief; and if it had been shown that the entry thus objected to had been necessary to the settlement of the mauza, or the completion of the title, or the right to present possession, the contention might have been well founded. But this has not been shown. It would seem that the mauza had been already granted by the Government to the Musumat, and she had been recorded as proprietor. The object of the paper appears to be, as already stated, to record peculiar customs and rights for the information of the Settlement Officer; and although the Deputy Collector asked for information as to the Musumat's successor, and upon the appellant's objection to the entry of the adoption, placed his objection upon the *wajibularz* and referred the parties to a Civil Court, their Lordships would have felt great difficulty to say the least, if it had been necessary to give a decision upon this point, in coming to the conclusion that these proceedings were such an obstruction to the title or right of possession as would sustain the decree.

Another ground on which it was alleged the plaintiffs were entitled to relief was that the appellant had put forward a nuncupative will of his deceased brother, by which he was made the proprietor of the estate, and that the plaintiffs were entitled, if they had asked for it, to a decree annulling that will. It would not probably be disputed that, if a fictitious will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled, and their Lordships are not prepared to say that, in cases where property may legally pass by an oral will, an analogous right to have it declared null may not exist. A claim under such a will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred. The reasons, too, for giving such relief in the case of written wills would seem to apply to nuncupative wills, and one of them, the probable deaths of witnesses, with even greater force to the latter than the former. It was, however, contended on behalf of the appellant that [707] relief against this will was not one of the objects of the original suit, which was confined to

(1) 15 B.L.R. 83=2 I.A. 169.

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the intervention of the appellant in the settlement proceedings. Undoubtedly the plaint refers only to this intervention, and the assertion of this will appears for the first time in the defendant's answer. But it will be found, on reference to the proceedings, that the claim was persisted in after Murari Lal had been added as a co-plaintiff, and, indeed, to the end of the suit. One issue framed at the first hearing of the cause was whether the verbal will had been in fact made, and one of the questions put to the witnesses examined upon the customs of the Jains was whether a verbal gift is valid against the widow. The commissions in which this question appeared were issued after the first remand to the Subordinate Judge, and after Murari Lal had been made a co-plaintiff. In his judgment given after the return of these commissions, the Subordinate Judge expressly finds on this issue that a nuncupative will by the deceased husband would not be valid as against the widow; and although he adds that there was no evidence that such will had been "pronounced,' the defendant, in one of his grounds of appeal to the High Court, complains that this finding is not correct, and the High Court deals with the question of this will in its final judgment. The contention then on the part of the appellant that his putting forward of this will ought not to be regarded, is reduced to the objection that it was not introduced into the original plaint. It is, however, questionable whether when Murari Lal was made a plaintiff, the suit ought not to be considered for this purpose as a new suit, and whether the appellant having before that time put forward the claim in question and persisted in it to the end, relief might not, if asked for, have been granted against it. It would not be necessary that the suit should have been in fact remodelled when Murari Lal became plaintiff so as to ask for this relief, it is sufficient if it might have been so remodelled, and relief obtained.

Their Lordships, however, do not think it necessary to give a definite judgment on this question, because they are of opinion that, under the circumstances in which this appeal to Her Majesty comes on to be heard, the appellant ought to be precluded from insisting on his objection to the decree on the ground of its being declaratory only.

[708] In his petition to the High Court for leave to appeal to Her Majesty, the appellant made no reference in the ground of appeal to this objection to the decree. The leave granted by the High Court having become abortive, in consequence of the deposit for costs not having been made in due time, application to this Board for special leave to appeal was made. In the petition for this leave again no reference was made to this objection, but the application was based on the ground that important questions affecting a large community were involved in the decision sought to be appealed from. This petition, after fully stating the conclusions of the High Court upon the evidence relating to Jain customs, contain the following passage: "The petitioner now humbly submits that the suit is one concerning properties of large value, and involving questions of great importance of the sect of the Jain community, to which the petitioner belongs." Their Lordships having, on this ground, advised Her Majesty to grant special leave to appeal, they are invited, when the appeal comes on to be heard, not to examine or consider the important questions thus indicated, but to reverse the judgment on a ground which altogether excludes their discussion. Their Lordships do not by any means intend to lay down, as a rule, that no questions can be raised at the hearing which are not indicated in the petition for special leave to appeal; but, in the present case, considering the whole course of the proceedings in the Court below, to

which they have fully averted, the importance of the questions upon which the appellant obtained special leave to appeal, and the somewhat technical character of the objections raised to the maintenance of the suit, they think the appellant ought not, at this stage, to be allowed to insist that, by reason of these objections, the decree appealed from should be reversed.

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Exception has been taken to that part of the decree of the High Court which varied the decree of the Subordinate Judge declaring that the widow was entitled to be maintained in possession as proprietor, by substituting the declaration that the widow is entitled to retain possession of the estate, either as proprietor, or as manager thereof on behalf of her adopted son, Murari Lal. The substituted declaration, being in the alternative, is no doubt in one sense uncertain, but it is independent of the other declarations which decide the right of the parties as between the plaintiffs on the one [709] side, and the defendant on the other, and repel the defendant's pretentions. The Court, indeed, could not properly make a binding declaration as between the adoptive mother and the adopted son, both being plaintiffs. It is no doubt on this account that the decree, whilst it declares the rights of the widow to present possession as against the defendant, is framed in a form which avoids prejudice to the rights of the plaintiffs *inter se*.

In the result their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court with costs.

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1 A. 709.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

DEBI SINGH (*Defendant*) *v.* BHOP SINGH AND OTHERS (*Plaintiffs*).*
[24th April, 1878.]

Pre-emption—Pleader's Fees—Act XX of 1865, *s.* 37.

Held, in a suit for pre-emption, where it was found by the Court that the actual price of the property was less than the price stated in the deed of sale and the Court gave the plaintiff a decree with costs, that the amount payable by the defendant in respect of the fees of the plaintiff's pleader ought to be calculated, not on a valuation of the property which was found to be false, or on the amount on which the Court fee on the plaint was paid, but on the real value of the property as found by the Court.

THIS was a suit to enforce the plaintiffs' right of pre-emption in respect of certain shares in certain villages. The suit, which was founded on special agreement, was valued, for the purposes of the Court Fees Act, at Rs. 1,370-5-0. For the purposes of jurisdiction it was valued at Rupees 6,000, the amount entered in the deed of sale as the price of the property. This price the plaintiffs alleged was not the actual price of the property. The Court of first instance found that the actual price of the property was Rs. 2,300, and gave the plaintiffs a decree with costs.

The defendant appealed to the High Court, contending, among other things, that the fees of the plaintiffs' pleader ought not to be calculated on the value of the property as stated in the deed of sale.

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*First Appeal, No. 16 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 8th November 1877.

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[710] Munshi *Hanuman Prasad* and Babu *Oprokash Chandar*, for the appellant.

Pandit *Nand Lal*, for the respondents.

The following judgments were delivered by the Court:

JUDGMENTS.

PEARSON, J., after disposing of the other pleas in appeal, continued: The pleader's fee clearly should not be reckoned upon a valuation of the properties which is found to be false. Whether it should be calculated on Rs. 2,300, the real value as found in the decision, or Rs. 1,370-5-0, the amount on which the Court fee on the plaint was paid, may be a question. The latest opinion seems to be in favour of the former mode of calculation, which should therefore be adopted in substitution for that which has been adopted in the Court below. With this slight modification, I would affirm the lower Court's decree and dismiss the appeal with costs.

STUART, C.J.—I entirely approve of the view taken of this case by my colleague, Mr. Justice Pearson and I quite agree with him as to the principle on which the pleader's fee should be calculated. The appeal is dismissed with costs (1).

Appeal dismissed.

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1 A. 710 (F.B.) = 3 Ind. Jur. 72.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

A. L. SEALE (*Defendant*) v. BROWN (*Plaintiff*).* [24th April, 1878.]

Will—Executor, Power of—Act X of 1865 *(Succession Act)*, s. 269—*Mortgage—Power of Sale.*

Certain persons, being executors of the will of an Englishman domiciled in India, such will having been made after the Indian Succession Act came into operation, and charging the testator's estate with the payment of his debts having as such executors borrowed certain moneys from a bank wherewith to discharge debts incurred by them in the administration of the estate of [711] the testator, gave as such executors to such bank a bond for the payment of such moneys on a certain date. By a second instrument, bearing the same date as the bond, they mortgaged as such executors aforesaid to the manager of such bank all their right, title, and interest in certain real estates of the testator, as security for the payment of the moneys, authorising and empowering, in default of payment of the same, the manager, his successors or assigns, absolutely to sell such real estate, either by private sale or public auction, for the realisation of the moneys and to sign a conveyance or conveyances, and a receipt or receipts for the purchase money, and declaring that such conveyance or conveyances, receipt or receipts, should be as valid as if the same were signed by them. By a third instrument, bearing the same date as the other two, they as such executors aforesaid constituted the manager of the bank for the time being their true and lawful attorney for them and in their names and as their act and deed to sell such real estate and to do all acts necessary for effecting the premises.

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* Regular Appeal, No. 99 of 1876, from a decree of R. Alexander, Esq., Subordinate Judge of Dehra Dun, dated the 20th May, 1876.

(1) Under the rules framed by the High Court under s. 37 of Act XX of 1865, in suits for moveable and immoveable property, where the amount or value of the claim does not exceed Rs. 5,000, five per cent. is the largest amount payable by any party in respect of the fees of his adversary's pleader. After Rs. 5,000 and up to Rs. 20,000, two per cent. is payable, *vide* G.O. dated the 23rd April 1866.

Default having been made in payment of the moneys by an instrument in writing which recited the instruments already mentioned, the manager of the bank for the time being, described as such in the exercise of the power of sale and for the purpose of re-imbursing to the bank the moneys, granted and conveyed to *B* such real estate and all the estate and interest therein of the executors freed from the mortgage above recited, and the manager for the executors executed the usual covenants for title and further assurance. *B*, having been resisted in obtaining possession of such real estate under such conveyance by a legatee of the testator, sued the legatee and the executors for a declaration of right to, and for possession of, such real estate in virtue of such conveyance. The legatee contended that the executors had no authority to confer a power of sale.

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FULL BENCH.

1 A. 710 (F.B.) = 3 Ind. Jur. 72.

Held (STUART, C J., dissenting) that the executors had such authority under s. 269 of the Indian Succession Act, and that the conveyance was accordingly valid and operated to transfer the property to *B*.

THE plaint in this suit stated that the plaintiff claimed to obtain a declaration of right to, and recover possession of, the estate called Rockville, or Jabberkhet, situated in the district of Dehra Dun, adjoining the Cantonment of Landour by virtue of a deed of sale, dated the 19th October 1875, and executed under a written power of sale, dated the 20th July 1874, from the defendants Sarah Emma Seale, Robert Edward Seale, and William Frederick Seale, acting as executrix and executors of the will of the late Colonel Robert Henry Seale, deceased, the owner of the said estate, the said deed of sale being executed by the defendants the Delhi and London Bank in favour of the plaintiff in consideration of Rs. 35,000; and that the cause of action arose on the 16th December 1875, when the defendant Alfred Leonard Seale refused to deliver possession of [712] the said estate to the plaintiff, and denied the plaintiff's title thereto, as well as the validity of the said deed of sale. The defendant, Alfred Leonard Seale, set up as defence to the suit, amongst other matters, that the deed of sale was invalid, the defendants, Sarah Emma Seale, Robert Edward Seale, and William Frederick Seale, having no power under the said will to delegate to the defendant Bank their powers as executrix and executor to sell. The material facts of the case were these:

Colonel Robert Henry Seale, an Englishman domiciled in India, by his will dated the 24th March 1869, charged his real and personal estate with the payment of all his just debts, and appointed his wife, Sarah Emma Seale, and three of his children, Mary Victoria Read, Robert Edward Seale and William Frederick Seale, executors. Colonel Seale died on the 1st April 1869, and probate of his will was granted to all the persons appointed by him as executors. In December 1869, Mrs. Seale applied to the Delhi and London Bank for a loan to discharge debts incurred in the administration of the testator's estate, offering to mortgage a portion of the estate as security for the loan. The loan was granted, a bond to secure the amount being executed by Mrs. Seale, R. E. Seale, and W. F. Seale, as executors, and a mortgage deed of a portion of the estate being executed by Mrs. Seale, as executrix. The debt thus created not having been discharged, on the 21st August 1872, another bond for the amount due was executed by Mrs. Seale, R. E. Seale and W. F. Seale, as executors of Colonel Seale, and by the same persons in the same character a portion of the testator's estate was mortgaged to secure the amount due on this bond. Default having been made in the payment of this bond-debt, the Dehli and London Bank instituted a suit for its recovery and for an order directing the sale of the mortgaged property for the satisfaction of the debt. On the 15th July 1874, the cause came on the trial, but before its decision it was withdrawn, terms having been arranged between the parties and embodied in the deeds next

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mentioned. By a bond dated the 20th July 1874, Mrs. Seale, R. E. Seale, and W. F. Seale, describing themselves as executors of the will of Colonel Seale, bound themselves to pay to the Bank Rs. 34,250 and interest. By a second instrument, duly registered and bearing the same date as the bond, the same persons [713] under the same description, conveyed to the Manager of the Bank as security for the debt created by their bond, all their right, title, and interest in the estates of the testator known as Rockville and FairyLand: and in the event of default being made in payment of the sum secured by the bond, they authorised and empowered the Manager of the Bank, his successors or assigns, absolutely to sell the properties mortgaged either by private sale or public auction for the realisation of the amount due on the bond: to sign a conveyance or conveyances, and a receipt or receipts for the consideration money: and declared that such conveyance or conveyances, receipt or receipts should be as valid as if signed by them. By a third instrument also registered and bearing the same date, the 20th July 1874, the same persons, under the same description, constituted the Manager of the Bank for the time being their true and lawful attorney for them and in their names, and as their act and deed, to sell the estates of Rockville and Fairy Land, and to do all acts necessary for affecting the premises. Default being again made in payment of the bond-debt, the Bank caused the property to be advertised for sale and eventually found a purchaser. By deed dated the 19th October 1875, which recited that at the date of the original loan Mary Victoria Read was resident in England, and had declined to continue acting as executrix, and which recited the several instruments to which reference has been made, Charles Edward Beresford described as Manager of the Bank, in exercise of the power of sale and for the purpose of reimbursing to the Bank the moneys advanced by and due to it, in consideration of Rs. 35,000 granted and conveyed to Isabella Blackburn Brown, the plaintiff in this suit, the estate called Rockville with its appurtenances, and all the estate and interest therein of Mrs. Seale, R. E. Seale, and W. F. Seale, as executrix and executors of the testator freed from all claims of the mortgage of the 20th July 1874, and the said Charles Edward Beresford, for the executrix and executors therein named, executed the usual covenants for title and for further assurance. When the plaintiff endeavoured in virtue of this sale to obtain possession of Rockville, she was resisted by the defendant, Alfred Leonard Seale, a son of the testator and a legatee under his will. She accordingly brought the present suit to establish her title under the sale and to recover possession of the estate.

[714] The Court of first nstance held that the deed of sale was valid and gave the plaintiff a decree. The defendant, Alfred Leonard Seale, appealed to the High Court upon the ground, amongst others, that the executors of the will of Colonel Seale had no power to delegate their authority to sell to a third party.

The Court (Stuart, C.J., and Spankie, J.) referred to the Full Bench the question whether the deed of sale, dated the 19th October 1875, being a deed of sale not under the hands of the executors themselves, but by and in the names of the persons to whom they delegated their authority under the power of attorney dated the 20th July 1874, was valid, and was a good and binding conveyance of the property it purported to sell.

Mr. *Hill*, for the appellant.

Messrs. *Ross* and *Conlan* (with them Mr. *Quarry*) for the respondent.

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JUDGMENTS.

The following judgments were delivered by the Full Bench:

STUART, C. J.—I am of opinion that, by the power-of-attorney given by the executors to Mr. Beresford, the Manager of the Delhi and London Bank, they delegated their authority to sell to that gentleman, but that the sale to the plaintiff was and is invalid. I would therefore allow this appeal for the seventh reason assigned, and reverse the judgment of the Court below with costs. I have arrived at this conclusion after anxious consideration of the case, and of the legal principles on which its determination depends. If I have not found any decision or dictum exactly in points, there appears to be in the books the recognition and application of principles and analogies all going to show that the sale by Mr. Beresford to Mrs. Brown was not valid as against the defendant, and that therefore the judgment of the Court below ought to have been for the defendant. Viewed, indeed, in any light the question thus before us for decision is, in principle, a most serious one, for if what was here done was validly done, then undoubtedly executors and trustees have much larger powers than is generally understood by lawyers, while if these executors have exceeded the limits of their authority, we should be told so by the Court in the last resort. I therefore trust that this case may go further, and that the Judges of the Privy Council may have an opportunity of instructing us on [715] the subject. The case is one of pure technical law, having nothing whatever to do with the legal customs and usages of India, nor does even the Indian Succession Act, in my opinion, affect it in the slightest degree. The three documents which are material to the case are fully set out in the order of reference by Mr. Justice Spankie and myself; and just let us see how the case stands on these First, there is the testator's will, in which, with the exception of charging his estate, real and personal, with the payment of all his just and lawful debts, there is no express provision for, or, indeed, any special recognition of the necessity of, such a sale as we have to consider; on the contrary, there is only one special trust to sell, and that for a totally different purpose than for the payment of debts, and appearing to show, too, that in the testator's mind at least there would be no necessity for such a sale as this so-called sale to the plaintiff, *viz.*, one for the personal benefit of one of his sons in consequence of his infirmity and inability to earn a competency, and otherwise for the benefit of the rest of his children. It is also to be considered that the debts for the payment of which the sale to Mrs. Brown was made were not debts incurred by the testator himself and left by him to be paid out of his estates, but debts incurred by the executors themselves in the course of their administration. Then we have the second document mentioned in the reference, *viz.*, the power-of-attorney by which the executors "constitute and appoint the Manager for the time being of the Delhi and London Bank, Mussoorie, our true and lawful attorney for us and in our names, and as our act and deed, to sell and negotiate the sale of the houses and property situate in Landour, &c., and to perfect all or other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises, we, &c., hereby ratifying and confirming whatsoever the Manager for the time being of the said Delhi and London Bank, Limited, shall lawfully do or cause to be done for us or on our behalf in or about the aforesaid premises by virtue of these presents." Here it will be observed there is no recital of the will or the discretion in it to pay the testator's debts, nor of the fact that there were any such debts

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existing, and of the necessity of paying those debts by means of a sale of a portion of the estate, and that such estate should be the particular property mentioned, but the Manager of the Bank is simply, and without any [716] reason assigned, directed to sell and negotiate the sale of the houses and property. There is no direction simply to make a subsidiary contract, or to receive offers, which offers are to be communicated to, and considered by, the executors, but a power to negotiate and conclude a sale and to sell, in the largest and most unqualified sense of the term; and as if this was not enough, the instrument goes on to empower the manager "to do and to perfect all or any other act or matter or thing whatsoever which shall or may be necessary or requisite for effecting the premises;" that is to say, the Manager is to effect the sale on any terms he pleases, and in effect, to deal with the property directed to be sold as if he himself was an executor or trustee of the will. If this is not a delegation of their office and, *pro tanto*, of their estate by the executors, I cannot imagine what delegation can possibly mean. One thing is certain, that Mr. Beresford, the Manager, evidently considered it was complete so far as he was concerned, and that he had, by means of it, acquired absolute control over the property which it had been determined to sell, for he proceeds himself, of his own authority, to sell the property, and he executes a conveyance to Mrs. Brown as if the transaction were a matter exclusively personal to him and her. This conveyance or deed of sale, no doubt, contains recitals which go to justify the arrangements to some extent as between the executors and him, but from beginning to end there is not the slightest recognition in this deed of the rights and interests under the will of the *cestui que trust* and legatees as parties and beneficiaries who are in any wise to be accounted to. The operative part of this deed of sale is remarkable as showing the merely personal character of both seller and purchaser. It is preceded by the following singular recital: "And whereas I (the Manager) being desirous of effecting a sale, &c., under the power hereinbefore recited" (by which he means the general direction in the will to pay the testator's debts), "have for a great length of time advertised the sale in the public newspapers, and have at last received an offer &c., of Rs. 35,000 to be paid on the execution, registration and delivery of these presents" (and of certain other instruments, none of which contained any recognition whatever of the executors, &c., "and having communicated the offer to the said executors" (it is not stated that the executors gave any answer about the offer, or [717] in any way gave their assent to its acceptance directly or indirectly), "and being satisfied" (that is, the manager being satisfied) "that it is unlikely any higher offer for the said estate will be made, etc., etc., have *decided* upon accepting the said offer, and have *duly communicated my acceptance of it*" (to the purchaser, Mrs. Brown). "Now therefore know ye that I the said Charles Edward Beresford, in exercise of the said power of sale" (that is, the power of sale given by the will to the executors), "and for the purpose of re-imbursing to the said Delhi and London Bank, Limited, the moneys advanced by and due to it" (that is, the manager's own Bank), "and in consideration of the sum of Rs. 35,000 to be paid by the said Mrs. Brown" (it is not said to whom, to the executors or to Mr. Beresford himself), "do by these presents grant unto the said Mrs. Brown, her heirs and assigns all those lands, forests, and houses, and hereditaments." It is unnecessary to go further with this deed of sale, which, it will be observed, contains not only the most absolute and complete, but the most thoroughly independent conveyance, by the Delhi and London

Bank, Limited, of all the property comprised in it, and this solely in the interest of the Bank itself, and without the slightest reference to the rights of the defendant as a beneficiary under the will.

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Now if all this does not amount to a delegation by these executors to Mr. Beresford not only of the control of the property and its sale, but of *their discretion* and of the *confidence* reposed in them by the will, I do not know what possible arrangement of this kind can have that effect. These executors undoubtedly, in my judgment, delegated their office, and, in doing so, took no sufficient measures, *indeed*, no measures at all, to protect the estate, and all that was done in virtue of that delegation was of course illegal, and the sale to Mrs. Brown was and is valid. The legal estate remained in the executors, and they undoubtedly did not divest themselves of it by the power-of-attorney to the manager, and the right and title to the property remains in the executors still. Although retaining therefore complete dominion over the property under the will, and bound in all transactions relating to it to exercise their own discretion, they left everything to the discretion of their attorney, who appears to have dealt with Mrs. Brown as if the property had become his own or the Bank's independent estate. This they [718] could not do—Sugden on Powers, 8th ed., pp. 179, 180—and the result therefore is that as against the defendant Alfred Seale there has been no sale to the plaintiff.

As to s. 269 of the Indian Succession Act, that enactment, as I have said, has nothing to do with the case. It relates solely to direct dealing with, or on account of, the estate by the executor or administrator himself, and not by means of delegation to any other person, or by means of any other intermediary. The case of a mortgage under this section is quite different from a sale out and out, for a mortgagor in that case retains in his own person not only the equity of redemption, but the right to pay up the debt on the contract made by it, such contract being the contract of the mortgagor himself, and not of any delegated agent or attorney. For these reasons my answer to this reference is that the sale-deed is not a good and binding conveyance of the property it purports to sell.

PEARSON and TURNER, JJ., concurring.—(After stating the facts of the case as already set out, the judgment continued.) The questions addressed to this Bench we understand to be the following: Whether the execution of the sale-deed by Mr. Beresford selling under a power of sale created by the executor of a will executed by an Englishman domiciled in India, after the Indian Succession Act came into operation, is valid, and whether, in the absence of other defects, such a conveyance operates to transfer the property sold to the purchaser. We do not understand that our opinion is sought on the question whether the deed of mortgage and the power-of-attorney are invalid by reason that Mrs. M. V. Read was no party thereto or whether any objection on that ground is not answered by the 271st section of the Indian Succession Act, which declares that, when there are several executors or administrators, the powers of all may, in the absence of any declaration to the contrary, be exercised by any one of them who has proved the will or taken out administration. The three instruments executed on the 20th July 1874 must be regarded as parts of the same transaction. The mortgage was intended to be a collateral security for the bond. The power-of-attorney was intended to give effect to the power of sale in the mortgage. The questions then put to us resolve themselves into these: Are executors [719] under a will to which the Succession Act applies competent to execute a mortgage of immoveable property, to create a power of sale in favour of the mortgagee, and to

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appoint the agent of the mortgagee their attorney to give effect to the power of sale.

In the case before us the testator charged his debts on his moveable and immoveable property, and in addition to this power executors have, under the Indian Succession Act, s. 269, which makes no difference between moveable and immoveable property, power to dispose of the property of the testator either wholly or in part in such manner as they think fit. It has, we are aware, been held in England that before a power of sale has been given to executors, they cannot sell by attorney, but it has also been held by the Courts in that country that an executor may mortgage with a power of sale property which by the law of England wholly vests in him. In *Russell* v. *Plaice* (1), Lord Romilly, when Master of the Rolls, held that a purchaser was bound to accept an assignment of leaseholds executed by a mortgagee under power of sale created by an executor. "The power," said His Lordship, "which an executor, or administrator possesses of making a valid mortgage includes in it a power to give all that is properly incidental to that species of alienation. * * The power of sale given to the mortgagee must be considered not as the delegation of a power intrusted to the executor, which is a power to sell, for the benefit of the *cestui que trust*, but as the creation of a new power not for the benefit of the persons interested in the testator's estate, but for the benefit of the persons interested in the mortgage; it is a power to render the mortgage effectual, and the right to create that power is incidental to the authority of the executor to mortgage." In *Bridges* v. *Longman* (2), it was held that a power to raise money by sale or mortgage authorises a mortgagee with a power of sale (3). We have cited these rulings because the learned counsel for the appellant relied in support of his argument on English authorities. But the points raised must be decided by the law of India. The charge of debts on the real and personal estate would probably be held sufficient by itself to authorise a sale or mortgage by the executor for the payment [720] of debts. There is it is true no express devise of the estate to the executors, but there is a direction for the application of the rents and profits during the life of the testator's widow, or until her remarriage, and then a direction for sale, and it may be taken that the testator was aware that by law his estate would vest in his executors, and that he intended the powers and trusts created and declared by his will should be exercised and performed by the executors.

The respondent is not, however, constrained to rely on the charge created by the will. She is entitled to rest the validity of the sale on the power given to executors by the Succession Act, and it is impossible that any power could be conferred in larger terms. The executors may dispose of the property of the deceased "in such manner as they may think fit." This language, in our judgment, authorises an executor to execute a mortgage with a power of sale. It is true that a power of sale is unusual in mortgages made by natives of this country, but it is not an unusual power in mortgages drawn after English precedents, and executed by and in favour of Englishmen resident in India, and if it were unusual, we are not prepared to hold, having regard to the wide language in which the power to dispose of property is by law given to executors, that a power of sale created in a mortgage by executors would be invalid. For the purpose of his office an executor is by the law of India invested with the same

(1) 18 Beav. 21 = 18 Jur. 254 = 23 L.J. Chanc. 441.
(2) 24 Beav. 27.
(3) See also *In re* Chawner's Will, L. R. 8 Eq. 569.

powers of conveying a testator's estate as the owner himself possessed. It is of course his duty to mortgage or sell the estate only when there is necessity for it. But in creating a power of sale in a mortgage he does not, as Lord Romilly pointed out, delegate the duty imposed on him. In the exercise of the discretion conferred on him he has decided that a mortgage is necessary, and as a power of sale increases the value of the security and facilitates the procuring of the required fund at the lowest rate of interest, he for the benefit of those interested under the will creates a new power to be exercised for the benefit of the mortgagee. The power-of-attorney is simply auxiliary to the power of sale and almost invariably is conferred by the same deed as the power of sale. It is not invalidated by being created by a separate instrument. We therefore reply that the conveyance to the purchaser is not invalid on any of the grounds suggested in the referring order.

[721] SPANKIE, J.—The executors in this case were acting under the authority vested in them by s. 269 of Act X of 1865, and not under any power of sale delegated to them as a trust by the testator relying on the exercise of their own personal discretion and judgment in effecting a sale. The power given by s. 269 of the Succession Act is unqualified. They may dispose of the property of the testator, real and personal, as they think fit. They have the same power to deal with the property that the owner himself would have had. If he could have empowered his agent or attorney to sell the whole or any portion of the property, the executors can do the same by virtue of the large authority given to them by the Act. It would appear that we are not called upon to look to English law in replying to the reference made to us. I would say that the attorney in this case could give a valid title to the purchaser acting as he was under the authority given to him by the executors.

When the case was returned to the Division Court (Stuart, C. J., and Spankie, J.), in disposing of the appeal, the following further observations were made by Stuart, C. J., on the question referred to the Full Bench:

STUART, C. J.—This case was referred by us to a Full Bench as to whether the sale-deed not being under the hands of the executors, but by and in the name of the person to whom they delegated their authority under the power-of-attorney, is valid, and is a good and binding conveyance of the property it purports to sell. All the Judges consulted have now returned their opinions, and, with the exception of myself, they have answered the reference in the affirmative, that is, they are all of opinion that the sale-deed to the plaintiff is a valid conveyance of the property to her.

Having fully considered all that has been recorded by my colleagues, I regret to say that I find myself wholly unable to adopt their reasoning, and I remain of the opinion expressed by me in my judgment in the reference. I am quite clear that s. 269 of the Indian Succession Act has nothing whatever to do with this case. That section provides that "an executor or administrator has power to dispose of the property of the deceased either wholly or in part in such manner as he may think fit." Now this is a proposition which properly understood, it never occurred to me to controvert. But [722] the question raised in the present case is a very different one, and it is not whether any executor has power to dispose of any portion of the testator's estate as he thinks fit, but whether he can refuse or abstain from disposing of the property himself by handing over the duty, the power, and the discretion to another party, a stranger to the estate and

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who as a creditor has an interest, not in its profitable or just administration, but an interest of a nature which is necessarily adverse to the interests of the legatees and others who take under the will. The Succession Act in this section appears to me to assume that the power to deal with the testator's estate is a power that must be exercised by the executors themselves directly, and not by a person delegated or authorized by them to act on their behalf, much less a person whose only interest is to obtain satisfaction of his own claims on the estate. As to the case of a mortgage, I have sufficiently expressed my opinion at the conclusion of my answer to the reference.

I may now add that, my attention having been directed by one of my colleagues to the fact, that there is evidence by letters addressed by one of the Seales to the Manager of the Bank showing that the family were extremely anxious to save the property in 1874 and 1875, and that a proposal for the management of the estate in the interest of all concerned was made, and that this proposition was in due course communicated to the Directors of the Bank in London—not a very competent body one would imagine to decide such a question—but that these gentlemen declined to entertain the offer, thinking no doubt more about the assets of the Bank and their responsibility to account for them than of any considerations or favour to the appellant's family being allowed a chance of saving the property. Be that as it may, the fact that the family were willing at the last moment to prevent the sale, adds considerable force, I think, to my contention that Mr. Beresford had no authority to exercise the power and the discretion reposed in the executors, and that neither could the executors place him in such a position, nor, if they did so place him, could he legally and effectually accept such authority at their hands, so as of himself to give a good title to the plaintiff as purchaser.

I also desire to point out that I never suggested that the bond to the Bank was executed for the purpose of discharging private **[723]** debts personal to the executors themselves. What I meant to convey was that the debt to the Bank had been incurred, not by the testator himself, but by the executors in the course of their administration of the estate; and although they could have sold the property themselves, that is, by a deed of sale under their own hands, subject to their liability afterwards to account for the transaction to the defendant or others concerned, they could not delegate or otherwise transfer the power to do so to a stranger, much less to a creditor of the estate, and who had become such by means of their own administration.

In my judgment in the reference I referred to, although I did not quote from, the well-known work of Sugden on Powers, but I had better give the words of that great authority. In the chapter (1) on the "Transfer of Powers," the learned author lays down the law as follows: "Wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus nonpotest delegare*." Therefore, where a power of sale is given to trustees or executors, they cannot sell by attorney. So where a father had a power of appointment to his children over a real estate, and he delegated the power to his wife, Lord Hardwicke said that this must be considered as a power of attorney

(1) Ch. VI. 8th Ed. pp. 179 (180).

which could be executed only by the husband, to whom it was solely confined, and was not in its nature transmissible or delegatory to a third person. Again, where personal estate was given to such charitable use as *A* should appoint, and he directed the money to be applied as *B* should appoint, Lord Hardwicke held the delegation void. So where a testator gave his wife a power to appoint personally amongst their children, and she delegated this power by her will to others, Sir Thomas Clarke determined that the delegation was void; and this is now a settled point. On the same ground a person whose consent is made requisite to the due execution of a power, cannot authorize another as his attorney to consent to any execution of it. This is a doctrine, the application of which to the present case derives increased force from the fact to which I have already alluded, that the donee of the power was a [724] creditor and claimant against the estate for which the executors were responsible, and had therefore a direct interest opposed to that of the legatees and beneficiaries under the will. On the other hand the author points out that it is the delegation of the *confidence and discretion* reposed in executors and other donees of powers that the law refuses to recognize. He says: "It is frequently contended in practice that the donee of a power cannot execute a deed of appointment by attorney. But the cases by no means authorize this position. They merely establish that the donee cannot delegate the *confidence and discretion* reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion is delegated. The appointment is in every respect an exercise of his own judgment, and there cannot be any reason why he should not be permitted to execute the *deed* of appointment by attorney (1)." The meaning of this as applied to the present case is simply that, where the executors or donees themselves make the contract, its execution and completion by deed may be by attorney; that attorney, however, exercising no confidence or discretion or judgment, but merely being the agent or officer deputed to carry the contract already made into effect. Now, in the present case everything was left to Mr. Beresford, the confidence and discretion of the executors was delegated or transferred to him, and he was left to his own judgment to make such bargain as he thought fit for the sale of the estate, a state of things which, if countenanced by any authoritative reading of the law, would, it is easy to understand, lead to the most pernicious consequences.

On all these grounds my judgment is that the sale to the plaintiff was and is wholly illegal. But the Judges consulted in the reference being differently minded, we must for the present hold as matter of law, that the executors acted within their powers, that therefore the Manager of the Bank acted within his, and that the plaintiff has got a good title to the estate.

It only now remains for me to notice the reasons of appeal in the original memorandum. (The learned Judge then proceeded to dispose of the remaining grounds of appeal.)

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(1) At p. 180.

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APPELLATE CIVIL.

1 A. 725.

1 A. 725.

[725] APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Spankie.

AFZAL-UN-NISSA (*Plaintiff*) *v.* TEJ BAN (*Defendant*).*
[27th May, 1878.]

Improper reception in evidence of unstamped document—Irregularity not affecting the merits of the case—Appeal—Act VIII of 1859 (*Civil Procedure Code*), s. 350.

Where a Court of first instance, treating an unstamped promissory note, the after stamping of which was inadmissible, as a bond, received such instrument in evidence, on payment of the stamp duty chargeable on it as a bond and of the penalty, *held* that the reception of such instrument by such Court, being an irregularity not affecting the merits of the case, was no ground for reversing the decree of such Court when the same was appealed from (1).

THIS was a suit for certain money due on a promissory note, dated the 1st May 1874. This instrument, although chargeable, under Act XVIII of 1869, with the stamp duty of fifteen annas, was unstamped. The Court of first instance, treating the instrument as a bond, allowed the plaintiff, in the exercise of the powers given to it by s. 20 of Act XVIII of 1869, to pay the stamp duty chargeable on the instrument as a bond and the penalty, and received the instrument in evidence, and gave the plaintiff a decree. On appeal by the defendant, the lower appellate Court reversed the decree of the Court of first instance and dismissed the suit on the ground that, after stamping of the instrument, it was inadmissible, and it could not be received in evidence.

The plaintiff appealed to the High Court, contending, amongst other matters, that, with reference to s. 350 of Act VIII of 1859, the lower appellate Court had erred in reversing the decree of the Court of first instance on account of an irregularity not affecting the merits of the case or the jurisdiction of the Court.

[726] Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

Mr. *Howard* and Shah *Asad Ali*, for the respondent.

JUDGMENT.

The judgment of the Court was deliverd by

TURNER, O. C. J.—The document could not be received in evidence on payment of any penalty (2). It should not then have been received in evidence, but it having been admitted by the Court of first instance, the lower appellate Court was not justified in reversing the decree of the Court of first instance and dismissing the suit, for the irregularity did not affect

* Second Appeal, No. 1244 of 1877, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 18th September 1877, reversing a decree of Muhammad Wajib-ul-lah Khan, Subordinate Judge of Moradabad, dated the 29th April 1877.

(1) As to whether the reception in evidence by a Court of first instance of an unstamped document is ground for interference with the decree of such Court on appeal, see *Hur Chunder Ghose* v. *Wooma Soondaree Dassee*, 23 W.R. 170, *Srinath Saha* v. *Saroda Gobindo Chowdhury*, 5 B.L.R.Ap. 10; *Lalji Singh* v. *Syad Akhram Ser*, 3 B.L.R., A.C., 235=12 W.R. 47; *Currie* v. *S. V. Mutu Ramen Chetty*, 3 B.L.R., A.C., 126 =11 W.R. 520; *Curness* v. *Sheochurn Sahoo*, W.R. 1864, p. 184; *Crawley* v. *Maling*, 1 Agra H.C. Rep. 63; *Adinarayana Setti* v. *Minchin*, 3 M H C.R. 297.

(2) See s. 28 of Act XVIII of 1869 and *Nandan Misser* v. *Chatterbati*, 13 B.L.R. Ap. 33.

the merits. The decree of the lower appellate Court cannot be supported on the ground on which it proceeds. The appeal to the Judge must then be tried on the merits, and if, as the appellant alleges, and as she proved to the satisfaction of the Court of first instance, the note was given to induce the appellant to consent to the mutation of names, the consideration is sufficient and the appellant will be entitled to a decree. The costs of this appeal will abide and follow the result.

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1 A. 725.

Cause remanded.

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1 A. 726.

APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

TETLEY (*Judgment-debtor*) *v.* JAI SHANKAR AND ANOTHER (*Decree-holders*).* [14th June, 1878.]

Interlocutory Order—Appeal to Her Majesty in Council—Act VI of 1874—*Act X of* 1877 (*Civil Procedure Code—Letters Patent*), *cl.* 31.

Held that the High Court has not any power, under Act X of 1877, or cl. 31 of the Letters Patent, to grant leave to appeal to Her Majesty in Council from an order of the Court remanding a suit for retrial.

The provisions of cl. 31 of the Letters Patent are repealed by the Code and Act VI of 1874 which preceded it.

[R., 52 P.R. 1907 = 34 P.L.R. 1908 = 119 P.W.R. 1908.]

THIS was an application to a Division Court of the High Court for leave to appeal to Her Majesty in Council against an order of such Division Court, dated the 23rd January 1878. This was an order, under s. 562 of Act X of 1878, remanding a case to the Court of first instance for a new trial. The order was made under these circumstances: The Court of first instance dismissed an [727] application for the execution of a decree made under the provisions of s. 53 of Act XX of 1866, on the preliminary point of limitation. On an appeal being preferred to the High Court by the decree-holders, the Division Court referred the point of limitation to the Full Bench. The Full Bench held that the application was not barred by limitation (1), and the case was accordingly remanded by the Division Court to the Court of first instance for disposal on its merits.

Mr. *Colvin*, for the applicant.

Munshi *Sukh Ram* for the opposite parties.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, O. C. J.—It is clear that, under the provisions of the Procedure Code, X of 1877, we have no power to give leave to appeal from the order of this Court directing a hearing on the merits, that order not being a decree but an interlocutory order; but it is argued that we have discretion to allow an appeal under the 31st clause of the Letters Patent. The case appears to be one in which, if we possessed the power, we should be inclined to exercise it, but we are of opinion that the provisions of that

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* Application No. 6 of 1878, for leave to appeal to Her Majesty in Council.

(1) See 1 A. 586.

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clause were by implication repealed by the Code and Act VI of 1874, which preceded the Code. The petitioner must apply for special leave or wait until this Court pronounces final judgment if the proceedings are brought before it. Each party to bear his own costs of this application.

Application refused.

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1 A. 727.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MANIK SINGH (*Defendant*) *v.* PARAS RAM (*Plaintiff*).*
[8th June, 1878.]

Sale in execution of decree—Surplus Sale-proceeds Lien—Act VIII of 1859 *(Civil Procedure Code)*, *s.* 271.

Certain immoveable property was attached on the 13th April 1876, in execution of the two decrees, *viz. M's*, dated the 15th January 1876, which declared a lien created by a bond dated the 17th July 1873, and *P's* dated the 21st January 1876, which declared a lien [728] created by a bond dated the 28th September 1875. *M* had another decree dated the 11th November 1875, declaring a lien on the same property created by a bond dated the 27th October 1874. On the 2nd June 1876, before the sale of the property, *M* applied for the attachment in the execution of that decree of the surplus remaining from the sale-proceeds after his claim under the decree dated the 15th January 1876, was satisfied in full. The Court made an order in accordance with his application. *Held* that, under such circumstances, *M*, as the holder of the decree, dated the 11th November 1875, was entitled to share in the surplus sale-proceeds under the provisions of s. 271 of Act VIII of 1859, and further was entitled to share before *P*.

ON the 15th January 1876, one Manik Chand obtained a decree for money against two persons named Duli Chand and Jugal Kishore, which declared a lien on certain immoveable property created by a bond dated the 17th July 1873. On the 21st January 1876, one Paras Ram obtained a decree for money against the same persons, which declared a lien on the same property created by a bond dated the 28th September 1875. On the 13th April 1876, the property was attached in the execution of both these decrees. At this time Manik Chand held a decree for money against the same persons, dated the 11th November 1875, which declared a lien on the same property created by a bond dated the 27th October 1874. On the 2nd June 1876, he made an application to the Court in which he stated that the property was advertised for sale on the 20th June 1876, in the execution of the decree dated the 15th January, 1876, and prayed that the surplus of the sale-proceeds remaining after the satisfaction of that decree might be attached in execution of the decree dated the 11th November 1875, and be paid to him. On the 3rd June 1876, the Court made an order directing the officer conducting the sale to attach in execution of the decree dated the 11th November 1875, the surplus remaining from the sale-proceeds after the claim under the decree dated the 15th January 1876 was satisfied in full. The property was sold on the 20th June 1876. On the 22nd August 1876, the Court ordered the claims of Manik Chand under the decrees dated the 15th January 1876, and the 11th November 1875, to be satisfied in full from the sale-proceeds, and the

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* Second Appeal, No. 376 of 1878, from a decree of Maulvi Sayyid Farid-ud-deen Ahmad, Subordinate Judge of Aligarh, dated the 5th February 1878, modifying a decree of Munshi Kishan Dayal, Munsiff of Hathras, dated the 6th September 1877.

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1 A. 727.

surplus remaining to be paid to Paras Ram under the decree dated the 21st January 1876.

The present suit was brought by Paras Ram to recover from Manik Chand a portion of the money paid to him under this order [729] on the ground that the plaintiff, as an attaching creditor, was entitled to have his claim under the decree, dated the 21st January 1876, satisfied in full. The Court of first instance dismissed the suit, holding that the defendant's claims under the decrees, dated the 15th January 1878 and the 11th November 1875, ought to be satisfied in full in preference to the plaintiff's claims under his decree. On appeal by the plaintiff the lower appellate Court gave him a decree for the amount which had been paid to the defendant under the order of the 22nd August 1876, in satisfaction of his claim under the decree dated the 11th November 1875, on the ground that neither attachment nor sale had been made under that decree.

The defendant appealed to the High Court against the decree of the lower appellate Court.

Babu *Oprokash Chandar Mukerji* and *Jogindro Nath Chaudhri* for the appellant.

Munshi *Hanuman Prasad* and Pandit *Bishambar Nath* for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The sale was made on the 20th June 1876, in execution of the defendant-appellant's decree, dated 15th January 1876, which declared a lien created by a bond, dated 17th July 1873, in pursuance of an attachment made by him on 13th April 1876, on which date the plaintiff, respondent, also attached the same property in execution of his decree dated 21st January 1876, which declared a lien dated 28th September 1875. Both Courts are agreed that it was proper that the defendant-appellant's decree above mentioned should first be discharged out of the sale-proceeds. Defendant-appellant had another decree, dated 11th November 1875, declaring a lien on the same property created by a bond dated 27th October 1874; the Court of first instance held that this decree should also be discharged out of the surplus sale-proceeds in preference to that of the plaintiff respondent; the lower appellate Court held otherwise for the reason stated in its judgment, *viz.*, that neither attachment nor sale had been made under the decree of 11th November 1875.

But it appears that on 2nd June 1876, the defendant preferred a petition to the Court praying that, as the property on which [730] his decree of 11th November 1875, declared his lien was about to be sold in execution of his decree, dated 15th January 1876, the surplus sale-proceeds might be attached for the purpose of being applied to the satisfaction of the decree of 11th November 1875 and that an order was passed on 3rd June 1876, in accordance with the petition.

Under the circumstances we are of opinion that the decree-holder of 11th November 1875 was entitled to share in the sale-proceeds under the provisions of s. 271 of Act VIII of 1859, as one who had prior to an order for distribution, before the sale even, taken out execution of his decree against the same judgment-debtor and not obtained satisfaction thereof; and as his lien as well as the decree which declared it were prior in date to the lien and decree held by the plaintiff, was entitled to share before him.

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1 A. 727.

We therefore decree the appeal with costs, modifying the lower appellate Court's decree so far as it modified that of the Court of first instance, and restoring the latter in its entirety.

Appeal allowed.

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1 A. 730 = 3 Ind. Jur. 120.

APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Oldfield.

MERCER (*Judgment-debtor*) *v.* NARPAT RAI AND ANOTHER (*Decree-holders*).* [21st June, 1878.]

Execution of Decree—Military Officer—Stat. 40 *Vict.*, c. 7 (*Mutiny Act*, 1877), *s.* 99.

Where, with reference to s. 99 of the Mutiny Act, a decree for money made against a military officer serving in India directed that the judgment-debt should be stopped out of a moiety of such officer's pay, *held* that the decree-holder could not obtain satisfaction of the decree by attachment of such officer's moveable property (1).

[R., 7 N.W.P. 331.]

THE judgment-debtor in this case was an officer belonging to Her Majesty's Royal Artillery serving in Allahabad. The decree, [731] which was dated the 1st June 1877, was a decree for money made by a Civil Court in the Punjab. It specially directed, with reference to s. 99 of Stat. 40, Vict., c. 7 (The Mutiny Act, 1877), that the judgment-debt should be stopped and paid to the judgment-creditor out of a moiety of any pay coming to the judgment-debtor in the current month or any future months. This decree was sent for execution by the Court which made it to the District Court at Allahabad. In execution thereof certain moveable property belonging to the judgment-debtor was attached in his residence at Allahabad. The judgment-debtor objected to this attachment on the ground that the decree did not award execution thereof generally. The Judge of the District Court made an order disallowing the objection on the ground that it was one to be urged before the Court which made the decree and not before him.

The judgment-debtor appealed to the High Court against the order of the District Court.

Mr. *Spankie*, for the appellant, contended that the District Court was bound to consider whether or not the decree was being executed according to its terms; that the decree, which was made in view of s. 99 of the Mutiny Act, only authorized the stoppage of the judgment-debtor's pay, and that consequently, under the provisions of that section, the judgment-creditors could not take out execution of the decree against the property of the judgment-debtor.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) for the respondent, contended that the fact that the decree directed the pay of the

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* Miscellaneous First Appeal, No. 27 of 1878, from an order of J. W. Quinton, Esq., Judge of Allahabad, dated the 2nd May 1878.

(1) In *Bansi Lal* v. *Mercer*, H.C.R. N.W.P., 1875, p. 331, it was held that, where no provision had been made in a decree for the stoppage of the pay of a military officer, the pay of such officer could not be attached in the execution of the decree in the hands of the Pay-master.

judgment-debtor to be stopped, did not debar the judgment-creditor from taking out execution against the property of the judgment-debtor under the Code of Civil Procedure.

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APPELLATE CIVIL.

1 A. 730 = 3 Ind. Jur. 120.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, O. C. J.—The Judge of Allahabad, in receiving the application for execution, was bound to consider whether there was any thing to prevent execution in the manner prayed. At the time the decree was passed the decree-holder obtained an order from the Court which passed the decree for the satisfaction of the decree by stoppage of half the defendant's pay. So long as that order subsists the decree-holder cannot obtain satisfaction of his decree by attachment, for it is clear to us that the decree-holder is not as [732] against officers to whom the Mutiny Act is applicable, entitled to both remedies at once. The object of the Act is to prevent public servants whose services may be urgently required from being incapacitated to discharge such services. The appeal is decreed and the order of the Judge discharged with costs.

Appeal allowed.

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1 A. 732.

CIVIL JURISDICTION.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

KANHAIYALAL (*Plaintiff*) v. DOMINGO AND ANOTHER (*Defendants*).*
[28th June, 1878.]

Promissory Note—Assignment of Chose in Action—Form of suit by Assignee—Act IX of 1872 (*Contract Act*), *s.* 62.

Held, where a promissory note made payable simply to the payee without the addition of the words order or bearer, and therefore not negotiable, was assigned to a third person, that the assignee could sue upon such note, a chose in action being by the law of India assignable, and that the assignee could sue in the Courts of India in his own name.

[F., 13 B. 42 (44); R., 28 M. 544 (546) = 15 M.L.J. 384; 9 P.R. 1907 = 41 P.W.R. 1907.]

THIS was a reference to the High Court, under s. 617 of Act X of 1877, by Mr. G. E. Knox, Judge of the Court of Small Causes at Allahabad.

The question referred by the Judge was the following: "Can a person, who has acquired by purchase for valuable consideration all the rights of a promisee in a promissory note, without notice given to the promisor, sue the promisor for the balance due upon such promissory note?" The facts of the case out of which this question arose were stated by the Judge to be as follows:—

"On the 7th April 1876, W. Domingo, one of the defendants in the present case, executed a promissory note in favour of Lala Gur Prasad, the second defendant, payable on demand. On the 7th April 1878, Gur Prasad had sold all his right and interest in the promissory note

* Reference, No. 8 of 1878, from G. E. Knox, Esqr., Judge of the Court, Small Causes at Allahabad, dated the 1st June 1878.

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to the plaintiff, Kanhaiya Lal, without giving notice of the sale to W. Domingo. These facts are admitted, and it is also conceded that since the sale W. Domingo has not in any way assented to the transfer, and only became aware of it on being asked [733] for the balance due. The plaintiff now sues both W. Domingo and Gur Prasad; and W. Domingo raises this plea (among others) that there was no privity of contract between him and Kanhaiya Lal.

"I am aware that the Calcutta High Court has held that the true holder of a negotiable document (and they held a promissory note to fall under that head) may at all times, if so minded, endorse the note to another with the express object of suing on it (1); and that by English equity law promissory notes may be assigned by separate deed (2). Still the ruling in the Calcutta High Court was given prior to the passing of Act IX of 1872, and I feel doubtful whether s. 62 of that Act does not affect the power of a creditor to assign a debt without his debtor's consent.

"Mr. Cunningham, in his Commentaries on the Indian Contract Act, appears to suggest that the words of s. 62 govern the present case. But with all due deference to that learned commentator, it does not seem necessarily to follow that, if the parties to a contract agree to substitute a new contract for it, in that case the original contract need not be performed. It is also true that, if one of the parties to a contract enter into a subsidiary contract with a third party, then the original contract need no longer be performed. Still both this section and the illustration (*c*) point rather to to the inference that in this case Gur Prasad and Kanhaiya Lal ought to sue as co-plaintiffs and not in the present form.

"It is easy to concede that the power of transfer might be abused as the defendant in his other pleas alleges. He further urges the principle contained in s. 232 of Act X of 1877. This section has suggested the present defence. It is of course inapplicable to this case, but the plea raised by him would still, I believe, hold good in English common law.

"These doubts compel my making the present reference. In spite of them, I do not hold that s. 62, Act IX of 1872, lays down the law in this present case, and, in the absence of any special provision, the Court is bound to follow the general rules of equity. I am of opinion that a suit by the plaintiff will lie, but that it would have been more regular for him to have sued [734] with Gur Prasad as co-plaintiff excepting always the case of Gur Prasad being unwilling."

The Court delivered the following

JUDGMENT.

The promissory note is not made payable to any other person than the payee. It is not made payable to "order," nor to "bearer." It is therefore not a "negotiable instrument." Nevertheless by the law of India a chose in action is assignable. Courts of Equity allow an assignee of a chose in action to sue in his own name, and, inasmuch as our Courts are Courts of Equity as well as of Law, in our judgment an assignee of a chose in action is entitled to sue in his own name. It is, however, requisite for the Courts to bear in mind that whatever defence might be set up against the assignor may also be set up against the assignee, or at least such defences as might have been set up to the time when notice of the assignment was given to the defendant. The Judge of the Small Cause Court may be informed accordingly.

(1) *Ram Lal Mookerjee* v. *Haran Chandra Dhar*, 3 B.L.R.O.C. 130.
(2) *Richardson* v. *Richardson*, L.R. 3 Eq. 686.

1 A. 734.

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APPELLATE CIVIL.

1 A. 734.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RUDR NARAIN SING (*Plaintiff*) *v.* RUP KUAR AND ANOTHER (*Defendants*).* [3rd July, 1878.]

*Hindu Law—Gift of Separate Property to Hindu Widow—Stridhan—Widow's Power of Alienation—Reversioner—Mitakshara—*Res judicata.

C, a Hindu subject to the Mitakshara law, died leaving a widow *R*, but no issue. In his lifetime he had transferred to *R*, by gift mauza *R*, a portion of his real estate. After his death *J* and *P*, his brothers, sued R for the possession of *C's* real estate on the ground that it was ancestral property. Their suit was dismissed, it being held by the Sudder Court that *C's* real estate was separate property, to which his widow would be entitled to succeed by inheritance. The Sudder Court determined that *R* had acquired mauza *R* by gift from *C*, and that *R* took under the gift a life-interest in the property only. *J* and *P* having died, *R* made a gift of mauza *R* to her agent as a reward for his faithful services. *N*, the son of *J* sued as the heir of his uncle C, to set aside this gift, to the agent as illegal.

Held that the decision in the former suit did not make the question as to the interest *R* took under the gift from her husband *res judicata*, inasmuch as *N* did not claim through his father when suing as heir to his uncle.

[735] *Held* also, on the finding that *R* had acquired the property from her husband by gift, that she did not take an absolute interest in the property under the gift, and her husband's heirs could question the validity of the gift to the agent.

Held also that the gift to the agent, being made only out of motives of generosity, was invalid.

ONE Raja Chait Singh died in the year 1849, leaving two widows, Rani Rup Kuar and Gulab Kuar, but no issue. At his death his name stood recorded in the revenue registers as the sole proprietor of certain mauzas, and as co-proprietor with his two brothers, Jagan Nath Singh and Partab Singh, of certain other mauzas. Shortly before his death he had transferred to Rup Kuar by sale and by gift certain of the mauzas, of which he was recorded the sole proprietor. His widows having taken possession of his estate and alienated portions of it, Jagan Nath Singh and Partab Singh sued them and the persons to whom these alienations had been made for possession of the estate and to set aside the alienations. The plaintiffs in this suit based their claim on the allegation that Chait Singh's estate was ancestral property to which they were entitled to succeed as his heirs to the exclusion of the widows, and that the widows were only entitled to maintenance. The defendants Rup Kuar and Gulab Kuar set up as a defence to the suit, among other things, that the mauzas of which Chait Singh was recorded as the sole proprietor were not ancestral property, but his separate property, certain of them having been acquired by Chait Singh in 1804 under a gift from one Chain Kuar, and the others being self acquired property, and that there had been a partition of the mauzas in respect of which Chait Singh's name stood recorded as a co-proprietor, and Chait Singh held his share in those mauzas as his separate property. The Principal Sudder Amin who tried the suit held that the gift by Jain Kuar to Chait Singh was invalid, and that the mauzas included in that gift as also the mauzas which were alleged by the widows to be

* First Appeal, No. 6 of 1878 from a decree of Maulvi Sultan Hasan Khan, Subordinate Judge o Gorakhpur, dated the 30th November 1877.

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Chait Singh's self-acquired property, were ancestral property. The Judge further held that the transfers to Rup Kuar by sale and by gift by Chait Singh should be maintained to the extent of his interest, *viz.*, one-third, and that the mauzas in respect of which Chait Singh's name stood recorded as a co-proprietor had been divided, and Chait Singh's shares therein were his separate property. A decree was [736] given to the plaintiffs in accordance with the above rulings in respect of the mauzas of which Chait Singh was recorded as the sole proprietor, and the rest of their claim was dismissed.

Both parties appealed to the Sudder Court. Gulab Kuar having died, an appeal was preferred by Rup Kuar alone. The Sudder Court held, on the 7th July 1852, that the gift by Jain Kuar was valid, and that the mauzas thereon mentioned and the remaining mauzas recorded as the sole property of Chait Singh were his separate property, and the suit was wholly dismissed. The Sudder Court did not determine whether the transfers by sale and gift by Chait Singh to Rup Kuar were valid or not, nor did it take any particular notice of the alienations made by the widows (1).

The plaintiffs applied on the 7th May 1864 for a review of the Sudder Court's judgment (2). Rup Kuar did not appear to oppose the application, but as the other defendants appeared and objected, among other things, that the proprietary rights of the plaintiffs had been confiscated by the Government in consequence of their misconduct in the disturbances of 1857 and 1858, and they were consequently not competent to impugn alienations made by the widow, and that, as one or more of the mauzas alienated by the widow had been given to her by her husband in his lifetime, and did not descend to her by inheritance from him, she was free to dispose of them as she pleased. The Sudder Court admitted the review, observing with reference to its omission to determine whether the sale and gift made by Chait Singh in Rup Kuar's favour were valid or not, and to notice the alienations made by Rup Kuar, as follows:—

"The Court's decision certainly assumes, without distinctly ruling, that a widow who succeeds her husband in a separate estate has an absolute unfettered right therein; and a review of it is sought mainly on the ground that such a doctrine has been declared to be erroneous by the Full Bench decision of the 6th July 1863, in the case of *Myna Baie* v. *Bhugwan Deen*, No. 114 of 1859, which rules that she only possesses a life-interest and a restricted right in such an estate, and is incompetent to alienate any part of it except for specific purposes of a pious or necessary kind (3). Considering the ground above [737] mentioned to be a good and sufficient ground for a review, we, on the 5th December last, directed the notices required by s. 378 of the Procedure Code to be served on the opposite parties. It appeared to us that, according to the Hindu law, as expounded in the decision of the 6th July 1863, the plaintiffs may be entitled to be regarded as the reversioners of their brother's estate after his widow, and as competent to impugn transfers made by her, and that an adjudication on the question of the validity of the deeds of gift and sale executed in her favour might be necessary."

(1) The Sudder Court's judgment will be found fully reported in S. D. A. Rep. N. W. P. 1852, p. 290.

(2) The proceedings taken in review of judgment and the Sudder Court's judgment passed on the 30th August 1865, in review of its former judgment will be found fully reported in S.D.A. Rep. N.W.P. 1865, p. 111.

(3) This case is reported in S.D.A. Rep. N.W.P. 1863, vol. II, p. 15.

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With reference to the objections of the defendants it observed as follows :—

"We disallow the second objection, because it is a doubtful question whether the confiscation included the contingent and reversionary rights of the plaintiffs, and one to be settled between them and the Government, but with which the objectors have no great concern.

"We disallow the fourth objection, because without now discussing the subject of the validity of the alleged deed of gift, we note that, according to Hindu law, property given by a husband to his wife is termed her *stridhan* and, if immovable, cannot be alienated by her."

At the rehearing of the appeal the Sudder Court laid down the following points for consideration :—

(1) "Whether alienations of property made by the female in favour of the male defendants are valid or not.

(2) "Whether the plaintiffs are entitled to be regarded as reversioners of their brother's estate after his widow's death, and as competent to impugn transfers thereof made by her.

(3) "Whether an adjudication on the validity of the deeds of gift and sale executed in her favour by him is necessary."

The judgment of the Sudder Court on these points was as follows :—

"It appears that mauzas Gondha and Saondha are two out of ten mauzas which the Raja, shortly before his decease, transferred to Rup Kuar by a deed of sale; and that she on the 15th September 1849, mortgaged one-half of the latter mauza to Surbu Prasad, and on the 12th March 1850, sold the former for Rs. 8,000 to Ram Partab. The fourth objection made to the plaintiff's application by the male defendants on the 19th ultimo was inaccurate besides being, for the reason then noted by us, untenable under Hindu law, but they now argue more plausibly that the mauzas transferred to the female defendant by sale had, in consequence of that sale, ceased to belong to the Raja before his death, and therefore form no part of his estate to which the plaintiffs can claim to succeed as next heirs after his widow's death. The plaintiffs alleged in their plaint that the aforesaid sale was purely nominal and fictitious, having been made without **[738]** consideration, and not having been followed by any real delivery. The question raised by that allegation was one on which the Courts did not enter, holding, as they apparently did, that a Hindu widow succeeding her husband in a separate estate was competent to alienate it at pleasure. Under the recent construction of Hindu law propounded in the Full Bench decision of the 6th July 1863 (1), that question would call for decision, but the defendants contend that such question is precluded in this case by the principle of the ruling of the Full Bench of the 24th January last in the case No. 1244 of 1864, *Solugna* v. *Ram Soochit Tewaree* (2), inasmuch as the sale in question and the receipt of the sale-consideration were admitted by the Raja in a suit instituted by Rup Kuar on the basis of the sale-deed, and decided in her favour accordingly. The ruling in the precedent above quoted is 'that a Hindu, who is absolute owner of a divided share of real property is competent to create a charge upon it in the shape of a mortgage, though no sum by way of binding the lien, has been received by him, if he have deliberately admitted the incumbrance, and that his reversioners are incompetent to have the conveyance charging the estate

(1) S.D.A. Rep. N.W.P. 1863, vol. II, p. 15.
(2) S.D.A. Rep. N.W.P. 1865, p. 52.

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set aside, except on grounds which he might himself allege in an action to avoid the same.'

"The plaintiffs plead that the precedent is inapplicable, because they do not seek to avoid wholly the transfer, but only insist that it should be viewed as a gift. But we observe that in so insisting they are taking ground which the Raja himself could not have taken. He was competent to sell the mauzas to his wife, but he could not, after having acknowledged the sale and the receipt of the sale price, allege in an action to avoid the sale that the transaction had been not a sale but a gift. Consequently, the Rani is entitled to any advantage which may accrue from the transaction being regarded as a sale rather than as a gift. That advantage is that she has the power of alienating the property so acquired by her, a power which under Hindu law she does not possess in respect of property received by gift or inherited from her husband. It is quite possible that, in making over to her some mauzas by deed of sale, and others by deed of gift, he intended her to have absolute control over the first to the exclusion of all other heirs, and a limited control over the second without detriment to those heirs. As in the precedent above quoted, the mortgage lien was held to be binding under the circumstances, even though the mortgage-consideration should not have been received, so in the present case the sale cannot be disputed, even though the sale price should have been remitted. The conveyance might, indeed, it would seem, have been made in another form which would have had the same effect as a sale-deed without being obnoxious to discussion as to consideration. Possibly an instrument not only giving her the mauzas, but authorising her to give away or sell the same, would have been sanctioned by the ruling in the precedent case No. 31 **[739]** in ch. VII, p. 238, vol. II, Macnaughten on Hindu Law, the mauzas in question being self-acquired property some of those, namely, which he had purchased when sold for arrears of revenue in 1817. We come therefore to the conclusion that the ten mauzas sold to the female defendant by her husband are not any part of his estate, but her absolute property, and that the sale by her to Ram Partab of mauza Gundha, and the mortgage of one-half of mauza Saondha to Surbu Prasad, are not liable to be impeached by the plaintiffs, who have title, however, to be regarded as the reversioners after her death of other mauzas received by gift or inherited by her from the deceased Raja and are competent as such to impeach any transfer thereof to other parties.

"We have thus disposed of the two first questions which we proposed to consider, and as regards the third have decided that the validity of the sale-deed in question cannot under the circumstances be questioned. Nor need the validity of the deed of gift be discussed, as it is immaterial to the plaintiffs whether it be valid or not, seeing that the mauzas conveyed by it would devolve on the widow by the Hindu law of succession, by reason of their having belonged exclusively to her husband."

"With these remarks which obviate any risks of injury to the plaintiffs' reversionary rights from the Court's former decision, we affirm that decision as regards the dismissal of their claim, and order the parties to pay each the costs which they may respectively have incurred in connection with this review of judgment."

On the 15th October 1876, Jagan Nath Singh and Partab Singh having meantime died, Rup Kuar transferred by deed of gift to Chandi Prasad mauza Ranipur, one of the mauzas which Chait Singh had transferred to her by gift.

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The present suit was instituted in the Court of the Subordinate Judge of Gorakhpur, on the 28th August 1877, by Narain Singh, one of the two sons of Jagan Nath Singh, against Rup Kuar and Chandi Prasad, to set aside this gift, on the ground that the property was the ancestral property of Chait Singh, Jagan Nath Singh, and Partab Singh, and the gift was made without consideration and without legal necessity.

From the plaintiff's written statement it appeared that he based his right to maintain the suit on the judgment of the Sudder Court in the suit brought against Rup Kuar and Gulab Kuar by Jagan Nath Singh and Partab Singh. He alleged in his written statement as follows:—

"She (the defendant, Rup Kuar) is trying to waste the property through enmity, so that no property might remain for the plaintiff after her death. [740] She has, with that intention, without any consideration and without any lawful necessity, made a gift of mauza Ranipur, yielding a profit of Rs. 800, in favour of the second defendant, her karinda. This gift is calculated to cause serious injury to the plaintiff. A transfer like this is illegal, both according to the shastras and legal enactments. The plaintiff, who is the heir of the defendant's husband, has the right of instituting a suit for the cancelment of the transfer made by her.

In his written statement filed on the 28th September 1877, Chandi Prasad, defendant, alleged that mauza Ranipur was the separate property of Chait Singh, and that in virtue of the gift of the mauza to Rup Kuar by her husband Chait Singh, she had full power over it and was competent to alienate it; that the plaintiff could not rely on the Sudder Court's judgment, as the defendant was no party to the suit in which it was passed, and that the gift had been made to him for his faithful services, and was not improper.

Rup Kuar, in her written statement, in addition to the grounds of defence taken by Chandi Prasad, pleaded that, as the property of the plaintiff's father and of Partab Singh, his uncle, had been confiscated by Government, no rights passed to the plaintiff on the death of his father or his uncle, and that the judgment of the Sudder Court was not binding on her.

The first, second and fourth issues fixed for trial by the Subordinate Judge were as follows:—

(1)—"Whether the village in question is the ancestral property of Rup Kuar's husband, and the gift is invalid, or it was acquired by her husband, by virtue of gift made in his favour by Jain Kuar, and he has been in exclusive possession thereof, and has transferred it by gift to his wife, Rup Kuar, and the gift in question is, at all events, valid?

(2)—"Whether the decree relied on by the plaintiff can be used by him as evidence or not? Has the plaintiff any right of action or not?

(4)—"Every right of the plaintiff's father, whether in his name or not having been confiscated on account of his rebellion, can the plaintiff bring the present suit or not?"

The Subordinate Judge first decided the fourth issue in favour of the plaintiff on the ground that the plaintiff had brought the suit in his own right under Hindu law. He then decided the first [741] issue against the plaintiff, dismissing the suit on that issue. His decision on that issue was as follows:

"The plaintiff has brought this action recognising the gift made in her favour by her husband as valid and in force; and considering that as the said gift merely conveyed a limited interest (life-interest) to her, she was not entitled to make the present transfer. The most important question which is now to be determined is, 'whether, under the gift made to the lady

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by her husband, she acquired a limited proprietary right, giving her no title to make the present alienation, or she is the absolute proprietress entitled to make this as well as every sort of alienation.' On perusing the record, it appears to me that the husband of the woman has made the gift in her favour without any condition or restriction. There is no condition whatever either for or against an alienation. As far as I can see, I consider a gift or alienation of this kind to be permanent and without any restriction. I do not think myself justified in considering a gift and alienation of this kind to be made only for the life time of the Mussumat. If the property be supposed to have actually been acquired and to have been exclusively possessed by the husband, and to have been transferred to the wife only for her life, then the gift and the expenses relating to it can be looked upon in no other light than that of a force. If we were to limit without any good reason any such absolute transfer, these restrictions could be placed in every instance. It would then follow that, if the husband would alienate his self-acquired property to a stranger by gift or sale, the alienation would be invalid. But this is clearly wrong. The precedent noted below (1) supports the view taken by me, *viz.*, that such alienation will be considered perpetual, and a daughter-in-law and widow are entitled to alienate (property). I therefore do not consider the plaintiff entitled to bring the present claim."

The plaintiff appealed to the High Court, contending that the decision of the Sudder Court, dated the 30th August 1875, had finally determined that Rup Kuar was not competent to alienate the mauza which Chait Singh has transferred to her by gift, and the Subordinate Judge should not have re-opened the question; that Rup Kuar acquired mauza Ranipur by inheritance and not by gift; and that even if she acquired it by gift, she was not competent to alienate it, and the appellant was entitled to a decree setting the gift aside.

The Senior Government Pleader (Lala *Juala Prasad*), Munshi *Hanuman Prasad*, and Lala *Lalta Prasad*, for the appellant.

[742] Mr. *Conlan*, the Junior Governmet Pleader (Babu *Dwarka Nath Banerji*), Moulvi *Mehdi Hasan*, Pandit *Bishambhar Nath*, and Babu *Jogindra Nath Chaudhri*, for the respondent.

The Court (PEARSON, J. and OLDFIELD, J.) delivered the following

JUDGMENT.

The plaintiff has brought this suit on the allegation that the estate belonged to Chait Singh as a separate estate, and his widow, the female defendant, succeeded to it at his death, and took a life-interest, and plaintiff, as the next heir to her husband at her death, sues to cancel a deed of gift made by her in favour of defendant No. 2, on the ground that there was no necessity for the alienation, and further that it was ruled, in a suit brought by plaintiff's father against the widow, on the 30th August 1865, by the Sudder Dewani Adalat, that the lady had only a life-interest and plaintiff was heir at her death and the above decision is binding.

The defendants pleaded that the above decision does not bind the parties to this suit; that Chait Singh made a gift of the property to the defendant his wife in his lifetime, by which she obtained it absolutely, and her transfer cannot be questioned; that the plaintiff is barred by limitation; and further that, in consequence of the confiscation of his father's property for rebellion, he has no *locus standi*, and the gift was a

(1) *Chatter Lal Singh* v. *Shewakram*, 5 B.L.R. 123=13 W. R. 285.

fitting reward to defendant No. 2 for services rendered as manager of the lady's property, and had been allowed by the brother of the plaintiff.

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The lower Court has decided that there was a gift by Chait Singh in favour of his wife as defendants plead, and that it gave her absolute power over the estate, and on this ground he dismissed the suit.

It appears that on the 30th August 1865, there was a review by the Sudder Dewani Adalat of a former judgment in a suit, brought by plaintiff's father and uncle against the defendant No. 1, the object of which was to be declared heirs of Chait Singh in respect of his property, among which is that now in suit, and to avoid certain alienations made by the widow. It appears to have been pleaded by the defendant that the estate was held separately by Chait Singh, and that some of the property had been sold, and some including the mauza in suit, had been given to the lady by [743] Chait Singh, and some inherited, and the Court held that the estate was the separate estate of Chait Singh, and that the mauzas sold did not form part of his estate at his death, but were the absolute property of the wife, but that the plaintiffs were entitled to be regarded as the reversioners after her death of the mauzas received by gift or inherited by her from the deceased, and competent as such to impeach any transfer thereof to other parties. The Court did not consider it necessary to decide the validity of the deed of gift on the part of Chait Singh to his wife, as they held it was immaterial to the plaintiffs whether it be valid or not, seeing that the mauzas conveyed by it would devolve on the widow by the Hindu law of succession by reason of their having belonged exclusively to her husband.

With reference to the pleas in appeal, we observe that it may be that the above decision has not the effect of *res judicata*, as the plaintiff contends, since the plaintiff does not come in through or under his father when he is suing as next heir to his uncle. Nor can there be any doubt that the defendant's husband, Chait Singh, did convey the property in suit to the defendant in his lifetime by deed of gift, for the evidence adduced on this point by the defendant is convincing. So much therefore of the case of the plaintiff which rests the claim on the allegation that the defendant succeeded as heir to her husband fails, but notwithstanding, we consider that the plaintiff is entitled to succeed in this case on the view we take of the case.

Admitting that the defendant obtained the estate by gift, there can be little doubt that by Hindu law she will have no absolute power over immoveables given by her husband. " What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or give it away excepting immoveables. The meaning is that, as regards immoveable property given by the husband, the wife is allowed to use it only by dwelling in it, but not to alienate it by gift, or sale, or in any other manner," Narada, Digest of Hindu law by West and Buhler, Bk. ii, p. 74, and Mr. Colebrooke's, remarkes found in Strange, vol. ii, pp. 402, 407, which are as follows : "No doubt the widow may give away her own property, excepting land given to her by her husband or [744] inherited from him, which she cannot dispose of without consent of the next heirs." There are other texts of the same purport, and this view of the effect of the gift was taken by the Sudder Dewani Adalat in the decision already referred to, in which the learned Judges cited a case in Macnaughten's Precedents (1), and their ruling in that case has been

(1) See case xxxi, 3d. ed. p. 238.

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followed by this Court in *Gunput Singh* v. *Gunga Pershad* (1). A ruling to the opposite effect by the Calcutta Court (2) has been cited to us, but it is not in accordance with the rulings of this Court.

Immoveable property given to a wife by a husband would appear therefore to be held on terms similar to those on which property inherited from her husband is held, and her acts in respect of it liable to question in a similar manner by the next heirs. And there seems no doubt plaintiff is in a position to question the alienation made by the widow as next heir, whether the property be held to be the lady's *stridhan* governed by the law of succession applicable to *stridhan*, or it be held subject to the ordinary succession of property inherited from her husband. In the latter case he is next heir to the husband, and if it be subject to the succession as *stridhan*, the lady being a childless widow, he will succeed failing the husband.

The defendants' pleas of limitation fail, since the right of suit to cancel the gift cannot be said to have accrued to plaintiff before the date of the alienation, and there has been no possession on the part of the widow which can be said to be adverse to the title. Nor is there anything in the confiscation of the father's property which can affect the plaintiff's reversionary rights as heir to his uncle. There remains the question of the validity of the alienation to defendant No. 2. The ground stated for the gift is that it was a reward for good and faithful services as the lady's manager. We do not think it is shown that the defendant has not always received his regular remuneration for services performed; on the contrary, it would appear that he has; and the gift in question can only be considered to be an act of generosity, and not one strictly called for by the circumstances, and which should be met from the lady's private [745] resources if at all, but is not one which can justify a permanent alienation of part of the landed estate which belonged to her husband.

The plaintiff will have a decree declaring that the gift to the defendant is invalid so far as it affects plaintiff's reversionary right as next heir. The appeal is decreed with costs.

Appeal allowed.

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1 A. 745 (F.B.).

FULL BENCH.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

COLLIS (*Plaintiff*) *v.* MANCHAR DAS (*Defendant*).* [16th July, 1878.]

Application for leave to sue as a Pauper—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 2, 54, 407, 314, 450, 588—*Act VIII of* 1859 (*Civil Procedure Code*), *s.* 311.

No, appeal lies under Act X of 1877 from an order made under that Act rejecting an application for permission to sue as a pauper.

ONE Edwin Collis applied to the Judge of that Small Cause Court at Allahabad, exercising the powers of a Subordinate Judge, for permission to

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* Miscellaneous Application, No. 15-B, against an order of G. E. Knox, Esq., Judge of the Small Cause Court, Allahabad, dated the 30th April 1878.

(1) H.C.R. N.W.P., 1867, p. 233.

(2) See *Chatter Lal Singh* v. *Shewakram*, 5 B.L.R., 123=13 W.R. 285.

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bring a suit as a pauper. The Judge, under s. 407 of Act X of 1877, rejected the application on the ground that the petitioner was possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit.

The petitioner preferred an appeal to the High Court against the Judge's order rejecting his application.

The Court (Turner, O.C.J.) on the 12th June 1878, ordered the petition of appeal to be laid before a Division Bench of the Court. The Division Bench (Turner, O.C.J., and Pearson, J.), on the 14th June 1878, admitted the appeal in order that the question whether an appeal would lie or not might be argued. This question was argued before the Division Bench, which directed that the case should be laid before the Full Bench.

The petitioner appeared in person and contended that the order of the Small Cause Court Judge was a " decree " within the meaning [746] of s. 2 of Act X of 1877, and that it was consequently appealable under s. 540 of that Act. He referred to *Thakur Prasad* v. *Ahsan Ali* (1).

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), for the opposite party, contended that the order was not appealable under Act X of 1877.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

PEARSON, J.—This is an appeal from an order passed under s. 407 of Act X of 1877, rejecting an application for permission to sue as a pauper. Such an order was not subject to appeal under the old Code of Procedure (s. 311 of Act VIII of 1859). The question is whether it is appealable under the new Code of Procedure, Act X of 1877. No provision for an appeal from such an order is made in s. 588 of the Act. The appellant contends that it is appealable as a decree under s. 540, in reference to the terms of the second section, in which a decree is defined as the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied.

The order in question certainly does not embody the result of the decision of the suit, which it refuses to entertain in the manner in which it is sought to be instituted without payment of the fee payable by law on the plaint.

It can hardly be denied that the order embodies the result of a judicial proceeding. But so also do the orders specified in s. 588 embody the result of a judicial proceeding, yet it cannot be presumed that those orders were regarded as decrees appealable under s. 540 by the Legislature, for had they been so regarded, it would have been unnecessary to declare in s. 588 that an appeal shall lie from them. It seems to follow that the judicial proceedings referred to in s. 2 are proceedings of a different nature from those which result in the orders specified in s. 588, and that they in some degree resemble and partake of the character of a suit.

The category given in s. 588 includes all important orders passed in the course of the trial of a suit and the execution of a [747] decree, except the most important of all, namely, orders finally disposing of applications for the execution of decree. As it is impossible to suppose that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended

(1) *Thakur Prasad* v. *Ahsan Ali*, 1 A. 668.

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to be appealable as decrees under s. 540. A recent judgment of the Full Bench of this Court (1) has settled that they are so appealable.

Proceedings in execution of decree necessarily follow what is called the decision of the suit in s. 2. They may, indeed, be still a part of the suit, if that be held not to terminate with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit; and the proceedings in each are not unlike those in the trial of the suit. That proceedings under s. 244 were so viewed by the Legislature is indicated by the provision made in s. 588, cl. (*j*), for appeals from orders passed in the course of them of the same nature with appealable orders made in the course of a suit.

An application for permission to sue as a pauper is really the presentation of a plaint. The order passed upon it does not so much resemble an order determining matters in issue between parties relating to the execution of a decree as an order passed under s. 54, cl. (*b*), rejecting a plaint written on paper insufficiently stamped. That order is not a decree appealable under s. 540, but is appealable under s. 588, cl. (*e*). From an order rejecting an application under s. 407 it was presumably deemed unnecessary to allow an appeal in reference to the provisions of s. 413. The present appeal should therefore in my opinion be rejected.

TURNER, O.C.J.—I concur in the judgment pronounced by Mr. Justice Pearson.

OLDFIELD, J.—I concur in the judgment of Mr. Justice Pearson.

Appeal rejected.

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1 A. 748 (F.B.).

[748] FULL BENCH.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, and Mr. Justice Oldfield.

GULAB SINGH (*Petitioner*) *v.* LACHMAN DAS (*Opposite Party*).* [16th July, 1878.]

Application to set aside an ex parte *decree—Appeal—Act X of* 1877 *(Civil Procedure Code)*, *ss.* 2, 103, 108, 244, 540, 588—*Act VIII of* 1859 *(Civil Procedure Code)*, *s.* 119.

No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for an order setting aside a decree made *ex parte* against a defendant.

[D., 4 A. 387 (F.B.).]

A DECREE was passed *ex parte* against one Gulab Singh, the defendant in a suit. He applied to the Court of first instance for an order to set this decree aside, on the ground that no summons to appear had been served upon him. The Court, on the 20th December 1877, rejected the application.

Gulab Singh preferred a petition of appeal to the High Court against the order rejecting the application. The Court (Pearson, J.) referred the case to the Full Bench, observing that, unless orders made under s. 108

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* Miscellaneous First Appeal, No. 35 of 1878, from an order of Maulvi Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 20th December 1877.

(1) *Thakur Prasad* v. *Ahsan Ali*, 1 A. 668.

of Act X of 1877 fell within the definition of decrees and were appealable as such, there seemed to be no provision in Act X of 1877 for appeals from orders made under that section.

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FULL BENCH.

1 A. 748 (F.B.).

Babu *Dwarka Nath Mukarji*, for the petitioner.

The opposite party was not represented.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

PEARSON, J.—Section 119 of Act VIII of 1859 provided that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," but that, "in all cases in which judgment may be passed *ex parte* against a defendant, he may apply within a reasonable time to the Court by which the judgment was passed" for an order to set it aside, and that "in all cases in which the Court shall pass an order for setting aside the judgment, the order shall be final, but in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable."

Under the new Code of Procedure an *ex parte* decree is appealable like any other decree. The provision that no appeal shall lie [749] against an *ex parte* decree has not been re-enacted. Section 108 of Act X of 1877 provides that, as before, "in any case in which a decree is passed *ex parte* against a defendant under s. 100, he may apply to the Court by which the decree was made for an order to set it aside." Section 119 of Act VIII of 1859 made provisions of a somewhat similar nature in respect of judgments against a plaintiff by default. He was not allowed to appeal against the judgment, but was permitted to apply within thirty days from its date for an order to set it aside; and in all appealable cases in which the application was rejected, the order of rejection was appealable. By the new Code of Procedure it may be a question whether a plaintiff is not precluded from appealing from a judgment against him by default; but he may, under s. 103 of Act X of 1877, apply for an order to set the dismissal of his suit aside; and under cl. (*f*), s. 588, orders rejecting applications under s. 103 (in cases open to appeal) for an order to set aside the dismissal of a suit are expressly declared to be appealable. As there is no provision of a like nature made in s. 588 of Act X of 1877 for appeals from orders rejecting applications under s. 108 for setting aside *ex parte* decrees, it is *prima facie* inferrible that such orders were not intended by the Legislature to be appealable. There remains the question whether such orders can be held to be decrees within the scope of the definition of a decree given in s. 2 of the Act, and as such appealable under s. 540. It is obvious to remark that if such orders could be regarded as decrees, so also might orders on applications under s. 103 refusing to set aside *ex parte* decrees be regarded as decrees. The circumstance that provision has been made in s. 588 for an appeal from orders rejecting applications under s. 103 seems to show that they were not regarded as decrees appealable under s. 540 by the Legislature, and warrants the conclusion that orders rejecting applications under s. 108 cannot properly be so regarded. "Decree" is defined in s. 2 as meaning the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. An order refusing an application to set aside an *ex parte* decree certainly does not embody the result of the decision of the suit. Such an order does, indeed, it must be admitted, embody the result of a judicial proceeding. But so do the orders specified in s. 588 embody the results of judicial proceedings, and yet they

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cannot be presumed to have been [750] regarded by the Legislature as decrees appealable under s. 540; for had they been so regarded, it would have been unnecessary to declare in s. 588 that an appeal shall lie from them. It is presumable then that the judicial proceedings referred to in s. 2 are of a different nature from those which result in the orders specified in s. 588, and that they in some degree resemble and partake of the character of suit. The category given in s. 588 includes all important orders passed in the course of the trial of a suit and the execution of a decree, except the most important of all, namely, orders finally disposing of applications for the execution of decrees. As it cannot be supposed that an appeal would be allowed from orders of secondary importance, and not from orders of the first importance, it may reasonably be concluded that orders finally disposing of applications for the execution of decrees were intended to be appealable as decrees under s. 540. A recent judgment of the Full Bench of this Court (1) has settled that they are so appealable. Proceedings in execution of decree, following the decision of the suit, may be still a part of the suit, if that be held to terminate not with the decree, but with the execution of the decree. Nevertheless each application for execution may be viewed as a little suit of itself, though it be a suit within a suit; and the proceedings in each are not unlike those in the trial of a suit. That proceedings under s. 244 were so viewed by the Legislature as proceedings of a distinct kind, analogous to proceedings in a suit, is indicated by the special and remarkable provision made in s. 588, cl. (*j*), for appeals from orders passed in the course of proceedings under s. 244 of the same nature as orders appealable in the course of a suit. The proceeding which results in an order rejecting an application to set aside an *ex parte* decree is a proceeding very different from that which results in an order determining matters in issue between parties relating to the execution of a decree and is not at all of the same character as a suit. The present appeal should, therefore, in my opinion, be rejected.

TURNER, O.C.J.—I am of the same opinion.

OLDFIELD, J.—I concur in the view expressed by Mr. Justice Pearson.

Appeal rejected.

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[751] APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

FATEH SINGH (*Plaintiff*) *v.* SANWAL SINGH (*Defendant*).* [18th July, 1878.]

Act IX of 1872 (*Contract Act*), *ss.* 23, 24—*Unlawful consideration—Void agreement—Act X of* 1872, *Criminal Procedure Code.*

F was required by the Magistrate, under the Code of Criminal Procedure, to furnish two sureties, who should be responsible for his good behaviour, each in a certain sum. *S* agreed to become a surety on condition that *F* would deposit with him the amount of the security. *F* made the deposit, and *S* became

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* Second Appeal, No. 1391 of 1877, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 27th August 1877, affirming a decree of Munshi Lalta Prasad, Munsif of Cawnpore, dated the 22nd March, 1877.

(1) *Thakur Prasad* v. *Ahsan Ali*, 1 A: 668.

a surety. The period for which *S* was responsible for *F*'s good conduct having expired without *F* committing any act to forfeit the security, and *S* refusing to return the deposit, *F* sued *S* to recover the deposit. *Held*, that, as the consideration for the agreement defeated the object of the law, the consideration was unlawful, and *F* was not entitled to relief.

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IN August 1875 one Fateh Singh was required, under s. 505 of Act X of 1872, to procure two persons of approved respectability who would be responsible for his good behaviour for one year each in the sum of Rs. 600. He produced one Sanwal Singh and a certain other person. These persons were accepted by the Magistrate as his sureties, and Fateh Singh was released from custody. The period of time for which these sureties were to be responsible for Fateh Singh's good conduct elapsed without his committing any act to forfeit the security. The present suit was brought by Fateh Singh against Sanwal Singh to recover from him Rs. 600. This sum the plaintiff alleged he had deposited in August 1875 with the defendant in consideration of the defendant's giving security for his good behaviour. The defendant denied that the plaintiff had made the alleged deposit with him. The Munsif trying the suit fixed as the sole issue, "Was the amount claimed by the plaintiff deposited by him with the defendant in consideration of the defendant's giving security for the plaintiff's good behaviour ?" This issue the Munsiff determined in the defendant's favour, and dismissed the plaintiff's suit. On appeal by the plaintiff, the District Judge found that the money had been deposited by the plaintiff with the defendant as alleged. The Judge nevertheless dismissed the plaintiff's suits for the following reasons ; "The only doubtful point in my mind is as to the suit being of a nature capable of obtaining [752] relief. Under the rules of the Criminal Procedure Code a person called upon to furnish bail for good behaviour cannot pay cash in lieu of security ; the object in having other persons to stand bail for him is to protect society against the perpetration of crime, and it is the duty of the sureties to look after their charge, and a Magistrate is competent to refuse a surety offered if he thinks such surety is an unfit person (s. 516 of Act X of 1872). When the surety knows that his bail-bond would be forfeited and he himself mulcted to the extent of the liability set forth therein on any failure of his to discharge that duty, he would naturally fulfil his duty, and the law would be satisfied ; but if, on the other hand, he receives a sum of money from the individual for whom he stands surety equal to the value of the bail, he has not the same interest in watching the doings of his charge ; he may be quite indifferent to the regards of society, and allow his charge to do and act as he pleases, conscious that, if his bail-bond be forfeited, he would only be called upon to make good its value ; he will in short have served his friend a good turn, but will thus have defeated the requirements of law, and any act which is in itself opposed to the principles of law is incapable of relief : it follows then that an abetment of such an act also places itself beyond civil remedy. Looking upon the act of plaintiff in advancing a money inducement to defendant to stand bail for him as illegal, although the custom is orally said to maintain and to be not infrequent, I arrive at the same conclusion as the lower Court, although upon different grounds, and sustain the finding."

The plaintiff appealed to the High Court, contending that he was entitled to recover the money claimed by him.

Pandit *Ajudhia Nath* and Mir *Akbar Hussain*, for the appellant.

Mr. *Chatterji*, the Junior Government Pleader (Babu *Dwarka Nath Banerji*), and Pandit *Bishambar Nath*, for the respondent.

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JUDGMENT.

The judgment of the Court was delivered by

TURNER, O.C.J.—The appellant was required by the Magistrate to furnish two sureties for his good behaviour, each in the sum of Rs. 600. The respondent agreed to become a surety on condition that the appellant would deposit with him the sum in which he was required to go bail. The deposit was made, the period of suretyship expired without any act having been committed by the appellant [753] to forfeit the security, and therefore the appellant applied to the respondent to repay the deposit. The respondent refused, denying the deposit. The appellant brought this suit to recover the deposit, but failed to establish to the satisfaction of the Court of first instance that the deposit had been made. The lower appellate Court found that the deposit of the sum of Rs. 600 with the respondent on the terms alleged was proved, but refused relief on the ground that the consideration of this agreement was unlawful in that it defeated the object of the law.

In special appeal the appellant challenges the propriety of this ruling.

In our judgment the conclusion at which the Judge has arrived is right. The Criminal Procedure Code, ch. XXXVIII, empowers the Magistrate to require a person of notoriously bad livelihood to procure sureties who shall be responsible for his good conduct in the amounts required from them. If the amount for which a surety is responsible is deposited with him by, or on behalf of, the person for whose conduct he undertakes responsibility, it is obvious that he is responsible only in name. No Magistrate with a knowledge of the facts would be justified in accepting the surety under this chapter. The object of the law would be defeated. We must then affirm the decision of the Judge and dismiss the appeal, but seeing that the respondent denied the deposit, and that he was a party to the agreement, and that the point raised is novel, we order each party to bear his own costs in all Courts.

Appeal dismissed.

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1 A. 753.

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Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

VAUGHAN (*Plaintiff*) v. HESELTINE AND OTHERS (*Defendants*).*
[8th June, 1874.]

Will—Devise of immoveable property subject to its being charged in a particular manner by the devisee—Property not charged in accordance with the will—Suit to enforce charge—Assignment by a legatee to executor of legacy.

Certain immoveable property was devised by will upon condition that the devisee, who was also an executor of such will, should execute a mortgage of [754] such property to the Official Trustee of Bengal for the time being to secure the payment of a certain legacy. The devisee, with the intention of giving effect to such condition, mortgaged such property to his co-executors. *Held*, in a suit by one of such co-executors to enforce the mortgage, that, the mortgage not being

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* Regular Appeal, No. 77 of 1873, from a decree of W. E. Kinsley, Esq., Subordinate Judge of Dehra Dun, dated the 13th May 1873. Reported under a special order of the Hon'ble the Chief Justice.

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executed in accordance with the terms of the will, was invalid, and the suit was not maintainable.

Semble that an assignment by a legatee to an executor of a legacy is void.

[R., 1 A. 762]

[*N.B.* —See in this connection 1 A. 762; 772, *infra*—ED.]

ONE Joseph Nelson Heseltine by the 9th clause of his will, dated the 16th February 1864, devised his estate known as the Ellenborough Hotel estate to the use of his son, Robert Henry, upon condition that he should, when so requested by the trustees of the will, execute and deliver to them a mortgage of such estate for securing to the trustees the payment of the sum of Rs. 16,000 bequeathed in the will to the trustees upon certain trusts therein mentioned. The testator further directed that such payment was to be made by annual instalments of Rs. 3,000 each without interest, and that the first of these instalments was to be paid at the expiration of one year after his death. The testator by his will appointed his son, Robert Henry, and his son-in-law, Joseph Hurst, the executors of his will, and Charles Frederick Vaughan and the Administrator-General of Bengal for the time being trustees of it. By a codicil to his will, dated the 24th February 1865, the testator revoked the appointment of Sir Charles Frederick Vaughan, and the Administrator-General of Bengal as trustees, and appointed the Official Trustee of Bengal for the time being the sole trustee of his will. He thereby further appointed Charles Frederick Vaughan to be an executor of his will in addition to his son, Robert Henry, and his son-in-law, Joseph Hurst. He also thereby gave and bequeathed to his daughter Charlotte, wife of Joseph Hurst, the sum of Rs. 12,000 "for her own sole use and benefit, free from the control, debts, and liabilities of her then or any future husband," and he directed that such sum of Rs. 12,000 should be paid to Charlotte Hurst "on her sole and personal receipt" out of the sum of Rs. 16,000 charged upon the Ellenborough Hotel estate. He further directed that such payment to his daughter Charlotte was to begin from the receipt by the trustees of his will of the second instalment of Rs. 3,000.

On the 2nd March 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and [755] Charles Frederick Vaughan to secure the payment of the sum of Rs. 16,000, with the intention of giving effect to the condition imposed upon him by the 9th clause of his father's will.

On the 20th July 1870, Charlotte Hurst assigned by sale to Charles Frederick Vaughan the sum of Rs. 12,000 bequeathed to her under the codicil to her father's will. The consideration for the sale was stated in the sale-deed to be Rs. 8,000. This deed contained a power of attorney authorising Charles Frederick Vaughan, for Charlotte Hurst and in her name, but for his own use and benefit, to demand, sue for, and receive the legacy from the proper persons, and on payment of the money to give a receipt for the same.

On the 11th February 1873, Charles Frederick Vaughan brought the present suit against Robert Henry Heseltine to enforce the mortgage of the 2nd March 1866. The plaintiff claimed to recover Rs. 19,427-8-0, being the amount of the second, third, fourth, fifth and sixth annual instalments of Rs. 3,000 each, and interest, by the sale of the Ellenborough Hotel estate, making Joseph Hurst a defendant in the suit, as he refused to join in it as a plaintiff. The suit was instituted in the Court of the Subordinate Judge of Debra Dun. The Mussoorie Bank, which held a prior mortgage of

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the Ellenborough Hotel estate, was made a defendant in the suit on its own application. The plaintiff did not describe himself in the plaint in the suit as an executor, and did not produce the will of J. N. Heseltine, but only the deed of mortgage. The plaint was therefore returned to him by the Subordinate Judge for amendment, and the case was adjourned for the production of the will. At the second hearing of the suit Joseph Hurst consented to be made a co-plaintiff. The issues for trial were fixed at this hearing, the first of them being as follows: "Can Vaughan, as executor, purchase of a legatee?" At this hearing the defendant admitted his liability to the extent of the instalments sued for. At the final hearing of the suit Joseph Hurst did not appear. The Subordinate Judge dismissed the suit on the first issue, on the 13th May 1873, on the ground that the plaintiff was not suing as an executor for the benefit of the estate, but to enforce the assignment to him by Charlotte Hurst of her legacy, which assignment the Judge considered invalid.

[756] The plaintiff appealed to the High Court against the decree of the Subordinate Judge.

Mr. *Warner*, for the appellant, contended that the Subordinate Judge was wrong in dismissing the suit upon a point foreign to it; that the assignment by Charlotte Hurst to the plaintiff of her legacy was not void, but merely voidable at the option of the assignor; that Charlotte Hurst was no party to the suit, nor had she taken any steps to have the assignment set aside; that the assignment could only be set aside upon repayment of the consideration-money, together with interest, and the costs incurred in connection with the assignment; that the suit was not based on the assignment but on the mortgage and the mortgage was valid, and should have effect given to it; that as the defendant had admitted the claim to the extent of the instalments due, a decree should have been made against him; and that the Mussoorie Bank had erroneously been made a party to the suit.

Mr. *Howard* (with him Messrs. *Hill*, *Newton* and *Quarry*) contended that the mortgage was invalid, as it had not been made in accordance with the wishes of the testator as expressed in his will, *viz.*, to the Official Trustee of Bengal for the time being, but to two of the executors of the will, and that the suit was consequently not maintainable.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—This is a regular appeal from the Court of the Subordinate Judge of Dehra Dun in a suit by the plaintiff, Vaughan, against the defendants, Heseltine and Hurst, to recover Rs. 19,247-8-0 principal and interest alleged to be due on a mortgage on certain property called the Ellenborough Hotel estate, under the following circumstances: The plaintiff, Mr. Charles Frederick Vaughan, sued as one of the executors of the late Mr. J. N. Heseltine, who died on the 8th March 1865, leaving a will, dated the 16th February 1864, and a codicil thereto bearing dated the 24th February 1865. By the will the testator disposed of his estate and effects, and various legacies were left to different parties, and among others two sums, both of Rs. 6,000—Rs. 12,000 in all—on certain conditions and contingencies, to the testator's grand-children, Joseph Hurst, and Isabella Hurst, but in the event of their deaths, as therein explained, he directed the said two sums **[757]** of Rs. 6,000 to be paid "unto my daughter, Mrs. Charlotte Hurst, the mother of Joseph Hurst and Isabella Hurst, for her absolute use and benefit, and her receipt for

the same, whether covert or sole, shall be sufficient discharge for the same." The will appointed the testator's son, Robert Henry, and his son-in-law, Joseph Hurst, one of the defendants, to be the executors thereof, and by a separate nomination he appointed the plaintiff "and the Administrator-General of Bengal for the time being" to be trustees of the will for the carrying out of the trust thereby declared, and by the 20th clause of the will the testator made the usual provision for the continuance of the trust in the event of death or failure. By clause 9 of the will the testator specially devised the Ellenborough Hotel estate to the use of "my said son Robert Henry, his heirs and assigns, upon condition that he or they do, upon being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing payment of the sum of Rs. 16,000, etc." Such were the provisions of the will on these points ; but the codicil, which is of considerable length, altered and revoked the will in various particulars, and among other things it altered the will as to the trustees as follows : "And whereas by the 19th clause of my said will I have nominated and appointed the said Charles Frederick Vaughan, in the said will styled Mr. Charles Vaughan, and the Administrator-General of Bengal for the time being, to be trustees of my said will, now I do hereby revoke such said appointment and I do nominate and appoint the Official Trustee of Bengal for the time being to be sole trustee of my said will for the purpose of carrying out the trust therein and herein declared, and I declare that my said will shall accordingly be so read and constructed as if the said Official Trustee of Bengal for the time being had in my said will been named and mentioned instead of the said Mr. Charles Vaughan and the said Administrator-General of Bengal for the time being." There was therefore to be but one trustee and that "the Official Trustee of Bengal" in place of Mr. Vaughan and the Administrator-General of Bengal, as provided by the will. The codicil then goes on to revoke the said 20th clause of the will, and also the clauses providing for the legacies to the grand-children, "and in lieu and instead thereof" the codicil provided as follows : "I do hereby give and bequeath to my daughter [758] Charlotte, wife of my son-in-law, Joseph Hurst, and mother of my said grand-children, Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely, for her own sole use and benefit, free from the control, debts and liabilities of her present or of any future husband with whom she may hereafter intermarry ; and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate, situate at Rajpur aforesaid, under the terms and conditions of the 9th clause of my said will, such said payment to my said daughter Charlotte to begin and commence from the receipt by the trustee of this my will of the second instalment of Rs. 3,000 provided for in the said 9th clause of my said will, and to continue until the said sum of Rs. 12,000 shall be fully paid and satisfied from and out of the said fund, and any balance that may remain due after payment of the last of such said instalments shall be paid and satisfied out of the general assets of my estate." We may presume that the testator had good and sufficient reasons for this change in his testamentary arrangements, and the circumstances which gave rise to this suit may well suggest what these reasons were. They are at least intelligible. But it will be observed that, while the codicil revoked the appointment of trustees as made by the will, it contained no expressed revocation of the testator's direction to his son to execute and deliver the mortgage itself for Rs. 16,000, and in fact, on the 2nd

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March 1866, which was within a year from his father's death, the son did, with the apparent approval of all concerned, including the plaintiff himself execute a mortgage deed of the Ellenborough Hotel estate in favour of Joseph Hurst and Mr. Vaughan and who, it will be recollected, were the trustees originally appointed. It is not disputed that the testator's estate was ample for all his testamentary purposes, and that there would be little or no difficulty in raising the Rs. 16,000 on the security of the Ellenborough Hotel estate. But some delay occurred, and it would appear that at the end of 1869 or beginning of 1870, Mr. Vaughan, the plaintiff, commenced negotiations with Mrs. Hurst for the purchase of her legacy, the result of which was that he, being an executor of the will, purchased for the price of Rs. 8,000 [759] a legacy of Rs. 12,000. Vaughan himself states that he does not recollect by whom the proposal for the purchase was made, but in the opinion of the Subordinate Judge it came from himself. This was the crisis of the suit in the Court below, and the Subordinate Judge's decision was that such a transaction could not stand, and he dismissed the suit with costs. Without pronouncing any judicial opinion on the question, which, from what I am about to explain, we are not called upon to do, I may be permitted to say that such negotiations between the executor of a will and a legatee are very questionable and improper, and if this case had been argued before us on the basis of the lower Court's judgment, it is I think probable that we would not have found much fault with it. But at the hearing of the appeal before us, the Counsel for the respondent disregarding the appellant's arguments on the merits of the Subordinate Judge's decision, took the objection that the mortgage deed which is the basis of the suit is invalid, and affords no cause of action to the plaintiff, on the ground of its not being conformable with the true construction of the will and codicil, and I am of opinion that this objection is well-founded. Although in the form of a suit to recover on a mortgage of a portion of the estate, it is really in the nature of one for the administration *pro tanto* of that estate, and it is more important to consider what were the testator's wishes and intentions. I observe that in the mortgage deed itself the codicil is referred to by date, and is there described as "in no way revoking that portion of the 9th clause of the will hereinbefore recited," but whether this was the idea of the mortgagor himself or the opinion of his legal advisers or draughtsmen, it is in my judgment altogether erroneous. The direction to the son contained in the will was to execute and deliver a mortgage deed to the trustees, that is to Mr. Vaughan and the Administrator-General of Bengal. The appointment, however, of these gentlemen was expressly revoked by the codicil, and a single trustee, in the person of "the Official Trustee of Bengal," was appointed in their stead. It is impossible therefore to contend that the mortgage, as actually made, was an administration *pro tanto* of the testator's estate according to his true intentions. The objection is indeed an obvious and substantial one, and it is extraordinary that the codicil to the will on which it is founded should have been overlooked, not only by the Subordinate Judge himself, but by all the parties before him.

[760] Without prejudice therefore to any suit which may be instituted for carrying out the intentions of the testator with respect to the direction to mortgage, or generally for the proper administration of the estate, I would dismiss this appeal, and dismiss the present suit, but seeing that the objection allowed by this judgment was not taken in the Court below, without costs. The Mussoorie Bank, however, who are the holders of a mortgage by the testator himself, and who have been obliged to intervene

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as co-defendant and co-respondents, are entitled to their costs, and these the plaintiff, appellant, must pay.

OLDFIELD, J.—The plaintiff in this suit, C. F. Vaughan, is one of the executors to the will of J. N. Heseltine. The defendant, R. H. Heseltine, is the son of J. N. Heseltine, and also one of the executors. The suit is to recover, as one of the executors, Rs. 19,427-8-0 principal and interest, on a mortgage-deed of the Ellenborough Hotel estate. It appears that, under the will and codicil of the late J. N. Heseltine, the estate known as the Ellenborough Hotel estate was devised to the use of his son, R. H. Heseltine, defendant, respondent, upon condition that he should execute and deliver to the trustees under the will a mortgage of the said estate for securing to the said trustees payment of Rs. 16,000, to be paid by equal yearly instalments of Rs 3,000 each, the first to be paid at the expiration of one year after the death of the testator, a sum of Rs. 12,000 to be paid out of the above sum to testator's daughter, Charlotte Hurst, and the rest as otherwise devised. The will and codicil further made R. H. Heseltine, defendant, J. Hurst, and C. F. Vaughan, plaintiff, executors, and the Official Trustee of Bengal for the time being the sole trustee for the purpose of carrying out the trusts named in the will. After the death of the testator the mortgage-deed on which this suit is based was executed by R. H. Heseltine in favour of the other two executors, Hurst and Vaughan, and the latter now sues to recover under it.

The claim was dismissed by the lower Court on a preliminary objection, and the appeal rests on the same ground, which has been fully discussed in the judgment of the Chief Justice. It is unnecessary for me to notice this point, as I am of opinion that the appeal must be dismissed on a ground taken before us by the respondent's counsel, that the mortgage-deed is absolutely void, and [761] the claim on it unmaintainable. The title of the parties to the mortgage-deed and to execute the mortgage rests solely on the will and codicil of J. N. Heseltine, and if these be examined, it will be found that they convey no power to execute such a mortgage. The will directed by the 9th paragraph that the Ellenborough Hotel estate was devised to "R. H. Heseltine his heirs and assigns, upon the condition that he or they do, on being so requested by my trustees, execute and deliver to them a good and sufficient mortgage of the said Ellenborough Hotel estate for securing to the said trustees, their executors, and administrators, payment of the sum of Rs. 16,000 hereinbefore bequeathed to them upon trust, &c.," and by the codicil the Official Trustee was appointed sole trustee, while R. H. Heseltine, Hurst, and Vaughan were appointed executors.

There has been no conformance with the terms of the will and codicil in the execution of the mortgage-deed the basis of the claim, which is executed, not in favour of the trustees, but of two out of three executors. The intention of the parties was to carry out the condition of the will and codicil, but these gave no power to execute such a mortgage-deed, which has been made contrary to the will and codicil and under a mistake as to the facts on the part of the parties to it, that they were thereby carrying out the condition of the will and codicil. Such a deed is invalid and can convey no right to the property to the plaintiff. The claim therefore must fail.

There is one plea raised in appeal which is to be noticed, whether the Manager of the Mussoorie Bank was properly made a party to the suit, and I consider he was, inasmuch as, holding an alleged prior mortgage on the property, he had an interest in asserting its priority in this suit, which included a claim to bring to sale the property.

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I would therefore, though on different grounds, affirm the decision of the lower Court, and dismiss the appeal, but without costs as regards all the defendants except the Manager of the Mussoorie Bank, who should get his costs.

Appeal dismissed.

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1 A. 762.

[762] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

HURST (*Plaintiff*) *v.* MUSSOORIE BANK (*Defendant*).* [3rd May, 1877.]

Real property—Legacy—Husband and Wife.

C, a married woman, was entitled, under her father's will, to certain money "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C*, but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment re-paid her husband the purchase-money of the property purchased. *Held* that the conversion by *C* of her legacy did not alter its character and conditions, and that the property purchased was her own separate property, and was not subject to the debts or liabilities of her husband.

IN November 1868, Joseph Hurst agreed to purchase a village called Mohkampur. At his request the property was not conveyed to him, but to his wife, Charlotte. The purchase-money was stated in the deed of sale, which was dated the 14th November, 1868, to be Rs. 6,000. Joseph Hurst paid the purchase-money by a cheque on the Mussoorie Bank for Rs. 6,350 drawn against a cash credit loan he had with the Bank. When the deed of sale was registered a power of attorney executed by Mrs. Hurst was also registered, which appointed Joseph Hurst Manager of the property on her behalf. In 1876 Joseph Hurst and his wife were in pecuniary difficulties. In a suit registered as No. 155 of 1874, the Mussoorie Bank held a decree against them both. In another suit registered as No. 185 of 1874, the same Bank held a decree against Joseph Hurst and his brother-in-law, Robert Henry Heseltine, and a third suit registered as No. 56 of 1876, brought by one Khushal Rai and another person, a decree had been made against Joseph Hurst and his wife. In execution of the decree in suit No. 155 of 1874, the village of Mohkampur was attached on the 31st March, 1876. On the 4th April, 1876, an order was made for the sale of the property on the 20th May, 1876. On the application of Joseph Hurst and his wife, [763] and on their satisfying the decree in part, and executing an agreement to pay the balance, this sale was postponed *sine die*. On the 9th June, 1876, Mohkampur was again attached in the execution of the decree obtained by Khushal Rai. No further proceedings were taken in this case till the 6th October, 1878. Mohkampur was again attached on the 13th July, 1876, in execution of the

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* Regular Appeal, No. 107 of 1876, from decree of R. Alexander, Esq., Subordinate Judge of Dehra Dun, dated the 15th September, 1876. Reported under a special order of the Hon'ble the Chief Justice.

[*N.B.*—See in this connection 1 A. 753, *supra* and 1 A. 772, *infra*.—ED.]

decree obtained by the Mussoorie Bank against Joseph Hurst and Robert Henry Heseltine. On the 17th July, 1876, an order was made for the sale of the property on the 20th September, 1876. Charlotte Hurst objected to the sale, claiming the property as her own. Her objection was disallowed on the 9th August, 1876. The property was eventually sold on the 20th September, 1876, and was purchased by one Charles Edward Beresford, with notice of Charlotte Hurst's claim.

In the meantime, on the 18th August, 1876, Charlotte Hurst instituted the present suit against the Mussoorie Bank in the Court of the Subordinate Judge of Dehra Dun. The plaintiff claimed in her plaint the reversal of the order of the 9th August, 1876, and all subsequent acts and orders made under that order, a declaration of her right to the possession of the property as full proprietor, and possession of the property in full proprietary right. She based her suit on the deed of sale dated the 14th November, 1868. She alleged that being entitled under her father's will at the time of the sale to a legacy of Rs. 12,000, she had purchased the property in suit, together with an estate called Ashton Cottage, arranging with her husband that he should advance the purchase-moneys of these properties, and promising to pay him back such moneys when she obtained her legacy; that she had subsequently sold the legacy to one Charles Frederick Vaughan for Rs. 7,875, receiving the purchase-money by a cheque for that amount, and that she had endorsed this cheque to her husband, paying the balance due to him, Rs. 125, in cash out of money of her own. The defence to the suit was that the money paid to the vendor of Mohkampur by Joseph Hurst was his own money, and not money paid in pursuance of any such agreement as alleged by the plaintiff, and that the conveyance of the property was made to the plaintiff with the object of protecting it from Joseph Hurst's creditors, Joseph Hurst being [764] in pecuniary difficulties at the time of the purchase. The defendant further alleged that from November, 1868, to July, 1876, Mohkampur had been held and enjoyed by Joseph Hurst as his own property, that the plaintiff's name never appeared in any transaction connected with the management of the estate, that the patwaris of the village were ignorant of her name, and her name did not appear in any revenue record as connected with the village, that in February, 1872, Joseph Hurst and the plaintiff had mortgaged the village jointly to a Mrs. Dick, styling the property as "their" property, and that in February, 1875, Joseph Hurst had given evidence in a certain suit to the effect that he had purchased the property, and held it as proprietor, and that he was the proprietor of it.

It was not alleged in defence to the suit that the property had been attached and sold in the execution of a decree to which the plaintiff was a party.

The Subordinate Judge fixed as an issue, among others, was Rs. 6,000, the price paid for Mohkampur, part of the plaintiff's legacy under her father's will or not? This issue was alone considered by the Judge, and on it he dismissed the suit, holding that the money paid for the purchase of Mohkampur was Joseph Hurst's money, and that there was no connection between it and the sum of Rs. 7,875 received by the plaintiff from Vaughan and made over to her husband by the plaintiff.

The plaintiff appealed to the High Court against the decree of the Subordinate Judge, contending that the property was her own separate and absolute property, and the Court of first instance had erred in finding that her husband was the true owner.

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APPELLATE CIVIL.

1 A. 762.

Messrs. *Ross* and *Conlan*, for the appellant.
Messrs. *Hill* and *Quarry*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C.J.—This is a regular appeal from a decree of the Subordinate Judge of Dehra Dun dismissing the plaintiff's claim to property called the estate of Mohkampur in virtue of her separate and exclusive right as a legatee under her father's will, and by which he bequeathed to her a sum of Rs. 12,000. The will was dated the 16th February, 1864, and there was a codicil dated [765] the 24th February, 1865. The testator, J. N. Heseltine, the plaintiff's father, died on the 8th March, 1865. The nature and terms of the will had been the subject of a previous suit with respect to a mortgage directed by it to be made, in which the plaintiff's rights as a legatee came to be considered. This suit came up in regular appeal to this Court, and was heard by Oldfield, J., and myself and determined by our dismissing the appeal and suit on grounds and for reasons which we fully explained in our judgments (1).

The record in that previous suit containing the proceedings in the lower Court and this Court was put in as evidence in the present suit, and it thus appears that the facts which gave rise to the present litigation are these: On the 14th November, 1868, Mrs. Hurst, the plaintiff, purchased the estate of Mohkampur from one Mary Wood, the price, as stated in the sale-deed (and correctly stated, for there can be no doubt on this point), being Rs. 6,000. This sum was not at once paid down in cash by the plaintiff, although it does not appear to be disputed that she, and she alone, was the actual vendee, the money having been found by Mr. Hurst, the plaintiff's husband, she, the plaintiff, claiming that it was on the credit of her legacy that the sale to her took place. Subsequently to this purchase, that is, on the 25th November, 1869, the plaintiff purchased from a Mrs. Walsh a certain property called Ashton Cottage, the consideration being Rs. 2,000, which had apparently been raised in the same way as the previous Rs. 6,000 for the purchase of Mohkampur. The two sums amounted to Rs. 8,000, which sum Mrs. Hurst swears in her deposition she repaid to her husband, first by endorsing over to him a draft for Rs. 7,875, being the sum, as explained by the plaintiff, to have been netted for her legacy, and by cash payment from herself of Rs. 125. The Subordinate Judge appears to sneer at and discredit this last circumstance, although it is not apparent why he should do so. For myself I do not see why it should be considered an "odd circumstance" that the plaintiff, situated as she was, could not command Rs. 125 on her own account, and there is not a particle of evidence to show that it was not her own money. The poor woman had suffered in pocket sufficiently already, for she [766] tells us, and the fact plainly appears in the record of the other suit to which I have adverted, that after a good deal of negotiation she disposed of her legacy of Rs. 12,000 to Mr. Vaughan one of the executors of her father's will, for Rs. 8,000. This, as remarked by me in the previous suit, was a very improper transaction on Mr. Vaughan's part, and it might have been set aside if she had been so minded and it had been worth her while, but no question of the validity of this transaction arises in the present case. I only now allude to the circumstance for the purpose of showing that the sum she thus obtained for the legacy was the precise

(1) See 1 A. 753.

amount of her purchase of Mohkampur and Ashton Cottage, and the question as to the identity of that payment, as regards its legal character as well as its amount, with her legacy, or whether the payment had been made by her husband from its own resources, or what must be taken to be such, is the first question that has to be considered. The next question is one of law, *viz.*, whether, if the money was hers and not her husband's, it could be used and dealt with by him in the way stated by the Subordinate Judge.

The Subordinate Judge correctly states that the first of these is the one important question, although very inconsistently with that he thus expresses himself in his judgment. "That he (the plaintiff's husband) got the legacy money there is no doubt, but there is equally no doubt in my mind that he received it as any other husband would do money coming to his wife," adding, with apparent inconsistency, that "the issue drawn which need be considered is, was this Rs. 6,000, the price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not?" and he decides that it was the husband's money and not the plaintiff's. There is a confusion of mind and want of legal knowledge in all this on the part of the Subordinate Judge which I by no means desire to rebuke, for Mr. Alexander has done his best according to his light, although I could have wished that he had not been so dogmatical in the expression of his views. He ought to have known that Mr. Hurst could not deal with the legacy "as any other husband would do with money coming to his wife," and that he could not defeat her rights under her father's will by any transaction of his own. His judgment appears to me to be altogether besides the case, and shows that he totally misapprehended the plaintiff's position and her rights under her father's will.

[767] That the Rs. 6,000 paid for Mohkampur was her money and not her husband's, is, I think, very plain. In the first place, the Subordinate Judge himself says that Mr. Hurst got hold of the legacy money, in the next place the respondents, defendants, argued their case here, as they appear to have done in the Court below, on the assumption that it was her legacy that had been used in raising the purchase money for Mohkampur, but that by conversion into cash it had changed its character and came under the control of her husband. Such a contention was totally unfounded in law, and I only refer to it now for the purpose of pointing out that, on the defendant's own showing, the money raised and paid by Mr. Hurst was really the plaintiff's and not his. But the plaintiff herself was examined in the Court below, and her evidence is before us. The Subordinate Judge put his gloss upon it, but I feel bound to reject this as altogether uncalled for. The plaintiff's evidence is not in any way contradicted or disputed, and I see no reason whatever for disbelieving it. It will be seen that it is clearly compatible and consistent with all we know of the facts. We have seen that her father made his will in 1864 and died in 1865, and the time that elapsed between the date of the purchase of Mohkampur is amply accounted for by the litigation and negotiations which had in the meantime been going on, and which prevented the payment to her of her legacy until the time mentioned by the Subordinate Judge. She states in her deposition as follows: "My husband paid the money for me, I was negotiating the sale of my legacy with Mr. Vaughan, the executor Mr. Vaughan sent me a cheque fot the amount, *viz.*, Rs. 7,875, on the Delhi Bank, and I endorsed the whole of it over to my husband; after this receipt I concluded the sale, negotiations for Ashton Cottage, which I had been

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carrying on for some time previously: the price of Ashton Cottage was Rs. 2,000: I paid Rs. 7,875 to my husband by the cheque, and Rs. 125 in cash; I sold my legacy for Rs. 8,000, and Mr. Vaughan made me go shares in the expenses, so I only got Rs. 7,875." And further on in cross-examination she says, "I bought the village (Mohkampur) in anticipation of my legacy money."

Then as respects the Mussoorie Bank's bond she says: "Mr. Hurst signed the deed shown me because the loan was to him, not because he had any right in the property." And in regard to Mrs. [768] Dick's mortgage she deposes: "The deed shown me was signed by Mr. Hurst and myself: I never read the deed in question, so I cannot tell how the words "moveable and immoveable came into it: I did not get the loan, Mr. Hurst got the loan." The Subordinate Judge makes some unfavourable comments on this evidence, but it is, I consider, unsafe to argue as he does, against the conduct of a wife situated, as the plaintiff was, under the influence and control of a needy husband. I believe she spoke the truth when she said she had not read this deed, and I also believe that she was totally unaware that she was transferring by it any rights of hers acquired by means of her legacy. In fact she could not legally have joined in any such mortgage-deed without making the usual acknowledgment required of married women before the officer appointed by law for that purpose (see Act XXXI of 1854, ss. 3, 4 and 5), and it is not pretended that any such formality was observed on the occasion.

From all these considerations I conclude and thoroughly believe that the Rs. 6,000 paid for Mohkampur was raised on the security of, and was in fact paid out of, the plaintiff's legacy, and from no other source; and that being so the plaintiff's legal rights are not as stated by the Subordinate Judge. I have looked into the record of the previous suit, and I find it there recorded that the bequest of the legacy to the plaintiff in her father's will and codicil is expressed in these terms: "I do hereby give and bequeath to my daughter Charlotte, wife of my said son-in-law, Joseph Hurst, and mother of my said grand-children Joseph and Isabella Hurst, the sum of Rs. 12,000 absolutely for her own sole use and benefit free from the control, debts, and liabilities of her present or of any furture husband with whom she may hereafter intermarry, and I direct such said sum of Rs. 12,000 to be paid to my said daughter Charlotte, on her sole and personal receipt from and out of the sum of Rs. 16,000 charged upon my Ellenborough Hotel estate." The effect of such a testamentary disposition is to give the plaintiff not only separate and exclusive use of the legacy money, but sole and absolute control over its disposal. The law on this subject is clearly stated by Mr. Joshua Williams, Q. C., in his "Principles of the law of Real Property," 7th ed., 1865, p. 207 (an able and reliable work of great authority in England, although the author is still [769] alive), as follows: "Not only the income, but also the corpus of any property, whether real or personal, may be limited to the separate use of a married woman. Recent decisions have established that a simple gift of a real estate, either with or without the intervention of trustees, for the separate use of a married woman, is sufficient to give her in equity a power to dispose of it by deed or will without the consent or concurrence of her husband. The same rule had long been established with respect to personal estate." Property is thus sometimes settled to wives so as to prevent even its anticipation by them. But it will be observed that there is no such clause in the will of the plaintiff's father. She did anticipate the legacy by accepting the Rs. 6,000 her husband raised for her on its

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security, and she was entitled to do this nor by so anticipating did she in any way change the legal character and conditions of the legacy itself, for that, as I have said, could in nowise be defeated by any contrivance on the part of her husband or any of his creditors.

The facts and evidence to which I have adverted, and which bring me irresistibly to this conclusion, appear to me to be clear beyond any doubt, and I see no necessity for a remand.

I have only to add that, if the plaintiff's husband took his loan from the Mussoorie Bank, either in ignorance of, or with the knowledge of plaintiff's exclusive rights under her father's will, he and the Bank must settle it between themselves, but in no case can the one or the other make any claim on the plaintiff, or make use of her money, should they succeed in getting it into their hands without her own deliberate consent given in the manner required by law.

I would allow the appeal and, reversing the judgment of the Subordinate Judge, decree the plaintiff's claim. No other conclusion could satisfy not only the legal necessities but the justice of the case. The respondents must of course pay all the costs, those of the lower Court as well as the costs of this appeal.

SPANKIE, J.—The subject-matter of the dispute between the parties and the facts of the case are clearly set forth by the Subordinate Judge. The lower Court considered that the first issue laid down by him decided the case. That issue was, was the sum of Rs. 6,000, the [770] price paid for Mohkampur, part of Mrs. Hurst's legacy under her father's will or not? Ordinarily speaking, the Judge remarks, when we look at a transaction like the one which took place between Mr. and Mrs. Hurst, we should say that the husband had bought the estate, entered his wife's name as purchaser for reasons of his own and that the endorsement of a cheque or draft made over to him some eighteen or nineteen months afterwards had nothing to do with the matter whatever. The lower Court comes to the conclusion that the money was Hurst's own, and had no connection with the Rs. 7,875, the proceeds of the legacy, paid over to him nineteen months after the purchase. The Subordinate Judge comes to this finding on the evidence of Mrs. Hurst which he considers contradictory and improbable. He holds also that Mr. Hurst got possession of the legacy as any other husband would do money coming to his wife.

It is contended in appeal that mauza Mohkampur is the separate and absolute property of the appellant, Charlotte Hurst, and the Court was wrong in finding that her husband, Hurst, was the true owner. Secondly, that the purchase-money of the village in question, though paid in the first instance by appellant's husband was eventually paid by appellant, who made over her legacy of Rs. 8,000 to her husband in satisfaction of the loan by means of which the said village had been originally purchased by her. Thirdly, that it is not shown that the legacy was paid for any other purpose. Fourthly, that the reason by the lower Court for its decision are fallacious and erroneous, and do not support the conclusion upon which that decision is based. Fifthly, that the amount entered in the lower Court's decree as pleader's fee is improperly calculated.

The suit appears to me to have been insufficiently tried, and Charlotte Hurst's evidence to have been set aside on apparently too slight grounds. There is no reason to doubt that she had the legacy in prospect when the purchase was made, a legacy to herself, and for her own use and benefit and quite independent of her husband's control. With this prospect before

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her it was not unlikely that she might contemplate the purchase of immoveable property, and it was not improbable that her husband should have found the money for her in the first instance, and have received it back from her on payment of the legacy. She stated that, when the village was bought, they were well off as compared with their present [771] position, and were then perfectly solvent. She appears to have given her evidence freely. It was not damaged in cross-examination or by the Court when the Judge examined her. She may have been flurried by the Court, but I certainly do not trace in her evidence confused and contradictory statements. These statements at least remain uncontradicted. The other party produced no evidence at all. If the lower Court thought that Charlotte Hurst's evidence was not satisfactory, she should have been allowed the opportunity of bringing forward some proof in corroboration of it. It would seem, however, that the Subordinate Judge was of opinion that the husband must needs have the control of the legacy, and that it was paid to him as any other money coming to his wife would be paid. This, in fact, was doubtless pressed upon him at the hearing, and indeed was contended here by respondent's pleader, Mr. Quarry. There is no doubt that, when from the terms of the gift, settlement or bequest, the property is expressly, or by just implication, designed to be for a woman's separate and exclusive use (for technical words are not necessary), the intention will be fully acted on, and the rights and interests of a wife sedulously protected in equity. There is no difficulty in this case as to the words used. The will of J. N. Heseltine gives the money to Charlotte Hurst "absolutely for her sole use and benefit, free from the control, debts and liabilities of her present or any future husband." The money is to be paid to her "on her sole and personal receipt." These words exclude the marital rights of a woman's husband, and the property will be regarded as being for her exclusive use.

So far then Charlotte Hurst, having certainly the exclusive control of this money left to her, might not unreasonably, as remarked above, have entertained the idea of buying Mohkampur, and as her statements remain uncontradicted there was *prima facie* no reason to doubt the truth of the claim. There are, however, alleged to be certain circumstances, such as the condition of Hurst's affairs for some time past, and the fact that he had treated Mohkampur as his own, regarding which it would have been desirable that further inquiry should have been made. Hurst himself should have been examined, and he should have been questioned regarding the alleged advance to his wife of the sum necessary to pay for Mohkampur, and also respecting the mortgage [772] of that village, amongst other properties, to Mrs. Dick. On the other hand, the defendant should have the opportunity of showing from any other evidence that he could produce, that the money used was not Mrs. Hurst's. The defendant, indeed, should have had evidence ready on this point, as it was in issue on the day fixed for trial. I do not understand why it was not produced if at hand, and if this suit were dismissed now the defendant would have himself to blame. But I would prefer, having regard to the fact that there are some suspicious circumstances in the case, that there should be further inquiry, and would remand the case to the Subordinate Judge in order that he should try and determine whether the purchase of Mohkampur was made by Charlotte Hurst on her own account and with money advanced by Hurst as a loan, which she subsequently repaid to him, or whether Hurst was the real purchaser and owner, and the money paid was his own.

The determination of this issue in a satisfactory way would, I think, dispose of the case. The remand might be under s. 354, Act VIII of 1859. On return of the finding a week might be allowed for objections, and on the expiration thereof the appeal would be disposed of.

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1 A. 772.

APPELLATE CIVIL.

Before Mr. Justice Turner, Officiating Chief Justice, and Mr. Justice Pearson.

BERESFORD (*Plaintiff*) v. CHARLOTTE HURST AND ANOTHER (*Defendants*).* [22nd July, 1878.]

Real property—Legacy—Husband and Wife.

C, a married woman, was entitled under her father's will to certain money "absolutely, for her sole use and benefit, free from the control, debts and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled, C borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to C, but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. C and her husband were married before [773] Act X of 1865 came into force, and had acquired an Indian domicile. *Held*, that, even if English law were applicable in the case, and any interest in the property purchased passed to *C's* husband, it passed, in view of the agreement between her and her husband, on an implied contract that he would hold the property in trust for her, and that, where such property was purchased at a sale in the execution of a decree against *J* as his property, with notice that such property was claimed by C as her separate property, such purchase did not defeat the title of *C*.

[N.B.—See in the connection 1 A. 753 and 762, *supra*—ED.]

THIS suit arose out of the execution of the decree obtained by Charlotte Hurst against the Mussoorie Bank, on the 3rd May, 1877, in the High Court, in the suit brought by her against the Bank, the circumstances of which are fully reported at p. 762 of this volume. The report of that case and of the case of *Vaughan* v. *Heseltine* reported at p. 753 of this volume should be read together with this report. Before Charlotte Hurst obtained that decree, *viz.*, on the 20th September, 1876, the property in suit was sold in the execution of the decree in the suit registered as No. 185 of 1874, which was a decree in favour of the Mussoorie Bank and against Hurst and Heseltine. It was purchased by Charles Edward Beresford, the plaintiff in the present suit. Having been dispossessed by Charlotte Hurst in the execution of her decree, Charles Edward Beresford eventually brought the present suit against Charlotte Hurst and Joseph Hurst for possession of Mohkampur. The plaintiff stated that he had acquired the right, title, and interest of Charlotte Hurst in Mohkampur in virtue of his auction-purchase, and that if he did not acquire any such right, title. and interest by such purchase, but acquired only the right, title, and interest in the property of Joseph Hurst, then Joseph Hurst was the sole owner of

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* First Appeal No. 43 of 1878, from a decree of F. Bullock, Esq., Subordinate Judge of Dehra Dun, dated the 3rd December 1877. Reported under a special order of the Hon'ble the Chief Justice.

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the property, and the plaintiff was entitled to it in virtue of his auction-purchase. The plaintiff alleged in support of his statement that Mohkampur belonged to Joseph Hurst as follows:

"Mohkampur was in November, 1868, the property of Mrs. Mary Wood, widow of Debra. Joseph Hurst heard it was for sale, and wrote the lady's son making an offer for the same which was accepted in writing. He afterwards delivered a cheque for the price to Mr. Wood, and asked him to make the conveyance in the name of his wife, Mrs. Charlotte Hurst. Mr. Wood agreed to make the conveyance as requested, thinking, the object of it was the protection of Mohkampur from the grasp of Mr. Hurst's creditors.

"The cheque was for Rs. 6,350, and was not against Joseph Hursts' own money, but against money borrowed from the Mussoorie Bank, Limited. At the same time he was in debt to the extent of about Rs. 30,000, without [774] any particular means of meeting his debts, and shortly afterwards he embarked in a risky timber business which involved him in additional liabilities........ The conveyance of Mohkampur was not made to Mrs. Charlotte Hurst's separate use or independent of her husband. Therefore its operation is to vest the property in the husband, Joseph Hurst.

"If it were otherwise, the transaction would stand as a voluntary postnuptial settlement of Rs. 6,350 by Joseph Hurst upon his wife. As he was in debt at the time it was made, and actually borrowed the money at a high rate of interest for the occasion, and it is still in one form or another due to his creditors, it was a fraudulent settlement, and void under the Act 13 Eliz., c. 5, made perpetual by the Act 29 Eliz., c. 5. the property so acquired legally vesting in the settlor, Joseph Hurst, and remaining available to his creditors.

"Immediately after the purchase, Joseph Hurst, the husband, entered upon Mohkampur, and took and enjoyed the assets and profits of it as sole owner, publicly asserting himself to be the sole owner of it, and as such his name has appeared for many years in the records of the Collector of the district, and he continued to fill the character of sole owner, without let or hindrance of any one, until this litigation began. On the 7th November, 1872, Joseph Hurst borrowed Rs. 16,000 from Mrs. Louisa Dick of Dehra. Part of the security for this was a mortgage upon Mohkampur. As a nominal party to the conveyance of that estate Mrs. Charlotte Hurst signed the mortgage, which in effect sets out that the property is her husband's; if the property had not been in fact her husband's then Mrs. Charlotte Hurst committed the grossest fraud upon Mrs. Dick, in aiding her husband to procure the Rs. 16,000 by virtue of a deed she knew was totally inoperative.

"On the 24th and 25th February, 1875, under circumstances the most solemn in which any European claiming to be respectable could be placed, namely, under cross-examination conducted with the utmost deliberation, extending over two whole days, in a suit brought against him to recover a large sum of money, Joseph Hurst swore as follows:

"I have purchased landed property in India * * *.

"I bought Mohkampur from Mr. C. Wood * * *.

"I hold Mohkampur as zamindar * *, I am zamindar of Mohkampur; I don't know the exact amount of revenue I pay; my assistant pays in the revenue, and receives the receipts; I did not ask what the revenue was when I was purchasing it; I don't remember if I made any inquiries as to the income of the village; did not inquire how much land

there was in Mohkampur, but was told how much there was; I had no reason for not inquiring * * it was not the custom for a native lessee to describe himself as zamindar.'

"As it cannot be asserted that Mr. Hurst committed perjury, or that he and his wife deliberately cheated the mortgages of Mohkampur, or that the Collector's records are wrong, it follows that Mohkampur was Joseph Hurst's, [775] and if it was his interest alone the plaintiff succeeded to, that interest covered the whole property."

The defence to this suit rested on the allegations on which the claim in the suit by Charlotte Hurst against the Mussoorie Bank above referred to rested, and on the establishment of which the High Court had given Charlotte Hurst a decree in that suit.

The Subordinate Judge fixed the following among other issues: "(i) Did the sale of the 20th September 1876, operate to transfer to the plaintiff the rights and interests of all the defendants in suits No. 155 of 1874, No. 56 of 1876, and No. 185 of 1874, in which attachment of Mohkampur had been made; if not, whose rights and interests passed to plaintiff by that sale? (ii) Does the High Court's decree set aside the sale made to plaintiff on the 20th September, 1876? (iii) If only Joseph Hurst's interest in Mohkampur passed to plaintiff by the sale, what was his interest in the property? (iv) Is the plaintiff entitled to recover the property as a *bona fide* purchaser for valuable consideration?"

On the first issue the Judge found that Mohkampur was sold in the execution of the decree in suit No. 185 of 1874, and that the sale only operated to transfer the rights and interests of the defendants in that suit, and that consequently only the rights and interests of Joseph Hurst, in Mohkampur passed to the plaintiff by the sale. On the second issue the Judge found that the sale of Mohkampur was set aside by the decree of the High Court. On the third issue the Judge found that Joseph Hurst had no interest in Mohkampur. On the fourth issue the Judge held that the plaintiff was not entitled to recover the property because he was a *bona fide* purchaser of it for valuable consideration. The Judge in accordance with the determination of these issues dismissed the plaintiff's suit.

The plaintiff appealed to the High Court. The facts of the case and the arguments are stated in the judgment of the Court.

Mr. *Quarry*, for the appellant.

Mr. *Spankie*, for the respondent.

The Court delivered the following

JUDGMENT.

In 1876 the respondents, Mr. J and Mrs. C. Hurst, were in pecuniary difficulties. In suit No. 155 of 1874 the [776] Mussoorie Bank, Limited, held a decree against both respondents. In suit No. 185 of 1874 the same bank held a decree against Mr. J Hurst and his brother-in-law Mr. Heseltine, and in a third suit brought by Khushal Rai and another a decree had been passed against Mr. J. and Mrs. C. Hurst. In execution of the decree in suit No. 155 of 1874 the village Mohkampur was attached on the 21st March, 1876, and an order for sale issued on the 4th April, 1876, fixing the 20th May, 1876, for the sale, but on the application of the respondents and on payment of Rs. 3,747-15-0, and on the execution of an agreement for the satisfaction of the balance, the sale was postponed *sine die*. Mohkampur was again attached on the 9th June, 1876 in execution of the decree obtained by Khushal Rai, but no further proceedings were taken

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till October 6th. Finally, Mohkampur was attached on the 13th July, 1876, in execution of the decree obtained by the Mussoorie Bank against J. Hurst and Heseltine, and on the 17th July an order was made for the sale of the property on the 20th September. The respondents Mrs. C. Hurst at once filed an objection, claiming that Mohkampur, as her separate property, should be released from attachment. Her objection was disallowed on the 9th August, 1876. On the 18th August 1876, the respondent Mrs. C. Hurst filed a suit claiming that her right might be declared to Mohkampur, that she might be put in possession of it and the order of sale declared void. Her suit was dismissed by the Court of first instance on the 15th September, 1876 and on the 20th September, 1876, the property was put up to sale in execution of the decree obtained by the Bank against Hurst and Heseltine as the property of J. Hurst. It was purchased by the appellant with notice of the claim asserted by Mrs. Hurst, and notwithstanding Mrs. Hurst's opposition the appellant obtained possession on the 22nd November, 1876. Meanwhile Mrs. C. Hurst appealed to the High Court, and on the 3rd May, 1877, obtained a decree declaring her right to Mohkampur and to posssession of the estate, and at the same time the order of the 9th August, 1876, was declared null and void and all subsequent acts and orders under the said order were also declared null and void. The appellant was not made a party, nor did he apply to be made a party, to the appeal brought by Mrs. Hurst, but on the 11th July, 1877, in execution of Mrs. Hurst's decree, possession of Mohkampur was delivered to her [777] and the appellant's servants were turned out of possession. The appellant instituted a possessory suit which was dismissed, and he then instituted the suit out of which the appeal arises. The Court below found that the sale of Mohkampur operated to transfer only what rights were possessed by Joseph Hurst in that estate, that the order in pursuance of which the sale was made was in fact set aside by the decree obtained by Mrs. Hurst, that Mohkampur was the sole property of Mrs. Hurst, that the appellant purchased with full knowledge of Mrs. Hurst's claim and was not on any ground entitled to be protected against it, and that Mrs. Hurst was entitled in execution of her decree to oust the appellant. The Court of first instance consequently dismissed the suit with costs.

In appeal it is contended that Mohkampur was in fact purchased by Joseph Hurst for himself and not for his wife, and that, if it was not purchased for himself but for his wife, when it was conveyed to the wife Joseph Hurst acquired her estate by *courtesy*, which will pass to the purchaser of his right and interests, and that, if Mrs. Hurst had an equitable title to the property, she is not entitled to protection against the purchaser, inasmuch as, as the equity was so doubtful, he was not bound to take notice of it. The last objection in appeal is expressed in such general terms that it is not clear what is the particular ruling to which this plea is directed. At the hearing the pleader who appeared for the appellant advanced, though he did not seriously press, the objection that the sale was made in execution of all the decrees in which the property had been attached, but it is clear that this was not so. We have the order for attachment, and though there is no application on the file, there is the order for sale. Then there is the objection of Mrs. C. Hurst which would have been frivolous if at the time an order existed for the sale of her rights also, and then there are sale-proceedings and a certificate,—all made in the one cause in which Hurst and Heseltine were defendants, and to which Mrs. Hurst was no party.

The pleader for the appellant more strenuously urged that the property was in fact purchased by Hurst on his own account, and that the conveyance was merely taken in the name of his wife as his *ismfarzi.* On the other hand, the respondents allege that [778] Mrs. Hurst, being entitled under her father's will to a legacy of Rs. 12,000, which was to be paid to her separate use in instalments of Rs. 3,000 per annum, was desirous of investing the legacy in land, and as it was not immediately payable, she borrowed the purchase-moneys of Mohkampur and two other properties from her husband and received conveyances in her own name; her husband consenting that the property so purchased should be held by her to her separate use. It is not denied that Joseph Nelson Heseltine by his will, dated February 16th, 1864, and a codicil, dated the 24th February, 1865, devised an estate known as the Ellenborough Hotel estate to his son Robert Henry Heseltine, subject to the condition that Robert Henry Heseltine should, when requested so to do by the trustees, execute a mortgage of the estate to secure the payment of Rs. 16,000 by instalments of Rs. 3,000 per annum, without interest, the first instalment to be paid on the expiration of one year from the testator's decease, and the testator bequeathed to his daughter Mrs. C. Hurst, the respondent, the sum of Rs. 12,000 to be paid out of the instalments provided by the mortgage, commencing with the second instalment, for her sole use and benefit, free from the control of her husband then living or of any future husband. Joseph Nelson Heseltine died on March 8th, 1865, and on March 2nd, 1866, Robert Henry Heseltine executed a mortgage of the Ellenborough Hotel estate to Joseph Hurst and Charles Frederick Vaughan, to secure the sum of Rs. 16,000, with the intention of giving effect to the condition imposed on him by his father's will. There had then accrued due to Mrs. Hurst in November, 1868, when the purchase was negotiated, Rs. 6,000; in March, 1869, she would be entitled to a further sum of Rs. 3,000. It is said that in 1868 Hurst was in debt, and it is suggested he might have desired to place any property he might acquire beyond the reach of his creditors. It is, however, admitted he had a large cash credit with the Mussoorie Bank. He negotiated the purchase of Mohkampur without informing the seller that the purchaser was Mrs. Hurst, but when the terms of purchase had been settled, he directed the seller to convey the property to Mrs. Hurst. The sale-deed does not state that the property was conveyed to Mrs. Hurst's separate use, but in this country deeds are ordinarily prepared by persons who have little, if any, acquaintance with English law, and therefore [779] we do not attribute any weight to this circumstance. At the time of registration of the sale-deed a power-of-attorney executed by Mrs. Hurst was also registered appointing her husband manager of the estate on her behalf. Hurst paid the purchase-money, Rs. 6,350, out of his cash credit. He subsequently purchased two other properties, one for Rs. 2,000 and another for Rs. 2,500, and these also were conveyed to his wife. The total of these purchase moneys, Rs. 10,500, would not have exceeded with interest the sum which Mrs. Hurst was to receive under her father's will, if her legacy had been duly paid. For some cause or other its payment was not pressed, possibly because Hurst and R. H. Heseltine were connected in pecuniary affairs, and in 1870 the legacy was sold with Hurst's consent to a trustee, Mr. Vaughan, for the sum of Rs. 7,875, and it is not denied that Hurst received this sum and used it as his own. It is admitted that what cattle and implements of husbandry were used in the sir cultivation of Mohkampur belonged to Hurst. Hurst was called upon to produce accounts showing the disposal of the profits of

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the estate; he failed to do so; and it may be assumed that the profits were used either in the ordinary course of business or in the maintenance of his household. It does not necessarily follow that the estate was not purchased on behalf of and held by Mrs. Hurst as her own; she was living with her husband, and may well have consented to allow him to cultivate her land and to receive the profits of the estate and appropriate them to the general expenditure. It has been shown that in February, 1875, Hurst swore he had purchased landed property in India, that he had bought Mohkampur, and was the zamindar of Mohkampur, and paid revenue for it. If these statements had been made when the question of the ownership of Mohkampur was in issue, of course they would have gone for to discredit any evidence now given by Hurst in support of his wife's case, but the question then raised was only as to Hurst's knowledge of zamindari matters. While, then, these statements are not to be altogether disregarded, too much weight is not to be given to them. It is also urged that Hurst obtained a loan from a Mrs. Dick on a mortgage of Mohkampur representing himself as the owner, but Mrs. Hurst was a party to the mortgage and would be bound by it. Considering the evidence as a whole, we are not satisfied that the conclusion at which the Court below **[780]** arrived on this issue is incorrect It is not shown that Hurst was pressed by his creditors in 1868, not that he apprehended difficulties, and it is shown that Mrs. Hurst was entitled to funds which would have enabled her to repay the sum advanced to her by her husband, and that in fact she did pay over to her husband the sum she received, which was in excess of the purchase-money of Mohkampur. If a scheme had been devised to conceal Hurst's ownership of Mohkampur, it is improbable that Mrs. Hurst would have made over her legacy to her husband at a time when he had, as is alleged on the part of the appellant, became more involved, and there was every probability that the money would be applied to discharge his debts, or be seized by his creditors. The conveyance to Mrs. Hurst was in our judgment *bona fide*, and executed in pursuance of the agreement alleged by her. The pleader for the appellant insists principally on the plea that the conveyance to Mrs. Hurst operated to convey the legal estate in Mohkampur to her husband and that the conversion of the legacy operated to set it free from the separate use of Mrs. Hurst, and that her husband is entitled to the rents and profits during her life, and may obtain an estate by *courtesy* if he survives her. The parties were, we understand, born in this country; they married in this country before the Succession Act of 1865, and are domiciled here. We are not prepared to hold that the English law would regulate their interests in landed estate in this country acquired by the wife during coverture, but if it were applicable, and if any interest in the estate accrued to her husband, in view of the agreement which we have found proved, it must be held that it came to his hands upon a contract between them that he would hold it in trust for her—*Ridout* v. *Lewis* (1); *Trupp* v. *Harman* (2); *Newlands* v. *Paynter* (3); *Parker* v. *Brooke* (4).

The appellant purchased with full notice of the claim set up by Mrs. Hurst, and it must be held his purchase will not defeat her title. The appeal then fails and is dismissed with costs.

Appeal dismissed.

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(1) 1 Atk. 269.
(2) 2 M. and K. 512.
(3) 4 M. and C. 408.
(4) 9 Ves. 583.

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Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

LACHMI NARAIN (*Plaintiff*) v. RAJA PARTAB SINGH (*Defendant*). * [19th July, 1878.]

British Territory in India, Power of the Crown to code.

Held, that the British Crown has the power, without the intervention of the Imperial Parliament, to make a cession of territory within British India to a foreign prince of feudatory. The opinion expressed by the Privy Council in *Damodar Gordhan* v. *Deoram Kanji* (1) followed. Question as to what amounts to a cession in sovereignty discussed.

[R., 16 P.L.R. 1904.]

THIS was a suit on a bond, which charged certain villages situated partly within the District of Bareilly, and partly within the territory of the Nawab of Rampur, with the payment of certain money, the suit being instituted in Court of the Subordinate Judge of Bareilly. The defendant set up as a defence to the suit, amongst other things, that the Subordinate Judge had no jurisdiction to make a decree for the sale of the villages situated within the territory of the Nawab of Rampur, inasmuch as such villages were not within the North-Western Provinces of India or within British India, but belonged to a Foreign Prince to whom they had been ceded by the British Government. The suit having been transferred by the High Court to itself for trial, the following issue, amongst others, was fixed by the Court for trial, *viz.*, are the villages (mentioning their names) or any and which of them within the local jurisdiction of the District Court of Bareilly. The facts of the case are fully set forth in the judgment of the Court.

[2] Mr. *Conlan*, for the plaintiff.

Pandit *Bishambar Nath* and Mir *Akbar Husain*, for the defendant.

Mr. *Evans* appeared as *amicus curiæ* in support of the defence to the suit which has been set forth above.

Mr. *Evans*.—The question before the Court is whether the Court has jurisdiction over certain villages situated in a tract of country the subject of a sanad, dated the 23rd June, 1860 (2). Prior to that sanad these villages formed part of the District of Bareilly, and were British territory in India, subject to the jurisdiction of the British Courts of Bareilly, and administered by the British Executive Government. That sanad purported to "bestow those villages on the Nawab of Rampur" and to "annex them to his old territory on the same conditions on which he held that territory." This does not purport to alter the status of the Nawab or to give him higher rights in the annexed territory than he had in his old territory. It is

* Original Suit No. 3 of 1877.

(1) 1 B. 67.

(2) Aitchison's Treaties, ed. by Talbot, vol. ii, p. 19.

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therefore necessary to ascertain what was the nature of the so-called Jaghir of Rampur and of its ruler the Nawab. For the purpose of ascertaining this it is open to the Court to consult histories, treaties, and the recorded proceedings of Government, and even to refer to the Foreign Office—*The Charkieh* (1); *Taylor* v. *Barclay* (2). [Mr. *Evans* then referred to the various matters connected with the history and status of Rampur which are fully set out in the judgment, and to a report from the Political Department of the Government of India upon the internal administration of Rampur, and submitted that it was clear that Rampur was an autonomous subordinate State of a class well known and frequent in India and often described as Feudatory States.] Apart from evidence the Court is bound to hold that Rampur is a State of this class, because it is recognised by the Executive as such, and the Court cannot go behind that recognition and inquire whether it is a rightful recognition or not—Wheaton, Int. Law, Lawrence's 2nd annotated ed., p, 47; *City of Berne* v. *The Bank of England* (3). The paramount power in India has always claimed to exercise an undefined power of control over this class of States. An independent **[3]** State has been defined as one owning no superior except the Ruler of the Universe. Probably there is no independent State in India except the British Government. Nipal (which at first sight seems an exception) theoretically acknowledges the suzerainty of the Chinese Empire—Aitchison's Treaties, ed. by Talbot, vol. ii, p. 157. It is clearly recognized by the text-writers on international law that a State may exist *qua* State, *i.e.*, retain its "Political personality," notwithstanding a very great "*imminutio imperii*" resulting from its relation with other States.

The distinction between "British Territory in India" or "British India" and the Native States of India over which the Crown claims to exercise the imperial powers formerly exercised by the Mughal Emperors of Hindustan has always been clearly recognized (see the Civil Procedure Codes of 1859 and 1877, and the Extradition Act of 1872). This distinction was evidently in the minds of the framers of Stat. 21 and 22 Vic., c. 106, which enacted "that all territories in the possession or under the Government of the Company, *and all rights vested in* or which (if the Act had not been passed) might have been exercised by the Company *in relation to any territories*, should become vested in Her Majesty." The distinction is here clearly drawn between "territories in the possession or under the Government of the Company," and other territories not in the possession or under their Government over which they claimed to exercise "rights" as Paramount Power.

The rights and obligations existing between the Paramount State and the Subordinate States are not defined by any law nor enforceable through Municipal Courts—[he referred to the recent inquiry in the charges against the Gaikwar of Baroda]; nor could a Municipal Court take cognizance of any breach of engagement between States as such—*Nawab of Arcot* v. *East India Company* (4). The competency of States in this position to enter into engagements *qua* States with the Paramount Power, and to cede territory to and accept territory from the Paramount Power is abundantly illustrated by the history of India for the last century.

If old Rampur was a *quasi* Feudatory State, not subject to British administration or British Courts, but self-governing, it follows **[4]** that

(1) L. R. 4 A. & E. 74.
(2) 2 Sim. 213.
(3) 9 Ves 347.
(4) 2 Ves. 56.

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British territory, if annexed to that State, would cease to be subject to the jurisdiction of British Courts, and would become exclusively subject to the jurisdiction of the Courts of that State. For it is undeniable that the right to possession of land can only be tried in the Court of the State to which the territory belongs, because the Executive Power of that State alone has power to put the claimant in possession—Westlake, art. 61, p. 56.

Now it is clear from the records now placed before the Court that, after the grant of this sanad, these villages were formally handed over by the Commissioner of Bareilly to the persons deputed by the State of Rampur to take possession: that the records were handed over: that the British police were withdrawn: that the new boundary between British India and Rampur was laid down by the survey authorities; and that from that day to this, for 18 years, the whole Government of the ceded territory—revenue, taxation, police, the administration of civil and criminal law—has been conducted by the officials of the Rampur State, without any interference or protest from any British authority or British Court: and that in 1862, before present High Court was established, the District Court of Bareilly and the Sadar Dewani Adalat of the North-Western Provinces had declined to exercise jurisdiction on the ground that these villages were no longer British territory (1).

It would be enough to stop here, because, where once it is proved that territory is peaceably in the possession of a Foreign State and has been peaceably and willingly handed over to the Foreign State, and the administration thereof voluntarily abandoned by the British Executive, the jurisdiction of the British Courts ceases "*ipso facto*." Whom are they to address their suits and processes to? If the Court exercises jurisdiction and sells the land, the Court is bound under s. 263 of the Procedure Code to place the purchaser in possession by ejecting the defendant or any person holding for him. The distinction between "*de facto*" and mere "*de jure*" sovereignty in its effect on allegiance is pointed out in *Calvin's case* (2). But when a "*de facto*" government is recognised by the Executive, I submit that it is no longer open to the Municipal Courts of the State which has so recognised it to enter into the [5] question whether it is or is not "*de jure*" owner of the domain of which it has been so recognised to be the Sovereign. That peaceable and undisputed possession is a good title in international law apart from lapse of time or prescription in-expressly stated by Phillimore in his Treaties on International Law. It is not, however, necessary to rest upon this, for there is a good and valid cession "*de jure*." [Mr. *Evans* then referred to the despatches of the Secretary of State for India, and the evidence of transfer, and to the argument in the *Bhaunagar Case* (3) and the cases there cited, and to the Charters and Acts relating to the East India Company which are fully referred to in the judgment.]

The result would appear to be that according to the theory of English law, the whole contractual power of the State and the powers of gift and acceptance are vested solely in the Crown. This cession appearing to be authorised by the Crown, it lies on those who say it is *ultra vires* of the Crown to show how the power of the Crown has been limited or cut down. The effort to do this on the part of the respondents in the *Bhaunagar case* failed completely. The proposition that the Crown could not cede in

(1) Misc. R. A. No. 1384 of 1862, decided the 1st November, 1862.
(2) Coke's Reports.
(3) 1 B. 367.

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time of peace without the consent of Parliament is not sustainable. There is not even a single dictum in any text-writer on English Constitutional Law to be found in favour of it, and there are instances in which such cessions have been made, but no instances in which the consent of Parliament was asked. But even if the power to cede were exerciseable only at the close of a war, the cession would be good, for it was made after and in consequence of the Indian Mutiny as a reward for faithful assistance rendered at that crisis.

The proposition that the Crown could not cede territory which had been legislated for without such consent is equally devoid of authority and equally opposed to precedent. In addition to the case of Bencoolen there is the cession of Nawabganj in exchange for Handia. This is a case directly in point, for Nawabganj was part of the district of Gorakhpur ceded to the British in 1801 by the same treaty by which these 19 villages were ceded. In 1803 no less than 50 Regulations were passed giving a complete system of laws and institutions and establishing Courts in these districts. [6] Nawabganj was subsequently ceded to the Nawab of Oudh in the time of peace and became part of his kingdom. Yet it never occurred to any one that the process of any British Court would run in that part of Oudh between the date of that cession and the time when the kingdom of Oudh was finally annexed and made British territory. Chinsurah and Chandernagore were legislated for before cession.

If the general right of the Crown to cede territory in other portions of its dominions were not so clear as it is, it might well be contended that the Crown possessed that power in India. For that power has been exercised from time immemorial by the Sovereigns whom we have succeeded. It was exercised for about a century by the East India Company as delegate of the Crown without question, and was freely exercised by the Crown immediately after it took over the direct government of India, and was never challenged till the *Bhaunagar Case.*

That case was very different to this. In that case there was undoubted jurisdiction when the suit was filed. There was no evidence of any actual delivery of possession to any State. The question was whether a certain document or documents had the effect of validly ceding British territory, and it was decided that, as the documents did not purport to cede territory, they formed no bar to the prosecution of the suit.

It has been well remarked by Sir Henry Maine in an unpublished note on the subject, "that if European principles are to be applied to the interpretation of the relations between the Indian Government and the Native Chiefs, they must rather be the principles of the Law of Nations than those of English Municipal Law. International Law has 'modes of international acquisition' which are set forth in the text-books, *e.g.*, Phillimore, vol. i, pp. 255, 315, but following Roman Law it regards documents, not as modes of acquisition, but as evidence of acquisition. Strictly speaking, alienation is effected by delivery of possession (*traditio*) and acceptance." It makes no difference that the cession is by sanad and kharita and not by a treaty. The engagements are just as valid and the form usual in India. As to the term "jaghir" the grant of the Diwan to the East India Company was in the instrument of [7] grant termed a jaghir. The history of India in the time of the later Mughal Emperors is full of cases of persons really independent—bearing titles indicative of independence.

Here there has been complete delivery of possession followed by long and peaceable enjoyment. The gift or cession appears to have been made

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by a competent donor and accepted by a competent donee, 18 years ago. The transaction being one between States in their political capacity, if the donor wished to resume the gift as invalid, no Municipal Court could take cognizance of the claim. War is the litigation of States, and the only mode of trial is the wager of battle. But neither the donor nor donee is dissatisfied with the transaction.

The cession would appear to be an act of State done by that power in the State to which the performance of such acts is ordinarily intrusted by the nation, and if this once becomes apparent, the Court will not examine further into the matter. The plaintiff in this case is a British subject who took a mortgage of the villages 10 years after the cession, while they were "*de facto*" part of the Rampur State and administered to by Rampur officials. He now argues that the cession is invalid and that this Court has jurisdiction to deal with the land. I submit that the "*de facto*" cession pleaded and proved by the defendant is a good plea in bar of suit so far as it relates to these 19 villages, and that the question of the original validity of the cession does not arise. But as the question has been raised, I further submit that the cession was and is a clearly good and valid cession of territory in form as well as in substance, and that there exists no grounds for questioning it.

Mr. *Conlan.*—Admitting that there has been a cession of the villages in dispute to the Nawab of Rampur, it was a cession by mere grant and not a cession in full sovereignty, and not only was it a cession by mere grant, but the grant was conditional. The sanad for the villages stated that they were "bestowed" on the Nawab on the same conditions as those on which he holds his old territory. His old territory is held by the Nawab in "Jaghir" that is to say, subject to his obedience and fidelity to the Paramount Power and to the right of the Paramount Power to resume the territory if it so pleases (art. 4 of Engagement No. IV relating to the [8] State of Rampur, Aitchison's Treaties, ed. by Talbot, vol. ii, p. 9; arts. 2 and 4 of Engagement No. V, *ibid.*, vol. ii, pp. 10, 11; art. 2 of Engagement, dated the 30th December, 1794, *ibid*, vol. ii, p. 13; the deed of acknowledgment, dated the 30th December, 1794, *ibid.*, vol ii, p. 15; agreement dated the 21st August, 1840, *ibid.*, vol. ii. p. 18; agreement dated the 10th April, 1855, *ibid.*, vol. ii, p. 19; and art. 2 of agreement with the Nawab Wazir of Oudh dated the 19th September, 1781, *ibid.*, vol, ii, p. 81.) Where territory has been ceded in full sovereignty it is expressed to be so ceded—see sanads given to the Rajas of Jheend and Nabha on the 5th May, 1860, Aitchison's Treaties, ed. by Talbot. vol. vi, pp. 82, 87. Where, too, a cession in full sovereignty is made, it is made by "the Viceroy and Governor-General"—see the same sanads—and not by "Government"—see the sanad for the villages in dispute. The validity of a mere grant of territory, and of a grant not in full sovereignty, cannot be determined with reference to the principles of international law. The cession in this case was not made by the Crown. The consent of the Crown was not asked for, and no direct sanction was given by the Crown. The power to cede territory in India in the time of peace is vested in Parliament. It is true that by Letters Patent granted by Geo. II, to the East India Company, bearing date the 14th January, 1758, the East India Company were empowered to make treaties of peace and cessions of territory, but the Charters granted by the Crown have always been confirmed by Parliament—see the Act 53, Geo. III., c. 155. Moreover, all the rights and interests possessed by the Company were placed by it at the disposal of Parliament—see preamble to the Act 3 and 4 Wm. IV, c. 85. From the passing of

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that Act up to the time of the mutiny there have been no important cessions of territory in India in the time of peace by the Governor-General. The instances of such cessions referred to by Mr. Fitzjames Stephen in the *Bhaunagar Case* (1) occurred, with two exceptions, before the passing of that Act. The two excepted instances occurred in 1846 and in 1856 respectively, and in one instance the territory ceded was conquered shortly before its cession. That the power to cede territory in India is vested in Parliament appears also from the provisions of [9] s. 49 of the Act 24 and 25 Vic., c. 85. It is there enacted that the boundary of any province or territory cannot be altered by the Governor-General without the sanction of Her Majesty.

Where the Crown has ceded territory in the time of peace it will be found that it has done so with reference to a treaty of peace. Treaties of peace are entered into in pursuance of negotiations, and for obvious reasons, it is important that such negotiations should be concluded as quickly as possible. The nation has therefore conferred on its supreme executive the right of making treaties of peace, and where such right exists, the right of ceding territory follows as a consequence. But where there is no treaty, there is no right of cession. A cession of territory by the Crown in time of peace without reference to a treaty is beyond its prerogative—Forsyth Const. Law, p. 182. The cession in this case was made off-hand, in the time of peace and without reference to a treaty, in the belief that it would pass unquestioned, and is invalid. A cession of territory by mere grant, and that a conditional grant, cannot release the inhabitants of such territory from their allegiance, and unless a cession of territory does release its inhabitants from their allegiance, it is invalid—Forsyth, Const. Law, p. 186.

The Court (TURNER, O. C. J., PEARSON, J., and OLDFIELD, J.,) delivered the following

JUDGMENT.

On the 22nd June, 1871, the plaintiff, a banker at Bareilly, advanced to the defendant Rs. 1,20,000, to bear interest at one per cent. per mensem, and with the following stipulations: that whatever interest might remain due at the end of each year should be added to the principal and bear interest at the rate agreed; and that, in the event of the plaintiff finding it necessary to resort to legal proceedings for the recovery of any sum due to him, the debt should, even after decree, bear interest at the rate agreed. As security for the loan, the defendant mortgaged a large number of villages. Default having been made in the payment of principal and interest, the plaintiff on the 15th September, 1876, instituted this suit to recover Rs. 2,17,402-8-0, due in respect of principal and interest up to the date of suit and future interest at the rate agreed, by bringing to sale the estates mortgaged.

[10] The defendant admitted the execution of the mortgage-deed and the receipt of the consideration; he also admitted that no moneys had been paid in respect of principal or interest; but he pleaded that the stipulation for the payment of compound interest was a penal provision which the Court was not bound to enforce; and that the stipulation for the payment of interest after decree at the rate of 12 per cent. was inoperative, in that it could not oust the discretion of the Court to award interest on the sum decreed at such rate as the Court might think proper. The defendant also

(1) 1 B. 367=3 I. A. 102.

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pleaded that, of the estates mortgaged, nineteen were not within the North-Western Provinces nor within British India, but were within the territory of a Foreign Prince, having been ceded to His Highness the Nawab of Rampur, and that the Court had no jurisdiction to order the sale of these estates.

The plaintiff contended that he was entitled to interest at the rate agreed, and that the estates to which the last plea referred were from of old and still continued to be British territory; that the alleged cession conferred on the Nawab merely the right to receive the public revenue assessed on the estate and not territory in sovereignty; that the Nawab was not competent to accept territory in sovereignty; and that territory in British India could not be ceded without the consent of Parliament, which consent had not been obtained.

Seeing that the issue relating to jurisdiction raised important questions of law, this Court, with the consent of the parties, called the case up to its own file for trial.

Inasmuch as the claim affects estates admittedly within the jurisdiction of the Courts of Bareilly, as well as estates which are alleged to be outside the area of the territorial jurisdiction of those Courts, we must dispose first of the issues relating to interest. (After disposing of these issues the judgment proceeded as follows): We find that the plaintiff is entitled to recover Rs. 1,20,000 principal and Rs. 97,402-8-2 interest up to date of suit, and interest on the whole debt, Rs. 2,17,402-8-0, at the rate of 12 per cent. from the institution of the suit until realisation.

It remains for us to determine whether, for the satisfaction of the amount due or to become due, the Courts of Bareilly would be [11] competent to order the sale as well of the estates which lie within the territory alleged to have been ceded to the Nawab of Rampur as of the estates which admittedly still remain in the District of Bareilly.

The Nawab Mahomed Yusuf Ali Khan Bahadur, having rendered conspicuous services to the British Government during the mutiny, it was determined to confer on him a substantial reward. It was at first proposed to make over to him the pargana of Kashipur adjoining Rampur on the north-west, but bounded on three sides by British territory. The inconvenience of the existence of a "Foreign State" in the midst of British territory was pointed out to the Government of India by the Lieutenant-Governor, North-Western Provinces, on the 20th January, 1860; and for this and other reasons it was suggested that, in substitution for Kashipur the Nawab should receive certain villages in the District of Bareilly, which had once formed part of the Rampur territory and had been taken from it at the close of the last century, and also certain villages in the District of Moradabad. These proposals were sanctioned, and Mr. Inglis, the Collector of Bareilly, in the early part of the year 1860, gave possession to the Nawab's agents of the villages in Bareilly, and among them, of the nineteen villages before mentioned. The revenue records were at the same time delivered to the Nawab's representatives, and "proclamation of the change was made throughout the whole of the assigned tract." On the 19th May, 1860, the Government, North-Western Provinces, reported Mr. Inglis' proceedings to the Government of India, and on the 23rd June, 1860, a Sanad was executed by the order of the Viceroy and Governor-General in the following terms:

"Whereas Furzund Dil Pizeer Nawab Mahomed Yusuf Ali Khan Bahadur Nawab of Rampur, exhibited from the commencement of the rebellion to the end his unswerving loyalty to the British Government by

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affording personal and pecuniary aid, protecting the lives of Christians and rendering other good services, to the satisfaction of Government, the Nawab has already been thanked, a killat of distinction has been conferred upon him, the number of his salute guns has been increased, and an addition has been made to his titles. In further recognition of his services the Government hereby bestows on him the villages in Bareilly and Moradabad as per separate schedules, assessed at Rs. 1,28,527-4-0, in perpetuity, from generation to generation. The above villages are now annexed to the old territory of the Nawab on the same conditions on which he holds that territory."

[12] The names of the nineteen villages appear in the schedule entitled "List of villages situated in Bareilly."

The transfer of the villages to the Nawab excited the apprehensions of the zamindars, who petitioned the Government of India that, on the expiry of the settlement, their proprietary right might be maintained. The substance of the petition having been communicated by the Lieutenant-Governor to the Nawab, His Highness addressed a kharita to the Lieutenant-Governor, in which, referring to the confident hope expressed by the Lieutenant-Governor that he (the Nawab) would not fail to consider the rightful claims of the petitioners, the Nawab assured His Honour that, if it pleased the Almighty, the rights of these petitioners, as well as of others in the same situation, would be duly respected and regarded, inasmuch as he had in his administration made a point of governing his subjects on the recognised principles of equity and justice which obtained under the British rule.

On the 7th March, 1862, a despatch was addressed by the Secretary of State to the Governor-General, of which the following paragraphs are material:—

"(i) I have received and considered in Council your letter, dated 22nd June, 1861, relative to the substitution, with the consent of the Nawab of Rampur, of villages amounting in value to Rs. 1,28,500 for the pargana of Kashipur as the reward of his services during the recent disturbances.

"(iii) I learn...........with much satisfaction that the Nawab has freely and willingly consented to accept villages in the Bareilly and Moradabad districts yielding about Rs. 1,28,000, in lieu of the Kashipur pargana, which he is stated to have estimated as prospectively worth to him two lakhs of rupees per annum.

"(iv) Among the papers submitted with your despatches is a memorial of some of the proprietors of the transferred estates, setting forth in temperate language objections which must be admitted to be far from unreasonable to the arrangement you have made.

"(v) The transfer to a Native State of villages which have been long under British administration, and formed part of one Regulation Province, is always objectionable. I observe that all these villages which have been transferred to the Nawab of Rampur by the present arrangement have ever since our acquisition of Rohilkhand belonged to the District either of Bareilly or Moradabad. They appear to be all held direct from Government, their respective proprietors being the sudder malguzars paying their revenue to the Collector without the intervention of any talukdar.

[13] "(vi) The Nawab must understand that in those villages, all that he acquires by the transfer is the right to collect and appropriate the assessed revenue, the amount of which cannot be increased during the

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period of existing engagements; and that, after the expiration of the present settlement, the proprietors will be entitled to re-assessment with the Nawab on the same principles as are accorded by your officers to the villages similarly circumstanced in the district from which they are unwillingly transferred.

"(vii) I am glad to observe that you have directed that the Nawab be informed that you expect him to respect existing rights and tenures. I am of opinion that a stipulation to this effect should be inserted in the sanad of grants which I request may be done, and that a copy of the sanad may be forwarded for my information."

The Government of India, having received from the Nawab the kharita above mentioned, considered it unnecessary to alter the sanad which had been already executed. Replying to the despatch of the Government of India on this subject, the Secretary of State, in a despatch dated 9th February, 1863, observed:

"Her Majesty's Government regret that, in the original grants transferring the several tracts of country, no words were introduced for the maintenance of existing rights in the land; they do not wish you to adopt any other measures for the furtherance of the object in view than such as may be resorted to without giving offence to the respective Chiefs or exciting mistrust in their minds."

It was subsequently discovered that, owing to similarity of names, an error had occurred in the assessment of villages. To rectify this error, it was proposed that the Nawab should re-transfer to the British Government Piparia and Chakarpur, but should remain in possession as *muafidar* of these villages, which should be subject to the Civil, Criminal and Revenue Regulations in force in British territory; and that in exchange for Piparia and Chakarpur, in Serouli, he should receive Piparia and Bhikampur in pargana Chowmehla. The Nawab assented to these terms in a *khut*, dated 22nd March, 1864, and the arrangement was communicated to the Secretary of State. In a despatch, dated 7th November, 1864, the Secretary of State approved the alterations that had been made; and observed that "the instructions of Government that territory yielding an annual revenue of between Rs. 1,28,000 to Rs. 1,29,000 be made over to the Nawab in exchange for the pargana of Kashipur were fulfilled." The despatch continues:

[14] "Under these new arrangements, the Nawab will continue to hold, but only as *muafidar* and subject to British Civil, Criminal, and Revenue Regulations, Piparia and Chakarpur (worth Rs. 1681) lately made over to him, in full sovereignty, under a misapprehension that they were identical with two villages of the same name........(iv) Her Majesty's Government are gratified that the Nawab should have again complied with your request involving a small loss to him of revenue and diminution of his jurisdiction. A communication to this effect should be made to His Highness."

From the year 1860, when Mr. Inglis gave possession to the Nawab, up to the present time, it has not been shown that the British authorities have exercised any administrative or judicial functions in the villages transferred. On the other hand, it is shown that in November, 1862, the Sadr Diwani Adalat, North-Western Provinces, refused to disturb an order of the Judge of Bareilly declining to issue process in execution of a decree of the Privy Council against certain estates of the defendant in this suit, on the ground that they had been transferred from British territory to that of

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the Nawab of Rampur (1). It has not been denied on the part of the plaintiff that, from the date above mentioned, administrative and judicial functions have been exercised in the transferred villages under no authority than that of the Nawab.

The document to which we have referred and the admitted facts leave no room for doubt that there has been not merely an assignment of revenue but a transfer of territory. We assent to the argument that in such arrangements we are not to look to documents as operating by their own force to transfer sovereignty—Kent's Commentaries, 10th ed., vol. i, s. 177. We are to look to what was done ; though we may consider the language of documents as evidence of what was intended to be done. The circumstance that the arrangement was recorded in a sanad is not incompatible with a cession. It is not inconsistent with usage in this country that a grant of sovereignty or territory by the Paramount Power to a Feudatory should be expressed in a sanad. The East India Company in 1818 entered into a treaty [15] with the Nawab of Bhopal, whereby it was stipulated that the Nawab and his successors, although bound to act in co-operation with the British Government and to acknowledge its supremacy, should remain absolute rulers of their country—Aitchison's Treaties, ed., by Talbot, vol. iii, 370 ; yet when, as the reward for services in the mutiny, pargana Bairsea was granted to the Bhopal State in sovereignty, the grant was expressed in a sanad—Aitchison's Treaties, ed. by Talbot, vol. iii, 374. So also, treaties had been made with Holkar in 1805 and 1818, but when in 1844 the *guddee* became vacant, intimation of the bestowal of the principality on Maharajah Tookajee and the heirs of his body lawfully begotten was conveyed to him by sanad. Pattiala is the largest of the Sikh States. In recognition of the assistance rendered by the Maharajah during the Nepal war, portions of the Keonthul and Bughut States were conferred on him and his heirs for ever by sanad, dated 20th October, 1815. At the close of the Sikh war, the Maharajah received a sanad, dated 22nd September, 1847, recognising him as entitled to continue in possession of his ancient hereditary estates with all Government rights thereto belonging, of police jurisdiction and collection of revenue, free from any demand of tribute or revenue on the part of the British Government, and it was declared that his chaharumains, feudatories, adherents and dependents would continue bound in their adherence and obligation to the Maharajah as theretofore. Again, in 1860, the British Government gave additional territory to Pattiala, and by sanad declared that His Highness the Maharajah and his heirs for ever, should exercise full sovereignty over his ancestral and acquired domains—Aitchison's Treaties, ed. by Talbot, vol. vi, pp. 65-69.

Nor is it inconsistent with a cession of sovereignty that it should be accompanied by conditions for the benefit of the inhabitants of the ceded territory. Gibraltar and Minorca were ceded to the English in 1713, on condition that the Spanish inhabitants should enjoy their estates and religion—Smollett, vol. ii, p. 97. Upper Assam was, in 1833, ceded to Raja Poorunder Singh, subject to the payment of an annual tribute, the Maharajah binding himself in the administration of justice to abstain from torture and barbarous punishments which had been practised by former Rajas of Assam.

[16] The sixth paragraph of the despatch of the 2nd March 1862, above quoted, must be read with the other despatches we have cited, and

(1) Misc. R. A. No. 1384 of 1862, decided the 1st November, 1862.

indeed is explained by the seventh paragraph. The cession to the Nawab was to be accompanied by the stipulation that he was to respect existing rights and tenures. This condition would not, as we have shown, be inconsistent with the cession of territory in sovereignty, and the despatch of the 7th November, 1864, states distinctly that the territory granted had been made over to the Nawab in full sovereignty.

The sanad, as we have said, declares that the territory granted "is annexed to the old territory of the Nawab, to be held on the same conditions as those on which he holds that territory." Unless it can be shown that the old territory is held on conditions incompatible with sovereignty, it does not admit of dispute that the territory made over to the Nawab in 1860 was ceded in sovereignty.

In the course of his address, Mr. Evans conceded that a cession of territory, with rights of sovereignty, could not be made to a mere subject, and therefore the learned counsel for the defendant raised the question as to the status of the Nawab. The Nawab, holding in 1860 no other territory than Rampur, the question as to his status is involved in the conclusion at which we may arrive as to the conditions on which the old territory was held. In determining it, we must not be taken to assent to the learned counsel's position without some qualification. In Coke's Inst., Bk. iv, c. 71, it is mentioned that Henry VI crowned the Earl of Warwick King of Wight: but it is added "we could never find any Letters Patent for this creation, because, as some do hold, the King could not by law create him a King within his own Kingdom, because there cannot be two Kings of the same place in one Kingdom." Counties Palatine were, however, created within the realm of England, and bestowed on subjects, and in its foreign dependencies the Crown of England has granted to subjects what have been termed proprietary governments "in the nature of feudatory principalities with all the inferior regalities and subordinate powers of legislations."—Broom and Hadley's Commentaries, vol. i, p. 124. Pennsylvania, Delaware, Maryland, and Barbadoes, are cited as instances, and to these may be added Bombay, granted by Charles II in 1669, and **[17]** St. Helena, granted by the same King in 1674, to the East India Company. The Governments established by Charter, of which we have had examples in British India, are also instances of the grant by the Sovereign of subordinate sovereignty to private persons, and the history of this country under native rule would, we apprehend, furnish precedents establishing the right of the Paramount Power to elevate subjects to the rank of Feudatories and to assign to them territories. We are, however, relieved of the necessity of determining this point by the conclusion at which we have arrived as to the status of the Nawab.

The case of *The Charkieh* (1) was cited by Mr. Evans as authorizing a Court to consult histories, firmans, treaties, and even replies from the Foreign Office for the elucidation of such questions. The Evidence Act, s. 57, requires Courts in this country to take judicial notice of (*inter alia*) the existence.........of every State or Sovereign recognized by the British Crown, and declares that in such cases and in all matters of public history, the Court may resort for its aid to appropriate books or documents of reference. From such sources, and mainly from the collection of treaties originally published by Mr. Aitchison, the Secretary to the Government of India in the Foreign Department, we have ascertained the following particulars respecting the State of Rampur, and its ruler.

(1) L. R. 4 A. and E. 59.

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His Highness the Nawab of Rampur claims descent from a Rohilla Chief, Ali Mahomed, who, having rendered service to the Emperor of Delhi in the suppression of the Bara Syuds, received the title of Nawab and a grant of a large territory in Rohilkhand. Owing to intrigues on the part of the Nawab of Oudh, Ali Mahomed was for a time deprived of his territory by Mahomed Shah. But taking advantage of the weakness of the Delhi ruler, Ali Mahomed regained the territory that had been assigned to him, and was confirmed in his possession by the son and successor of Mahomed Shah. In the absence of his elder son detained as a hostage at Delhi, and during the minority of his younger son, Ali Mahomed intrusted his territories to Hafiz Rahmat Khan and Dudi Khan; and on the 13th June, 1872, Hafiz Rahmat Khan [18] and the other Rohilla Chiefs by treaty entered into an offensive and defensive alliance with the Nawab Wazir Shujah-ul-dowla. On the division of Ali Mahomed's territory among his sons the Jaghir of Rampur fell to Faizullah Khan. The Nawab Wazir shortly afterwards declared war with the Rohillas, and with the assistance of troops of the East India Company, furnished by Warren Hastings, the Sirdars were defeated and forced to sue for peace.

By a treaty to which Colonel Champion, the Commander of the Company's forces, was a party, the Nawab Wazir agreed to give Faizullah Khan the country of Rampur, and some other districts dependent thereupon, producing an annual revenue of Rs. 14,75,000: while Faizullah undertook to continue in submission and obedience to the Nawab Wazir, to retain in service no more than 5,000 troops to furnish 3,000 troops to the Nawab if and when required, to enter into no relations with any other power save the Nawab, nor to hold correspondence with any save the Nawab, the English Chiefs excepted. By an agreement dated September 19th, 1781, which recited that by his breach of treaty Faizullah Khan had forfeited the protection of the British Government, and caused by his continuance in his present independent state great alarm and detriment to the Nawab, the Governor-General permitted the Nawab to resume his lands and pay him in money the amount stipulated by the treaty, after deducting the charges, he stood engaged by treaty to furnish. This resumption was not, however, effected. In 1783, Major William Palmer, acting on behalf of the Nawab and " the gentlemen," in consideration of the payment of fifteen lakhs of rupees, released the Nawab Faizullah Khan from the obligation to supply the force of 3,000 men stipulated by the treaty, and in other respects affirm the treaty. On the death of Faizullah, Gholam Mahomed Khan murdered his elder brother Mahomed Ali Khan and usurped the Jaghir. The Nawab intervened and being assisted by the British compelled the Rohillas, who had taken up arms to support Gholam Mahomed, to accept terms. What remained of the treasure of the Nawab Faizullah was given over in deposit to the Company. The Nawab Wazir Ausuf ul-Dowla in December, 1794, by sanad granted to Ahmad Ali Khan, the town of Rampur, producing a revenue of Rupees 10,00,000, and received [19] from him that treasure deposited with the Company, amounting to Rs. 3,22,000 gold mohars, as a *nazarana* for the jaghir and in lieu of all rights of confiscation of the property of the Nawab Faizullah Khan and Mahomed Ali Khan. The East India Company was a párty to, and guaranteed the performance of, these engagements. In 1801 the Nawab Wazir ceded to the East India Company several provinces and, among others, the territory since known as Rohilkhand. No mention of Rampur is made in this treaty; whereas the paramount sovereignty over Farukhabad and its dependencies, which

paid an annual tribute of Rs. 4,50,001, is ceded in the following terms: "Farukhabad and others, Rs. 4,50,001."

It may be noticed that by another treaty made in 1802, the Nawab of Farukhabad ceded the province of Farukhabad and its dependencies to the East India Company in full sovereignty. Rampur, it must be remembered, paid no annual tribute, and possibly on this account was not mentioned in the treaty of 1801. By Regulation XI of 1804, s. 22, certain specified articles exempted from export duty when exported to the territory of the Nawab Wazir, were also exempted from the same duty when exported from the Ceded Provinces to "the territory composing the Jaghir of Rampur;" and in Regulation IX of 1810 the same provision was re-enacted, and it was declared that all goods and articles of trade imported into the Province of Rohilkhand from Rampur Jaghir, being of the description of goods and articles of trade which were liable to the payment of Government customs under that Regulation, should be subject to the payment of the same import duties to which the same goods and articles of trade were subject on importation from the dominions of the Nawab Wazir. These provisions were cited by Mr. Evans to show that the territory of the Jaghir of Rampur was regarded as foreign territory, and on the same footing in respect of trade as the dominions of the Nawab Wazir.

In 1839, the Nawab Ahmad Ali Khan died. The claims of his daughter were set aside, and his cousin Mahomed Syed Khan, having been admitted to the succession, executed an agreement in the form not unusually employed by feudatories, dated 21st August, 1840. It commences as follows: "Agreeably to the orders of the [20] Governor-General, the Government of Rampur having devolved on me, I therefore declare that all matters connected with my rule shall be conducted with a view to maintain justice, &c., &c.

From this document, it appears that the Nawab recognized the British Government as having acquired the paramount rights of the Nawab Wazir over the Jaghir of Rampur.

In 1855, Nawab Mahomed Syed Khan was succeeded by his son Nawab Mahomed Yusuf Ali Khan, who, acknowledging that his succession had been sanctioned by the British Government, also executed an agreement declaring he would administer the affairs of the Jaghir with justice and equity, and would govern the Pathans with consideration.

In 1862, the Nawab received from the Government a sanad in the following terms, which are identical with the terms of a similar instrument given on the same occasion to the Nizam and other Feudatory Princes:

"Her Majesty being desirous that the Governments of the several Princes and Chiefs of India who now govern their own territories should be perpetuated, and that the representation and dignity of their houses should be continued, I hereby, in fulfilment of this desire, convey to you the assurance that, on failure of natural heirs, any succession to the government of your State which may be legitimate according to Mahomedan Law will be upheld. Be assured that nothing shall disturb the engagement thus made to you so long as your house is loyal to the Crown and faithful to the conditions of the treaties, grants, or engagements which record its obligations to the British Government."

In 1864, certain lands lying within the territory of Rampur, and it is stated at the bar, also lying within two of the transferred villages, were required for the purpose of constructing a railroad. The Nawab, in answer to enquiries addressed to him by the Government, North-Western Provinces, replied that he would give up the lands required in full sovereignty,

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and that duties should not be levied on goods in transit through his territories, but only on goods imported and exposed for sale in his markets.

In 1865, His Highness Nawab Mahomed Kulb Ali Khan Bahadur, on succeeding to the Jaghir, executed an agreement in nearly the same words and to the same effect as the agreement executed by his predecessor in 1855.

[21] Mr. Aitchison estimates the area of Rampur at 1,140 square miles with a population of 507, 103 souls. No tribute is paid to the British Government. The Nawab maintains a force of 315 artillery with 28 guns, 505 cavalry, and 977 infantry. He has also a police force of 1,023 men, and regularly constituted Court for the administration of justice.

The facts to which we have adverted show that the ancestors of the Nawab of Rampur were admitted to treaty engagements with the Nawab Wazir, when that Prince was in all but name independent; that they and His Highness the present Nawab have been recognized by the British Government as in possession of such powers of sovereignty as are enjoyed by the Feudatories of the Empire, and that the State of Rampur has been held by them subject indeed to the extraordinary control of the Paramount Power but otherwise independent.

The learned counsel for the plaintiff contended that such sovereignty was inconsistent with the name "jaghir," which we have seen was applied to the territory before the cession of Rohilkhand, and has since been retained. The etymology of the term is not inconsistent with the sovereignty enjoyed by a Feudatory, though it may be admitted that the term is applied more frequently to tenures which do not partake of sovereignty; but as were declared in *Calvin's Case*, *sæpenumero ubi proprietas verborum attenditur sensus veritatis amittitur*. The circumstances of India in the 18th century were such that the names of forms of government or rulers would afford little indication of their actual sovereignty or attributes. "The conquered rajahs or the appointed subadars, though still professing themselves dependent, had ceased to pay any real obedience or submission to the Mughal. In this distinction between nominal and substantial authority, the state of India might be not inaptly compared to the state at the same period of Germany. According to the ancient forms, the Princes who had long since become independent of the German Emperor, nay who were sometimes hostile to him, still continued in name the humblest of vassals."—Lord Mahon, History of England, vol. iv, 427. It would be more than ordinarily dangerous to accept the denomination acquired by a State or a ruler at such a period as affording any certain test of status.

[22] The learned counsel who represented the Government went on to argue that, if the Court arrived at the conclusion there had been an actual cession and occupation of territory by a foreign Sovereign, the Court need go no further. We understood him to contend that a *de facto* occupation of territory by a foreign Sovereign of itself ousted the jurisdiction of the territorial Courts, and much more so if the occupation had been acquired peaceably and with the acquiescence of the territorial authorities. In support of his argument the learned counsel relied on the rule that persons born during the hostile occupation of territory by a foreign prince are subjects of the foreign prince. It is, however, a condition of this rule that the persons so born should be born of parents

who are in obedience, and not hostile to, the foreign power—*Craw* v. *Ramsay* (1), cited in Forsyth's Constitutional Law, p. 340. "There are three incidents to a subject born: first, that the parents be under the actual obedience of the King; second, that the place of his birth be within the King's dominion; and third, the time of his birth"—*Calvin's Case*, cited in Wheaton, Int. Law, Lawrence's 2nd annotated ed., p. 895. The *de facto* occupation of territory is sufficient for the purpose of constituting allegiance by birth if the parents are in obedience to the power in occupation; but if the parents are not so subject, but hostile, we apprehend the allegiance would be due to the *de jure* prince of the territory. It, however, appears to us that no conclusion can be drawn as to the question before us from the peculiar rules which determine allegiance. The jurisdiction of Courts is not ousted by the inability or the unwillingness of the Executive to assist in the execution of process. The French Courts did not lose their jurisdiction in the territories occupied by the German Army during the late Franco Prussian War by the mere fact of foreign occupation. Nor would such jurisdiction necessarily be lost if for a season a foreign power was allowed peaceably to occupy territory. At the same time in this, as in other matters, the Courts of Justice would be guided by principles recognized in Municipal Law. They would, we apprehend, infer from a long occupation of territory peaceably enjoyed by a foreign power that there had been a valid cession or such acquiescence as would amount to a valid cession. They could [23] not, however, draw such inferences from an occupation of a few years, although it had been acquired without the exercise of hostile force and peaceably enjoyed.

We must then proceed to determine whether the transfer was made by authority competent to make a cession. It is contended by the learned counsel for the plaintiff that a valid cession of British territory cannot be made without the sanction of Parliament. On this point it was admitted at the bar that little could be added to the exhaustive arguments of Sir Vernon Harcourt, Sir Fitzjames Stephen, and Mr. Forsyth before the Privy Council at the hearing of *Damodhar Gordhan* v. *Deoram Kanji* (2), known as the *Bhaunagar Case* and to the observations of the eminent Judges, who, although they did not eventually decide the point, intimated with some distinctness their opinions on the arguments advanced.

It is held by jurists that the authority competent to bind the nation by treaty may alienate the public domain and property by treaty—Kent's Commentaries, 10th ed., vol. i, ss. 165, 166; Wheaton, Int. Law, Lawrence's 2nd annotated ed., pp. 457, 873; and although the opinions of Grotius and Puffendorf differ from the opinion of Vattel on the point, the Lord Chancellor appears to prefer the opinion of the latter writer, that there is no presumption against the power of the Sovereign to alienate without the consent of his subjects. It is declared by writers on Constitutional Law and is established by precedent that the Sovereign of Great Britain is the authority to which is committed the power to make treaties. *Il appent tantum a roy fœdus percutere et bellum indicere*—*Calvin's Case*. "To make leagues and alliances belongs to the King only"—Comyn's Digest, Prerogative, Bk. iii; Stephen's Blackstone, vol. ii, p. 503. At a very early period in Parliamentary history, Sovereigns of England consulted the Parliament in reference to questions of peace and war, and in two instances treaties made by the Sovereign were confirmed by Parliament. A league of mutual assistance made by Henry V with the Emperor

(1) Vaughan, p. 281. (2) 1 B. 367.

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Sigismund on the 11th August 1416 was confirmed by Parliament on October 14th, 1416.—Coke's Instit. Bk. iv, c. 26. The treaty of Troyes, whereby England and France were to be united under one King, received the sanction of Parliament on the 21st May 1420—Hallam's [24] Middle Ages, vol. iii, p. 97. The submission of the latter of these treaties to Parliament (and it will be observed that neither was submitted until after it had been concluded by the Crown) may be explained by the circumstances that it dealt with the Crown and territory of England; but it is more probable it was due, as was perhaps also the submission of the former treaty, to the King's consciousness of the weakness of his title to the Crown and to his frequent need of the subsidies over which the Parliament had then established its control. Coke's Instit., Bk. iv, c. 26, states it to have been one of the charges brought by the Commons against the Duke of Suffolk that he had procured the King to have conference with the French Ambassador in his presence only, without any other of the Council. This was in 1450: again in 1529 of the articles exhibited against Cardinal Wolsey, the 2nd and 3rd charged him with infringing the prerogative of the King in negotiating treaties; but on neither of these occasions was complaint made by any invasion of the functions of Parliament. In 1698-1700 William III negotiated and ratified the "Partition" treaties without communicating them to the Privy Council. It is true Lord Somers was impeached for carrying out the King's instructions with regard to these treaties, but the impeachment fell through and the treaties were not disaffirmed. With the exception of the Treaty of Versailles in 1783, no precedents have been produced to show that in modern times the Crown has sought or received the intervention of Parliament in regard to treaties except in those cases in which it has required the action of Parliament to give effect to the treaty. The Treaty of Versailles, as was pointed out in the Privy Council, stands on a peculiar footing. Its object was to conclude a peace with the American Colonies, whose people had been declared by Parliament rebels, with whom no intercourse was to be maintained, and therefore it was necessary that authority to treat should be given by Parliament.

It is argued that the Crown cannot of itself cede territory because it cannot release the inhabitants of the territory from their allegiance. But allegiance is correlative with protection; *mutua debet esse domini et subditi connexio, ita quod quantum debet domino ex homagio tantum debet dominus ex dominio...est reciprocum ligamen, quia sicut subditus tenetur obedire, ita rex regere et protegere*—[25] Glanville cited *Calvin's Case.* When then the Crown withdraws its rule from territory, and consequently no longer affords protection to the inhabitants of the territory, they are free either to continue their allegiance to their former Sovereign, or to transfer it to the Sovereign who succeeds to the territory. Nor is it necessary that allegiance should be transferred by express submission: its transfer may be accomplished by tacit submission; and tacit submission may be inferred from remaining in the territory under the dominion of the succeeding Sovereign and fulfilling the obligations of subject—Forsyth's Constitutional Law, p. 335.

It was shown by the instances cited in the Privy Council that the Crown has without the intervention of Parliament ceded territory. Thus by the Treaty of Breda, in 1667, Nova Scotia, then known as Acadia, was restored to France, and Surinam to Holland. By the Treaty of Ryswick, in 1697, a part of the Hudson's Bay territory was ceded to France. It was also shown by the instance of the cession of Florida in 1793 that a

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cession is not necessarily restricted to territory which has been the subject of conquest or reconquest during the particular war at the end of which it is made.

That the authority to cede enjoyed by the Sovereign is not confined to cessions made to put an end to, or at the close of, war is shown by the instances of the cession of Guadaloupe to Sweden in 1813, and of Sumatra and Bencoolen to the Netherlands in 1824; and we may here observe that Wheaton, in discussing the possession of the rights of cession by the treaty-making authority, admits it to extend to cessions when deemed necessary not for the national safety only, but for "policy."—Wheaton, Int. Law, Lawrence's 2nd annotated ed., p. 873.

It is further shown by the instances of Bencoolen and Florida above mentioned, and of portions of Canada ceded in 1873, that even after Parliament has legislated for a territory, it is competent to the Crown to cede it. As was observed by the Lord Chancellor, the circumstance that territory has been the subject of legislation by Parliament does not take away from the Crown its prerogative of cession. To the instances adduced on this point there may also be added the cession of Nawabganj to the Nawab of Oudh in 1816, inasmuch as that pargana had theretofore formed part of the [26] district of Gorakhpur, and, as such, had been the subject of numerous Regulations enacted under the authority of Parliament.

We are not concerned to inquire whether the Crown can without the authority of Parliament cede any portion of the realm of Great Britain and Ireland. The authorities and precedents cited to the Privy Council, and the observations which fell from the eminent and learned members of the Committee in the course of the argument, appear to establish conclusively the prerogative of the Crown to cede territory which does not form part of the realm of Great Britain and Ireland; but it is also to be inferred that, where the inhabitants of a territory have been admitted to a share in the government through the instrumentality of representative institutions, the Crown lies under a moral obligation to consult them through their representative before it proceeds to make a cession of their territory.

Whatever be the extent of the prerogative of cession enjoyed by the Crown in other of its dominions, it is certainly not more restricted in this country.

It is an axiom of English law that, when dominion is acquired by Great Britain in an infidel country already subject to law, the laws of England do not extend to that country; but the laws of the country are to be observed so far as they are not repugnant to the law of God until they are abrogated, and that, where such laws are rejected, a silent recourse is to be had to natural equity—*Calvin's Case*; *Blankard* v. *Galdy* (1); *Smith* v. *Brown* (2)— precedents the more noteworthy in that they appear to have influenced legislation for India. The Crown of England having acquired by conquest of cession all the sovereignty or the paramount power in this country obtained, with that sovereignty, the prerogative of cession which from the nature of its authority had theretofore been exercised by the paramount power without control. The prerogative so acquired has not been curtailed by any legislation.

Furthermore, even before the complete acquisition of paramount sovereignty in India, the Crown had exercised the prerogative of cession

(1) Salk. 411. (2) Salk. 666.

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by delegation without any intervention or objection on the part of Parliament. By Letters Patent granted in the 13th [27] year of Charles II, April 3rd, 1661, the Company thereby incorporated was authorised for the security and protection of their factories and other places of trade in the East Indies to send ships of war, men, and ammunition, and to appoint commanders over them, and to give commanders authority to *continue or make peace or war* with any prince or people that were not Christians, in any place of their trade, to exact reprisals, and to erect castles and fortifications. By Letters Patent issued in the 20th year of Charles II, March 27th, 1669, the Port and Island of Bombay were granted to the Company to be held in free socage as of the Manor of East Greenwich on payment of an annual rent of £10, in the same manner as Maryland had in 1632 been granted by Charles I to Lord Baltimore, to be held in socage as of the Manor of Windsor, he yielding yearly two Indian arrows. In this Charter it was thought necessary to introduce a distinct declaration that the Company should not alienate the territory thereby granted to any Prince Potentate or State or person except such as should be the subjects and of the allegiance of the King. By the same Letters Patent power was given to the Company and to governors to be appointed by them to retain by force of arms possession of the territory thereby granted, and also of any territory they might therefter acquire in the East Indies.

By Letters Patent granted in the 10th year of William III, September 5th, 1698, the united Company thereby incorporated was empowered to appoint Governors who, under their direction, might raise and muster troops for the defence of their forts, factories, and plantations; and by Letters Patent granted in the 26th year of George II, January 8th, 1753, the Company was empowered to appoint Generals of all the forces belonging to Fort St. George, Bombay, and Fort William respectively, and such Generals were authorised not only to protect by force of arms their respective territories, but upon just cause to invade and destroy the enemies of the same.

But in relation to the question before us by far the most important of the several Charters granted to the Company is the Charter granted by George II in the 31st year of his reign, dated January 14th, 1758. The Letters Patent, after reciting that the Company had been compelled to carry on war against the French [28] and likewise against the Nawab of Bengal and other Princes and Governments in India, and that some of their territories and possessions had been taken by the Nawab and afterwards re-taken, empower the Company by any treaty or treaties of peace made or to be made between them and any of the Indian Princes or Governments to "cede, restore or dispose of any fortresses, districts or territories acquired by conquest from any of the said Indian Princes or Governments," or which should be acquired by conquest in time to come.

It was at the same time provided that the Company should not have any power or authority to cede, restore, or dispose of any settlements, fortresses, districts or territories conquered from the subjects or any European power without the special license and approbation of the Crown.

By the Act 13 Geo. 3, c. 63, known as "The Regulating Act," there was committed to the Governor-General and Council of the Presidency of Fort William superintendence and control over the Presidencies of Bombay, Madras and Bencoolen, and in section 9 it was declared unlawful for the President and Council of the last mentioned Presidencies (except

in the case therein excepted) to make any orders for commencing hostilities or declaring or making war against any Indian Princes or Powers or for negotiating or concluding any treaty of peace or other treaty with any such Indian Princes or Powers without the concord and approbation of the Governor-General and Council, and by the same Act the Governor-General and Council were directed to pay due obedience to all orders they might receive from the Board of Directors.

The Act 24 Geo. 3, c. 25, established a Board of Commissioners for the better government of the territorial possessions of the Kingdom in the East Indies. For this purpose the Board was invested with the superintendence and control over the territories and over the affairs of the Company, and with power to direct all acts, operations and concerns which in any wise related to the civil and military government of the territories. It was also enacted that the Commissioners should be furnished with copies of all despatches received by the Directors of the Company and of all despatches proposed to be sent by the Directors to any of their [29] officers in the East Indies, and that their orders relative thereto should be obeyed by the Directors. The 15th section of the Act empowered the Commissioners, if they considered the subject matter of their deliberations "concerning the levying of war or making of peace or negotiating with any of the Native Princes or States in India" required secrecy, to send secret orders and instructions to the Secret Committee of the Court of Directors, who were thereupon required to transmit them to the respective Governments and Presidencies, and such Governments and Presidencies were required to obey the orders so conveyed to them.

By the 24th section of the same Act the Governor-General and Council of Fort William were prohibited (except in the case thereby excepted), without the express command of the Secret Committee of the Court of Directors, either to declare war or commence hostilities or enter into any treaty for making war against any of the countries, Princes or States in India, or any treaty for guaranteeing the possessions of any countries, Princes or States* * * and in all cases where hostilities should be commenced or treaties made the Governor-General and Council were ordered to communicate the same to the Court of Directors by the most expeditious means they could devise.

These provisions were repealed and again enacted by the Act 33 Geo. 3, c. 52, and with some alterations by the Act 3 and 4 Wm. 4, c. 85. From 1734 then up to 1858 the power of cession granted by the Charter of George II was exercised by the Company subject to the control of the Board of Commissioners. But before and during that period it was construed as extending not only to territories acquired directly by conquest but also to territories ceded doubtless in many cases as a consequence of conquest: nor were these cessions made only for the purpose of concluding war or rectifying frontiers, but for the promotion of the policy of the Government.

In 1765 the Nawab Wazir was restored to his dominions with the exception of the district of Corah and Allahabad; and among others he received Ghazipur and Benares, of which the Company had obtained a grant from the Emperor.

[30] The districts of Allahabad and Corah were given to the Emperor for the maintenance of his dignity, but on his granting a sanad for Currah and Corah to the Maharattas they were resumed by the Company in 1773 and ceded to the Nawab Wazir. In 1816 the Company, in the name of the British Government, in order to extinguish a debt due by the Government to the Nawab Wazir, ceded to the Nawab the district of

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Khyraghur and the territory then lately conquered from the Ghurkas, and exchanged pargana Nawabganj, part of the district of Gorakhpore, for pargana Handia.

In 1782 the city and pargana of Broach was ceded by the Company to Scindiah, in testimony of the sense entertained of the generous conduct manifested by the Maharajah to the Government of Bombay at Wargaon, and of his humane treatment and release of the British gentlemen who had been delivered to him as hostages on that occasion.

In 1805, at a time of peace, the Company ceded to Scindiah the territories of Gwalior and Gohud, which had been ceded to them by Rajah Umbaji, who had held them as Governor for Scindiah, but had revolted.

In 1806, the Governor-General restored by cession to Raghojee Bhooslah the territories of Sumbulpur and Patna which had been ceded to the Company in 1803.

In 1817 a part of the territory captured from the Rajah of Nipal and ceded to the Company by treaty of peace was ceded in full sovereignty to the Sikimputti Rajah. In 1833 a portion of Assam was ceded to Rajah Poorunder Singh.

It is unnecessary to refer to the other instances cited in argument in the Privy Council. They are all consistent with the opinion we have expressed as to the exercise of the power of cession by the Company; and inasmuch as the Company acted only in virtue of the authority committed to it by the Crown, they establish the exercise by the Crown of the prerogative of cession in this part of its dominions without any limitation, and without any intervention on the part of Parliament. But it is also important to remember that, notwithstanding the Crown permitted the Company to exercise its prerogative of cession in the East Indies, [31] it had not divested itself wholly of the prerogative in respect of its Indian dominions. Chandernagore was captured from the French in 1793, and Chinsurah from the Netherlands in 1795. They were administered by the Company and Regulations passed for the establishments of Courts of Justice—Regulations I and XVI of 1805; II of 1808; and XI of 1809. Chinsurah was restored to the Netherlands in pursuance of the treaty made in London on the 13th August 1814, and Chandernagore was restored to the French in accordance with the stipulations of the treaty made in Paris on the 30th May, 1814. In pursuance of the treaty signed at Kiel on January 14th, 1814, the town of Serampore and its settlements were restored to the King of Denmark.

In 1824 Bencoolen and the English possessions were ceded to the Netherlands in exchange for establishments on the continent of India and the town and fort of Malacca and its dependencies.

This cession is the more noteworthy in that it was immediately brought to the notice of Parliament that the prerogative of cession had been exercised by the Crown. The treaty was concluded on the 17th March, 1824; and on the 24th June, 1824 an Act, 5 Geo. 4, c. 108, was passed transferring to the Company the island of Singapore and all the colonies and possessions ceded to His Majesty by the treaty, to be held on the same conditions and subject to the same restrictions as the factory of Bencoolen and the possessions in the island of Sumatra had been held by the Company immediately before the conclusion of the treaty.

The exercise of the prerogative by the Crown concurrently with the Company is established by these instances.

By Act 16 and 17 Vic., c. 95, the territories administered by the Company were continued under their Government in trust for the Crown,

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and they so remained until 1858, when it was deemed expedient they should be governed by and in the name of Her Majesty. Consequently by Act 21 and 22 Vict., c. 106, it was enacted that the government of the territories then in the possession or under the government of the Company, and all powers in relation to government vested in or exercised by the Company, and all territories in the possession or under the government of the Company, and all rights vested in or which, if the Act had not been passed, might have been exercised by the Company in [32] relation to any territories, should become vested in Her Majesty. The rule of the Company thus came to an end; and the privilege to exercise the prerogative of cession, which the Crown had conceded for the government and protection of the territories administered by the Company, expired when the occasion for it could no more arise.

We find then that the Crown is competent to cede territory in its Indian dominions without the intervention of Parliament. The prerogative of the Crown is exercised with the advice and through the agency of the responsible ministers of the Crown. In the case before us it is shown that the cession of territory to His Highness the Nawab of Rampur was effected by the Government of India, that it was accepted by the Secretary of State as fulfilling instructions conveyed to the Government of India, and that it was approved by Her Majesty's Government. We have then sufficient evidence of a cession by the Crown : and when it is proved that a cession has been so made, it is not for this Court to inquire whether in the particular instance the exercise of the prerogative was called for.

We therefore find that the nineteen villages which fall within the territory transferred to His Highness the Nawab of Rampur had passed by valid cession out of British territory before the institution of this suit, and that the Court in which the suit was instituted had no jurisdiction to order a sale of those villages.

A decree will pass for the sum found due and for the sale of the remaining villages in satisfaction of the debt and interest due up to the date of realisation, if the debt, interest, and such costs as are decreed be not paid into Court within two months after the date of the decree. The claim to bring to sale the nineteen villages in Rampur is dismissed. The plaintiff accepted the security which he now seeks to enforce many years after the territory had been ceded, and could not therefore claim "benevolence" from the British Government. He must, should his security in British territory proved insufficient, pursue his remedy in the Courts of Rampur, and we doubt not he will receive justice. But inasmuch as the defendant was willing to admit the debt (save in respect of a minor item of interest) and the costs, with the exception of [33] the stamp-fee, have been incurred chiefly by reason of the plaintiff's contention regarding the jurisdiction of the Bareilly Court, we order that the plaintiff recover the stamp-fee from the defendant, to be realised in the same manner as the debt and interest: and that, in respect of costs other than the institution-fee, each party shall bear his own costs.

1878
AUG. 15.

APPEL-
LATE
CRIMINAL.

2 A. 33=
3 Ind. Jur.
281.

2 A. 33=3 Ind. Jur. 281.

APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* CHATTAR SING AND OTHERS.*
[15th August, 1878.]

Act XLV of 1860 (*Penal Code*), *s.* 302—*Murder—Sentence—Judgment—Reference to High Court—Act X of* 1872 (*Criminal Procedure Code*), *ss.* 271, 287, 464.

L, *C*, *K*, and *D* conspired to kill *S*. In pursuance of such conspiracy *L* first, and then *C* struck *S* on the head with a *lathi*, and *S* fell to the ground. While *S* was lying on the ground, *K* and *D* struck him on the head with their *lathis*. *Held* (STUART, C. J., *dissenting*) that, inasmuch as *K* and *D* did not commence the attack on *S*, and it was doubtful whether *S* was not dead when they struck him, transportation for life was an adequate punishment for their offence.

Observations by STUART, C. J., on the impropriety of a judicial officer adding a "note" to his judgment in his criminal case impugning the correctness of the conclusion he has arrived at on the evidence in such case.

ON the 6th July, 1878, Mr. G. L. Lang, Sessions Judge of Aligarh, convicted Chattar Singh, Lachman Singh, Kundan Singh, and Dungar Singh, of murder, and sentenced all four persons to death. The Sessions Judge appended the following "note," dated the 10th July, 1878, to his judgment in the case:

"In sending up this case to the High Court for confirmation of the sentence or final orders in the case, I feel bound to express a doubt that has arisen in my mind regarding the complicity of Kundan Singh and Dungar Singh in the actual murder of Shere Singh, a doubt that is not supported by the evidence, but by the probabilities of the case.

"There can be no question that Lachman Singh and Chattar Singh actually killed Shere Singh, and that, the alarm being at once given, they fled for their house. That some endeavour was made to [34] seize the murderers before they reached their home, I gather from the statements of Gulab and Lachman before the police, as given in the police diaries, an English abstract of which is filed with the proceedings.

"It is possible that Kandan and Dungar were close by, and took part in the rescue of Lachman and Chattar, and being seen in their company immediately after the murder were credited with having taken an active share in the murder.

"It is true that the direct evidence of the eye-witnesses is to the effect that all four of the accused struck Shere Singh, but in this country it is no uncommon thing for the most truthful witnesses to add to their evidence somewhat beyond what they actually saw.

"The very fact that the accused are unable to bring a single witness, true or false, to give evidence in their favour, proves how strong the feeling of the village is against them; and it is therefore not impossible that the case against Kundan and Dungar has been somewhat exaggerated, so as to make them appear equally guilty with Lachman and Chattar.

"It is certainly far more probable that, after Shere Singh had been struck down and the alarm raised, Dungar and Kundan should have helped Chattar and Lachman to get away home, than that they should have wasted their time by returning to batter a dying man.

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* Reported under the special orders of the Hon'ble the Chief Justice.

"Although I have heard it stated out of Court that such were the real facts of the case, no evidence is forthcoming to support it, nor indeed could Kundan himself have made this defence without incriminating his brothers, Chattar and Lachman.

"Briefly, as it appears to me possible that the part taken by Dungar and Kundan in this affair may have been somewhat exaggerated, and as it is certain that Shere Singh was actually killed by Lachman and Chattar, I would recommend the revision of the capital sentence in the case of Kundan and Dungar."

Appeals were preferred to the High Court by all four persons.

Mr. *Leach*, for the appellants.

JUDGMENTS.

The Court (STUART, C.J., and OLDFIELD, J.) delivered the following judgments:

[35] STUART, C. J.—In this case the Judge, after stating the opinion of the assessors and recording his own judgment, by which he convicted the whole four prisoners of murder and sentenced them to death, has added to his judgment a "note" by which he endeavours to throw doubts on the conclusion at which he had arrived on the evidence. I feel it my duty to state that, in my opinion, this was a most unwarrantable proceeding on the Judge's part, and that nothing that that note contains can be considered by us in disposing of the question whether the sentence shall be confirmed or not. The reasoning of the note is also such as ought not to be made use of in a criminal case. The Judge states in this note that he feels bound to express a doubt that has arisen in his mind as to the complicity of Kundan and Dungar in the murder, "a doubt that," he adds, "is not supported by the evidence, but by the probabilities of the case." The note further states that "it is true that the direct evidence of the eye-witnesses is to the effect that all four of the accused struck Shere Singh," adding, however, "but in this country it is no uncommon thing for the most truthful witnesses to add to their evidence somewhat beyond what they actually saw," although in his judgment he refers in terms of strong approval to the evidence of the principal witness for the prosecution, whom he describes as "a respectable looking old man, who gave his evidence in a straight forward manner that convinced me of the truth of what he said." The note states further "probabilities," wholly unsupported by the evidence and I actually find in it the following extraordinary remark: "although I have heard it stated *out of Court* such were the real facts of the case (that is his probabilities and surmises after the trial) no evidence is forthcoming to support it:" and the note ends with the following conjecture: "as it appears to me *possible* that the part taken by Kundan and Dungar in this affair *may* have been somewhat exaggerated, and as it is *certain* that Shere Singh was *actually* killed by Lachman and Chattar, I would recommend the remission of the capital sentence in the case of Kundan and Dungar." Now, not a word of this is supported by the evidence, or any portion of it, which was given before the Judge himself at the trial, and I do not see that we are driven to conclude that Shere Singh was actually killed by Lachman and Chattar. On the contrary, there is evidence suggestive [36] of a different state of things. There are other uncalled-for remarks in this note, but I have stated enough to show its improper and unwarrantable character, and to justify me in expressing the hope that such an inadmissible appendage to a criminal record may never be brought before us again.

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The facts and circumstances we have to consider appear to be these: The four convicts were all closely related to each other; three of them are brothers, and the fourth is a cousin, and they all lived together in the same enclosure. The deceased was one of the lambardars of the village, and he had on several occasions been obliged, in the discharge of his duty, to oust the accused from their holding; and bad feeling therefore existed between them and the murdered man, or rather on their part against him. As the Judge points out, no less than six different cases or causes of quarrel on this score were stated by Chattar and Lachman before the committing Magistrate, and there can be no doubt of the bitter enmity entertained by these men against the deceased. Nor is there anything in the evidence to show that this enmity was shared more largely by any one of the four than by the others. They appear to have been all actuated by the same ruthless feeling, and to have acted on the night of the murder on a plan preconcerted among them all. This manner of attack upon the deceased, is deposed to by the witnesses for the prosecution, especially Khushali, who is described by the Judge as a respectable, straightforward, and reliable witness. From the evidence thus afforded it appears that on the evening of the 8th June last, at about 9 P.M., Shere Singh was returning from the bazar to his house with the witness Khushali, and they had reached a shop, Shafkat's shop, when the accused Chattar Singh, accompanied by his brother Lachman Singh, came up from behind and struck Shere Singh heavily on his head with a lathi. The blow made Shere Singh stagger, but it was immediately followed by another blow from Lachman Singh, and Shere Singh then fell senseless to the ground, uttering these words—"*Ram Ram.*" Khushali, the witness, cried out when he saw his companion thus assailed, but received a blow from Lachman which appears to have induced him to refrain from further interference. Meanwhile, [37] from a spot which appears to have been exactly or nearly opposite to that where Shere Singh had just been attacked and felled by Chattar Singh and Lachman Singh, the two other accused, Kundan and Dungar, ran up, also armed with lathis and beat Shere Singh as he lay on the ground, on the head, also, as it would appear. The four murderers then ran off pursued by Aulad Ali, the chaukidar; but the four accused succeeded for the moment in reaching and securing themselves in their house, seeing which Aulad Ali returned and found that Shere Singh was dead. The concert and identity not only of motive but action on the part of the whole four accused is thus shown.

Nor is it, I think, material, as against the concerted action and equal guilt of the whole four criminals, to consider whether, when Kundan and Dungar came up and added their blows to those of the other two, Shere Singh was then dead or still alive. The impression made upon me on this part of the case is that Shere Singh was alive, and had not then breathed his last, and that in all probability the blows of Kundan and Dungar sealed his fate. On this subject the *post mortem* examination by the Civil Surgeon is very important. It results, in the first place, from this gentleman's report, dated the 9th June, that when Shere Singh was attacked, he was in natural and healthy condition of body, and when he first saw the body he described it as that of a "healthy looking man." On examination the Civil Surgeon found "the top of the head smashed in, skull fractured into small pieces, scalp torn, and brain lacerated and protruding." Such being the terrible nature of violence used against the unfortunate deceased, I scarcely think it reasonable to conclude that such fearful injuries were solely produced by the blows of the two first assailants, Chattar

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and Lachman; the condition of the head on the contrary indicates that the blows of Kundan and Dungar contributed in no small degree to the frightful state of things deposed to by the Civil Surgeon; and whether the deceased was still alive or already dead when Kundan and Dungar attacked him with their lathis is, in my opinion, immaterial to the question of their guilt. That they believed Shere Singh to be alive when they attacked him I have no doubt whatever, and I do not see that we are compelled by the evidence to conclude that he was then dead. Such [38] would also appear to be the opinion formed by the Judge at the trial. For, in summing up the evidence in his judgment, he states that the witness for the prosecution "tell the same story, and swear that all four accused deliberately and barbarously murdered Shere Singh; they all say that Chattar struck first, and then Lachman, and that the blows of these two dropped Shere Singh, and that the other two prisoners, Kundan and Dungar, hammered him while on the ground." The Judge further states correctly that "the four accused lay in wait for the deceased, took him unawares, closed in on him, and beat his brains out." I have carefully read the evidence, and have no hesitation in approving this statement of the effect of it. There can indeed be no doubt that this is a correct statement of the effect of the evidence; and it shows, I think, that the whole four accused acted together and participated in the murder, and that they all are equally guilty.

Finding, therefore, that I cannot make any distinction between the two sets of the assailants, I would confirm the sentence of death on them all.

OLDFIELD, J.—Four persons have been convicted of murder, and sentences of death passed upon them and referred for confirmation. In respect of two, Kundan and Dungar, the Judge has added a proceeding, dated four days after he passed judgment, from which it would appear that he subsequently entertained doubts of the guilt of these two prisoners, and he recommends the remission of the capital sentences in their cases.

There can be no doubt of the guilt of Chattar Singh and Lachman Singh, and the evidence points to the conclusion that the attack with intent to murder Shere Singh was pre-meditated. He had been sitting with Khushali, a witness, at the shop of Bakhshi Chaudhri, and at 8 or 9 P.M. the two were walking homewards, and had arrived opposite the shop of Shafkat, not far off, when they were attacked by Chattar Singh and Lachman Singh. The former struck the first blow of a club, which was at once followed by a blow of a club from Lachman Singh, and the deceased fell on the ground. It then appears that the other two prisoners came up from the opposite direction and struck deceased when [39] he was down, and that all four ran off to their house not far off, where they appear to have resisted the attempt of the police to arrest them, and their arrest was finally made at 4 A.M.

There appears to me to be no appreciable difference in the guilt of Chattar Singh and Lachman Singh, and I would confirm the sentences of death passed on them. With regard to Kundan and Dungar, I see no reason to distrust the evidence or to participate in the doubts which appear to have occurred to the Judge after close of the trial, and from reports which he must have picked up out of Court. The Judge admits that these doubts are not supported by the evidence on the record, nor does he inform us that he is in a position, or that the accused are able, to support them by any evidence which is capable of being procured.

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On the contrary, the recorded evidence does not appear to be open to distrust. The accusations implicating these two persons were made without any delay by persons who have no interest to accuse them falsely; the statements of the witnesses are consistent; and it is shown that these two prisoners were on or near the spot where the outrage occurred by the substance of their own statements; and that they retreated with the other prisoners to the same house after the crime was perpetrated; and they had equally with the others a motive for the murder. They seem to have joined in a conspiracy with Chattar Singh and Lachman Singh, but they did not begin the attack, and it is doubtful if the death-blows were inflicted by them; for these reasons I would commute the sentence of death passed upon them to transportation for life.

The learned Judge who heard the case differing in opinion as to the proper sentences to be passed on Kundan Singh and Dungar Singh, the case was consequently referred to a third Judge, with reference to the provisions of ss. 271 and 287 of the Criminal Procedure Code.

PEARSON, J.—I concur generally in the view of the case taken by my Hon'ble colleague Mr. Justice Oldfield, and am of opinion that the claims of justice will be sufficiently met by the sentences proposed by him.

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2 A. 40=3 Ind. Jur. 220.

[40] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAJPATI SINGH (*Plaintiff*), *v.* RAM SUKHI KUAR (*Defendant*).* [16th August, 1878.]

Act VIII of 1871 *(Registration Act)*, *ss.* 17—*cl.* (2), 49—*Registration Mortgage.*

The value of the interest created by a mortgage of immoveable property is estimated, for the purposes of the Registration Act of 1871, not by the amount of the principal money thereby secured, but by the amount of such money and the interest payable thereon.

Consequently, a bond dated the 9th August 1873, which charged certain immoveable property with the payment on the 31st May 1874, of Rs. 98, and interest thereon at the rate of one per. cent. per mensem, should have been registered. *Darshan Singh* v. *Hanwanta* (1) followed. *Nanabin Lakshman* v. *Anant Babaji* (2) differed from (3).

[Diss., 5 M. 214 (215); F., 2 A. 688 (689).]

THIS was a suit to recover Rs. 98, the principal money due on a bond dated the 9th August 1873, which charged certain immoveable property with the payment on the 31st May 1874, of such money together with interest thereon at the rate of one per cent. per mensem, the suit being instituted on the 26th May 1877. The defendant set up as a defence to the suit that the bond operated to create an interest in immoveable property of the value of upwards of Rs. 100, and its registration was therefore compulsory, and being unregistered it would not affect the property comprised in it. The Court of first instance held that, as the plaintiff only claimed to enforce his lien on the property in respect of a sum

* Second Appeal No. 509 of 1878, from a decree of Hakim Rahat Ali, Subordinate Judge of Ghazipur, dated the 7th March 1878, reversing a decree of Mirza Kamr-ud-din Husain, Munsif of Ballia, dated the 1st August 1877.

(1) 1 A. 274. (2) 2 B. 353.

(3) See also *contra*, *Narasayya Chetti* v. *Guruvappa Chetti*, 1 M. 378.

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under Rs. 100, the fact of the bond not being registered did not bar his claim under it. On appeal by the defendant the lower appellate Court held that the bond could not affect the immoveable property comprised in it, inasmuch as it created an interest in the property of the value of upwards of Rs. 100, and was nevertheless unregistered.

The plaintiff appealed to the High Court, contending that the claim was maintainable, notwithstanding that the bond was not registered, inasmuch as he sought to enforce a lien on the property comprised in the bond to the extent of Rs. 98 only.

[41] Munshi *Sukh Ram* and Lala *Lalta Prasad*, for the appellant.

Babu *Barodha Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The bond in suit, in reference to the ruling of this Court in *Darshan Singh* v. *Hanwanta* (1) and other similar rulings in similar cases, undoubtedly required to be registered, and under s. 49 of Act VIII of 1871, cannot affect the property therein comprised, being immoveable property. We disallow the pleas in appeal, and dismiss the appeal with costs.

Appeal dismissed.

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2 A. 41.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

GAURI DAT AND OTHERS (*Defendants*) *v.* GUR SAHAI (*Plaintiff*) AND RUKMIN KUAR AND ANOTHER (*Defendants.*)* [22nd August, 1878.]

Hindu Law—Alienation—Reversioner—Fraud.

S was entitled under the Mitakshara law, to succeed, on the death of *M*, her mother, to the real estate of *N* her father. Certain persons disputed *S*'s right of succession and claimed that they were entitled to succeed to *N*'s estate on *M*'s death, and complained that *M* was wasting the estate. The differences between such persons and *M* and *N* were referred by them to arbitration, and an award was made and filed in Court which, among other things, partitioned the estate between *S* and such persons. *G*, who claimed the right to the estate on *S*'s death, sued for the cancellation of the award on the ground that it was fraudulent and affected his reversionary interests. *Held* relying on *Dowar Boonda* (2) that the suit was maintainable notwithstanding that *G* was not the next reversioner.

[F., 10 C. 225 (230).]

THIS was a suit for the cancellation of an award made on a reference to arbitration. The facts of the case were as follows: One Tek Chand, deceased, had by his first wife three sons, Dario Singh, Nand Lal, and Sidh Gopal, and his second wife one son, Sheo Prasad. On the death of Tek Chand the four brothers separated, and a partition of the family estate took place. Dario Singh died leaving two sons, who died leaving each a son, the son [42] of one being Gur Sahai, the plaintiff in the present suit, and of the other Raja Ram, a minor. Nand Lal died in September, 1863, leaving a widow, Rukmin Kuar, a defendant in the present

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* First Appeal No. 124 of 1877 from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 3rd September 1877.

(1) 1 A. 274. (2) H.C.R. N.W.P. F.B. Rulings 56.

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suit, and a daughter, Sitala Kuar, also a defendant in the present suit, who had six daughters, one of whom had male issue. Sidh Gopal died leaving a daughter. Sheo Prasad died leaving six sons, of whom five, *viz.*, Har Dat, Gauri Dat, Ambika Dat, Din Dayal, and Sheo Dat, were defendants in the present suit. The sixth son Prag Dat died leaving two sons, Ram Dayal and Sankata Din, also defendants in the present suit. After the death of Nand Lal differences arose between the heirs of Sheo Prasad on the one side and Rukmin Kuar and Sitala Kuar on the other side with regard to the estate of Nand Lal. The heirs of Sheo Prasad asserted that they were the reversioners to such estate, and Rukmin Kuar was wasting it, while Sitala Kuar asserted that she was her father's heir, and entitled to succeed to the property on Rukmin Kuar's death. The parties, by an instrument in writing dated the 18th August, 1876, agreed to refer the differences between them to arbitration. In pursuance of this agreement an award was made which, after reciting that it was made in order to protect the property, to perpetuate the name of the ancestor, and to perform ceremonies for the spiritual benefit of the deceased (Nand Lal), disposed of all the estate of Nand Lal between the parties to the arbitration.

On an application made by Sitala Kuar, this award was ordered to be filed in Court by the Subordinate Judge. The heirs of Sheo Prasad subsequently obtained possession from the Court of the property awarded to them. The present suit was brought by Gur Sahai, a son of Dario Singh, and a grandson of Tek Chand, as a reversioner to the estate of Nand Lal, against Rukmin Kuar, Sitala Kuar, and the heirs of Sheo Prasad for cancellation of the award as being fraudulent and injurious to his rights as such reversioner.

On the 7th June, 1877, the plaintiff and the defendants Rukmin Kuar and Sitala Kuar filed an agreement in Court, in which these defendants agreed that a decree should be made against them in [43] the plaintiff's favour, the plaintiff on his part agreeing that, in respect of a certain portion of the property awarded to Sitala Kuar, he would not at any time seek to disturb her possession. It was also stated in this agreement that "the plaintiff is the nearest heir to the estate of the deceased Nand Lal, the husband of petitioner Rukmin Kuar." On the 24th July, 1877, the heirs of Sheo Prasad filed a written statement in which (amongst other things) they urged that the plaintiff was not the next reversioner after Rukmin Kuar, and consequently no cause of action had accrued in his favour.

The Subordinate Judge fixed two issues for trial, *viz.*, (i) "Whether the plaintiff is the next reversioner after Rukmin Kuar : if not, has he any cause of action ?" and (ii) "Whether the plaintiff is entitled to set aside the arbitration-award in dispute ?" On the first issue the Subordinate Judge held that, as Sital Kuar, the heir to the estate of Nand Lal had no sons, and as the parents and brothers of Nand Lal were dead, the plaintiff was, under the Mitakshara law, reversioner to the estate of Nand Lal on Sitala Kuar's death ; and that as the plaintiff's right as such reversioner was affected by the award, and Sitala Kuar, the heir to the estate, raised no objection to the plaintiff's suit, the plaintiff had a cause of action. On the second issue the Judge held that the plaintiff was entitled to have the award cancelled, as it plainly affected his reversionary rights, and he accordingly gave the plaintiff a decree cancelling the award.

The heirs of Sheo Prasad appealed to the High Court, contending in their memorandum of appeal that the award was valid for the lives of Rukmin Kuar and Sitala Kuar and as between them, and that as the

arrangements affected under the award were intended to save the estate from the consequences of a debt incurred for the benefit of the soul of Nand Lal, such arrangements were legal and ought to stand good.

Mr. *Conlan* and Maulvi *Obeidul Rahman*, for the appellants.

Pundit *Ajudhia Nath*, for Gauri Dat, respondent, and Pandits *Bishambhar Nath* and *Nand Lal*, for Rukmin Kuar and Sitala Kuar, respondents.

[44] Mr. *Conlan* contended that the plaintiff could not maintain the suit not being the next reversioner to the estate. He referred to *Dabee Saradaprosaud Mookerjee* cited in Norton's Leading Cases on the Hindu Law of Inheritance, ed. by Scharlieb, part ii, p. 628 and following pages; and to the Tagore Law Lectures, 1870, pp. 201, 202.

Pandit *Bishamber Nath* relied on *Dowar* v. *Boonda* (1) and *Ammur Singh* v. *Murdan Singh* (2).

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—The suit in which this appeal has arisen was instituted by the plaintiff Gur Sahai alone against Rukmin Kuar; her daughter Sitala Kuar, and other persons, descendants of Sheo Prasad, deceased, a male relative of Nand Lal, Rukmin Kuar's husband. During the pendency of this suit an arrangement appears to have been come to between the two ladies, defendants, and the plaintiff to the effect that he would not in future make any claim in disturbance of, or in opposition to, the arbitration award so far as it allotted property to Sitala Kuar, and that with that exception he, the plaintiff, would have a decree in his favour; and in looking into the record I find that such an arrangement or compromise, under the name of a petition of cognovit, was filed, and it bears the plaintiff's signature. The petition was sent for attestation to the Munsif of Fatehpur, who got it attested, and reported that the ladies expressed their consent; and there was thus an end to the dispute between them and the plaintiff. But the other defendants, the descendants of Sheo Prasad, being dissatisfied with the judgment of the Subordinate Judge have preferred the present appeal, the form of which is thus explained, the respondent being not only the plaintiff but the two ladies with them.

The compromise between these parties, however, does not affect the legal question raised by the appeal before us. It has been argued at great length on both sides, and numerous authorities have been referred to, but the case is a very simple one. The plaintiff seeks to set aside an arbitration award made between the two ladies Rukmin Kuar and her daughter Sitala Kuar on the one side, and **[45]** the defendants Ram Dayal and other descendants of the deceased Sheo Prasad, on the other side, and the award disposed of the whole property in suit among these defendants themselves to the prejudice of the plaintiff and in disregard of his reversionary right. The Subordinate Judge has given the plaintiff a decree, holding that according to the law of Mitakshara he has the reversion to the estate after Sitala Kuar.

In support of the present appeal it was argued by the counsel for the appellants that the plaintiff had no such reversionary right as would enable him to maintain the suit, as his interest was too remote, and the learned counsel referred to several authorities in support of that contention. But it is unnecessary for us to examine these, seeing that the appellants

(1) H.C.R.N. W. P. F.B. Rulings, 56. (2) H.C.R. N.W.P. (1870), 31.

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themselves in their written statement admit the reversionary right of the plaintiff, and that being so, the only question is whether he can as such reversioner maintain the present suit to have the award set aside. Undoubtedly he can.

The pleaders for the respondents refer to a judgment of the Full Bench of this Court, delivered on the 12th September, 1866, in the case of *Dowar Rai* v. *Boonda* (1) in support of the plaintiff's right to maintain his suit against the defendants, appellants, and so far as it goes, that case clearly supports the plaintiff's right of suit. I was not a Judge of the Court when the judgment of the Full Bench was delivered, but I have carefully considered it, and I fully concur in its ruling. But irrespective of it and on principle, the plaintiff, although not the immediate next reversioner, has clearly a right to protect such interest as he has in the estate, and for that purpose to maintain such a suit as the present, for his right of reversion is of such a nature, according to Hindu law, that it cannot be defeated should he survive Sitala Kuar.

The judgment of the Subordinate Judge is therefore right, and the present appeal is dismissed with costs.

PEARSON, J.—The pleas set forth in the memorandum of appeal do not appear to have much weight. The award which the plaintiff sues to set aside has absolutely disposed of the property in suit in such a manner as to destroy his reversionary interest therein, which cannot be protected without or otherwise than by avoiding [46] the award *in toto*. Nor can it be admitted that no other arrangement than that made by the arbitrators for the discharge of the debts due from the estate of Nand Lal, or incurred for the benefit of his soul was possible.

These pleas were not indeed pressed upon us orally. The learned counsel mainly urged that the plaintiff not being the next reversioner, is incompetent to bring this suit. It is true that Sitala Kuar is the next reversioner on the death of her mother Rukmin Kuar, the present incumbent. But the plaintiff alleges that these ladies have colluded with the defendants, appellants, in the matter of the award with the view of defrauding him. The suit is therefore maintainable under the authority of the Full Bench ruling of this Court, in the case of *Dowar Rai* v. *Boonda* (1). The learned counsel impugns that ruling, but we are bound by it.

He further contended that Sitala Kuar would take her father's estate after her mother's death in full proprietary tenure, so as to be able to dispose of it absolutely, and that therefore the result of the arbitration to which she had consented was not obnoxious to objection on the part of the plaintiff. Were the contention sound he would not be the reversioner after her, and would of course have no *locus standi* in this suit; but the contention is opposed to Hindu law prevailing in these parts, and is indeed inconsistent with the pleading in the last paragraph of the written statement filed by the defendants (appellants here) in the Court below, wherein they admitted the plaintiff to be the next reversioner after the female defendants to a moiety at least of the property in suit. I would dismiss the appeal with costs.

Appeal dismissed.

(1) H. C. R. N. W. P. F. B. Rulings, 56.

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APPEL-LATE CIVIL.

2 A. 46.

2 A. 46.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

RAM GHULAM (*Defendant*) v. CHOTEY LAL (*Plaintiff*).*
[22nd August, 1878.]

Contract of sale—Suit to enforce registration of conveyance—Act III of 1877 *(Registration Act)*, ss. 36, 75, 77.

Held, where a person had agreed to sell another certain immoveable property, and had conveyed the same to him by a deed of sale which under the Registration [47] Act of 1877, required registration, and the vendor refused to register such deed, that it was not incumbent on the vendee to take steps under that Act to compel the vendor to register before he sought relief in the Civil Court, but that he was at liberty without doing so to sue the vendor in the Civil Court for the registration of such deed.

[**Diss.**, 9 C. 150 (153); 16 M. 341 (342); **F.**, 16 A. 303 (304) = A.W.N. (1894), 94; **R.**, 24 A. 402 (409); 4 L.B.R. 91; **D.**, 3 A. 397 (399) (**F.B.**).]

THE plaintiff in this suit claimed the registration by the defendant of a deed of sale and possession of the property conveyed by such deed. He alleged in his plaint that the defendant had agreed to sell a certain dwelling-house to him, and had on the 31st October, 1877, conveyed the same to him by a deed of sale, and had received a portion of the purchase-money, but that the defendant refused to register the deed of sale or to receive the balance of the purchase-money, and that he, the plaintiff, was ready and willing to pay the balance of the purchase-money. The defendant denied execution of the deed of sale and the receipt of any portion of the purchase-money, and further pleaded that the suit was not maintainable.

It appeared that the defendant had presented the deed of sale to the Sub-Registrar for registration, but not at a proper time, and that the deed had been returned with a direction to present it at a proper time, and that he afterwards refused to obtain registration of the deed.

The Munsif held that the suit was not maintainable, on the ground that the plaintiff should have compelled the defendant to appear at the registration office, under the provisions of s. 36 of the Registration Act of 1877, and in case the defendant had denied the execution of the deed of sale, and the Sub-Registrar had refused to register it, have applied to the Registrar under s. 75 of that Act to establish his right to have the document registered, and in case the Registrar had refused to order the sale-deed to be registered, and not till then, have instituted a suit in the Civil Court under s. 77 of the same Act, for a decree directing the document to be registered.

On appeal by the plaintiff the District Judge held that it was impossible for the plaintiff, under the circumstances of the case, to have obtained relief otherwise than by the present suit, and finding that the defendant had executed the deed of sale, gave the [48] plaintiff a decree directing its registration and for possession of the property.

On second appeal by the defendant to the High Court it was again contended by him that the suit was not maintainable, for the reasons stated by the Munsif.

* Second Appeal, No. 133 of 1878, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 2nd January, 1878, reversing a decree of Maulvi Muhammad Abdul Basit Khan, Munsif of Chibramau, dated the 10th December, 1877.

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Munshi *Sukh Ram*, for the appellant.
Munshi *Hanuman Prasad*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C.J.—The order of the Judge is right, and this appeal must be dismissed. The sections of the Registration Act relied on by the Munsif are merely permissive, and do not exclude such a suit as the present for the enforcement of the contract of sale, which includes the obligation to register the deed. The appeal is dismissed with costs.

OLDFIELD, J.—This is a suit for the specific performance of a sale-contract by completion of the deed and its registration and delivery to plaintiff and possession of the property.

The pleas in special appeal fail, as there is nothing in the Registration Act to bar a suit of this kind, or to prevent a Civil Court directing the defendant to register the deed. The deed was never properly presented to the Sub-Registrar, nor was there refusal to register on his part, which could bring into operation the provisions of chapter XII of the Registration Act, and give plaintiff his remedy by appeal for an order of refusal to register rather than by a suit; and supposing that it was in the power of plaintiff to have applied under s. 36 to the registering officer to summon the defendant in order that the deed might be registered, there is nothing in that circumstance which can prevent his remedy by a regular suit for the specific performance of the sale contract, including an order to the defendant to complete the same by registration.

The pleas fail, and the appeal is dismissed with costs. The plaintiff will have a decree directing that he pay into the lower appellate Court Rs. 250, the balance of the purchase-money, if not already paid into the Court, within one week from the date of [49] this decree, and thereupon the defendant shall execute a deed of sale of the property in suit, cause registration and delivery of the same, and put the plaintiff in possession of the property sold, and defendant shall then receive the balance of the purchase-money.

Appeal dismissed.

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2 A. 49.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

LALA AND ANOTHER (*Defendants*) *v.* HIRA SINGH AND OTHERS (*Plaintiffs*).* [22nd August, 1878.]

Cess—Custom—Act XIX of 1873 (*N.W.P. Land Revenue Act*), s. 66.

A cess leviable in accordance with village custom which is not recorded under the general or special sanction of the Local Government cannot, under s. 66 of Act XIX of 1873, be enforced in a Civil Court.

A custom to be valid must be ancient, must have been continued and acquiesced in, and must be reasonable and certain.

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* Second Appeal, No. 475 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 27th February, 1878, reversing a decree of Pundit Ratan Lal, Munsif of Bijnor, dated the 22nd September, 1877.

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The fact that a cess leviable in accordance with village custom has been recorded by a settlement officer is important evidence of the custom, but not conclusive proof of it.

Held, on the evidence in this case, that the village custom set up was not established.

THIS was a second appeal in a suit in which the plaintiffs, zemindars of the village of Nurpur, claimed from the defendants Rs. 5 as the cess leviable in accordance with the custom of the village on the second marriage of a widow of the Ramaiya caste. The defendants belonged to the Ramaiya caste and resided in Nurpur. The defendant Lala had married the second defendant, who was a widow at the time of the marriage. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Spankie*, for the appellants, contended that the suit was not maintainable as the cess, although recorded in the administration paper of the village by the settlement officer, had not been recorded with the sanction of Government—s. 66 of Act XIX of 1873; that the custom was not proved, that it was bad by reason of not being ancient, not having been continued, not having been acquiesced in, and not being reasonable and certain, and further by reason of its being in restraint of the marriage of a Hindu widow, [50] which the law sanctioned. He referred to *Harpurshad* v. *Sheo Dyal* (1) ; Broom's Commentaries on the Common Law, Ed. of 1856, p. 12 and the following pages ; s. 26 of Act IX of 1872 ; and Act XV of 1856.

Babu *Ratan Chand*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court:

OLDFIELD, J.—The plaintiffs sue as zemindars of Nurpur to recover Rs. 5, a sum which they assert they have a right to levy on occasion of a second marriage of a widow of the Ramaiya caste, resident in their village, from the person who marries the widow. Both husband and wife have been made defendants, and plaintiffs rest the claim on ancient custom, and support it by an entry in the administration paper of the village drawn up in 1872, in course of the current settlement, and by other evidence. The Court of first instance dismissed the suit, holding that the evidence was insufficient to establish the right by custom, and that the administration-paper could not bind those who were no parties to it. The Judge has held that the custom has been established, and he considers that the fact that the cess was entered in the settlement record is a sufficient fulfilment of the provisions of s. 66 of Act XIX of 1873, and he appears further to consider that this Act is not applicable to the case, as the administration-paper was prepared before it came into operation.

The defendant has appealed on several grounds, and without dealing with all, I am of opinion that the decision of the Judge cannot be affirmed, because the cess here claimed is not one which the law permits to be enforced in a Civil Court, and because no right by custom has been established, the Judge having failed to rightly appreciate the nature of the evidence necessary to establish a custom.

The settlement administration-paper drawn up in 1872 contains an entry detailing certain cesses which the zemindars have a right to levy from artisans, and among them is an entry that a sum of Rs. 5 is leviable

(1) 3 I. A. 259 (285).

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as a zemindari due from the caste Ramaiya on occasion of "*karao*" or second marriages by widows. It is necessary for the validity of all such cesses that they be recorded at the time of settlement and sanctioned by Government. In the case before [51] us the settlement of the mauza had been commenced, and the record which contains the entry of the cess had been drawn up while Regulation VII of 1822 was in force, but with reference to ss. 2 and 37 of Act XIX of 1873, the settlement then in progress was brought under the operation of Act XIX of 1873, which is now the law in force, and it is essential to see whether those conditions which give validity to a cess under Act XIX of 1873 have been fulfilled in this case. The second paragraph of s. 66 of Act XIX of 1873 applies to the cess in question, and by it a condition for its validity is not only that the cess be recorded by the settlement officer, but that it be recorded after special or general sanction by the Local Government. But there is no evidence of any such sanction, nor has the settlement, as we understand, received the final confirmation of Government. Any presumption there might be in favour of the entry of the cess having been made by the settlement officer after sanction had been obtained, is weakened in this case by the consideration that the record was drawn up before the new law came into force, which has particularly required that sanction to these cesses be obtained prior to recording them. The claim is therefore not maintainable with reference to s. 66 of Act XIX of 1873.

Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable, and is certain and not indefinite in its character. To support the custom in this case we have only the evidence of three witnesses. One of them is styled the head of the Ramaiya caste, who is said to be entitled to a part of the cess; another is the plaintiff's family priest; another the patwari; it is obvious that their evidence should be received with caution, as they appear to have reasons for supporting the plaintiffs' but accepting what they say, it is clear that no custom has been established, and that any payments hitherto made, have been exceptional and voluntary.

Bhagwan Das, patwari, says that before the administration-paper was drawn up in 1872, by which the cess was fixed at Rs. 5, every one paid according to his means, and that there have been five marriages of the kind in 1875, and no cess has been paid, but it was disputed in all.

[52] Nilapat, the priest, can only say, in a general way, that the cess is paid, but he allows none has been paid for the last two years; and Hira, who styles himself the headman of the Ramaiya caste, and claims a cess for himself, admits that he has never realized the cess hitherto. Nor is it clearly shown from what particular person the cess is claimable. No right by custom can be established on the above evidence, and the plaintiffs' case is not assisted by two decrees, which he files to show that the cess has been decreed.

With reference to the entry in the administration-paper, no doubt the proceedings before the settlement officer recording a custom are to be received as important evidence, but they must be weighed against evidence on the other side, and their value has to be properly appreciated. In the case before us, the entry is entitled to little weight, for not only is it not shown that it was recorded as the law requires, but it appears for the first time in the record of the tenth settlement in 1872, and it was made manifestly in the interest of particular parties, with a view to establish claims against persons who have not been shown to have been parties to the

proceedings, for although the record purports to be attested by Umer, as headman of the Ramaiya caste, he was himself interested in having such a cess recorded, and his authority to represent the caste has not been shown.

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It is unnecessary to deal with the other pleas in appeal, as for the above reasons, I am of opinion that the claim is not maintainable, and I would reverse the decree of the Judge and dismiss the suit with costs.

STUART, C.J.—I entirely concur in and approve the view taken of this case by Mr. Justice Oldfield. I would only wish to add a remark on a point which was wrongly insisted on at the hearing by the counsel for the appellant, namely, that the alleged custom, even if proved, was opposed to public policy which favours marriage. But in my opinion that is a consideration derived from the judgments of English Courts which is not applicable to a case like the present. In other respects I agree with Mr. Justice Oldfield. The appeal is allowed, the decree of the Judge reversed, and the suit dismissed with costs in all the Courts.

Appeal allowed.

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2 A. 53.

[53] APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA v. NADUA.* [26th August, 1878.]

Appeal by person convicted by Deputy Commissioner invested under s. 36 *of Act X of* 1872 *(Criminal Procedure Code)—Act X of* 1872 *(Criminal Procedure Code),* ss. 270, 271—*High Court.*

Quære.—Whether, where a person has been convicted by a Deputy Commissioner invested under s. 36 of Act X of 1872, and setenced to a term of imprisonment requiring under that section to be confirmed by the Sessions Judge to which such Deputy Commissioner is subordinate, and such sentence has been confirmed accordingly, an appeal lies to the High Court against such conviction and sentence.

[N.F., 13 C. 162; F., 6 A. 341; R., 7 A. 528; 12 A. 129; 31 C. 511.]

ON the 17th June, 1878, one Nadua was convicted of a certain offence by Mr. J. Liston, Deputy Commissioner of Lalitpur, invested with the powers mentioned in s. 36 of the Code of Criminal Procedure, and was sentenced by the Deputy Commissioner to rigorous imprisonment for four years. This sentence was, in accordance with the provisions of the same section of the Code, on the 26th June, 1878, confirmed by Mr. H. B. Webster, Commissioner of Jhansi, and the Sessions Judge to whom the Deputy Commissioner of Lalitpur was subordinate.

On the 26th July, 1878, Nadua appealed to the High Court.

JUDGMENT.

The following judgment was delivered by the Court:

STUART, C.J.—I doubt very much whether this appeal lies. The original trial took place before Mr. Liston, the Deputy Commissioner of Jhansi, and, as directed by s. 36 of the Criminal Procedure Code, the sentence was confirmed by Mr. Webster, the Commissioner, who, by

* Reported under the special orders of the Hon'ble the Chief Justice.

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Resolution of the Government, North-Western Provinces, of 1862, has the powers of a Sessions Judge, and to whom Mr. Liston is subordinate. But neither s. 36 nor any other provision of the chapter, ch. IV, of which it forms part, contains anything respecting an appeal from such a conviction and sentence to this Court.

By s. 270 of the Code it is provided that any person convicted on a trial held by an officer invested with the powers described in s. 36 may appeal to the High Court, but that no appeal in such case shall lie to the Court of Session. This would apply to the present case if the procedure had stopped with the trial before [54] Mr. Liston, the Deputy Commissioner; but the peculiarity is that here the sentence was confirmed by the Commissioner, as it had to be by law, and it would seem anomalous to allow an appeal to the High Court from a conviction and sentence by an inferior Court like that of a Deputy Commissioner over the head of, and in fact ignoring what had been done by, the superior officer, the Commissioner. The last provision of s. 270 allows a sentence of an Assistant Sessions Judge to be appealed to the High Court, a provision which has obviously no application to such a case as this.

The only other section respecting appeals to the High Court on convictions on a criminal trial is s. 271, which provides that any person convicted on a trial held by a Sessions Judge may appeal to the High Court. But neither does this section apply to a case like the present, for here the trial was not by the Sessions Judge, but an inferior officer, and the Commissioner, who no doubt had the powers of a Sessions Judge, simply confirmed the sentence.

Under these circumstances I would have felt disposed to refer the case to a Full Bench with the question whether the appeal to this Court lies. But it would appear that the practice of this Court has been to entertain these appeals whether the sentence was confirmed by the Sessions Judge or not, and a list of cases, going over a period of three years, has been supplied me by the office in which the appeals were entertained and apparently without objection. No such cases have come before myself, and the question does not appear to have been raised before any other Judge, the validity of the appeal having apparently been assumed. For myself I confess that I doubt the legality of the procedure. It may have been intended to allow an appeal to this Court in such a case as the present, but that intention does not in my opinion appear from the sections of the Code of Procedure to which I have referred. In deference, however, to the practice of the Court, or such practice as the Court has, tacitly at least, sanctioned, I refrain from making any order calling it in question, especially as such practice is on the side of the right of appeal in a criminal case, which I consider ought always, if possible, to be favoured.

In the present case the appeal is dismissed and the conviction and sentence affirmed.

Appeal dismissed.

2 A. 55.

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APPELLATE CIVIL.

2 A. 55.

[55] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

RAYNOR (*Plaintiff*) v. THE MUSSOORIE BANK (*Defendants*).* [22nd August, 1878.]

Will—Construction—Precatory Trust.

W. R. by his will left to his wife, *M.A.R.* the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her. *M.A.R.*, by her will, left to their children certain portions of such property, leaving to their child *A.C.R.*, amongst other things, certain banking shares. These were attached in the execution of a decree against the executors to her estate as belonging to such estate. *Held* that she took under her husband's will a life-interest only in his property, with a power of appointment in favour of the children, and that the shares belonged to *A.C.R.* and could not be sold in execution of the decree as part of the estate of *M.A.R.*

THIS was a suit to establish the plaintiff's right as proprietor to twenty-four shares in the Delhi and London Bank, Limited. The facts of the case, so far as they are material for the purposes of this report, were as follows: The shares had been attached in the execution of a decree obtained by the Mussoorie Bank against the executors to the estate of one Mary Anne Raynor as belonging to her estate. The plaintiff had objected to the attachment, claiming the shares as his own property, but his claim was disallowed. The shares had originally belonged to William Raynor, the husband of Mary Anne Raynor. William Raynor, by his will, made on the 23rd March 1859, gave and bequeathed the whole of his property including these shares to his wife, saying that he did so "feeling confident that she would act justly to their children in dividing the same when no longer required by her." By her will, made on the 5th September 1868, Mary Anne Raynor gave certain property to each of her children, giving the plaintiff in this suit, amongst other property, the shares in suit.

The plaintiff contended that William Raynor had, by the words he had used in his will, created a trust for the benefit of his wife during her life, and after her death for his children, and that the shares were consequently not liable to be sold in the execution of a decree against the executors of Mrs. Raynor's estate as portion of her estate. The Court of first instance held that there was an absolute [56] gift to Mrs. Raynor of everything her husband possessed, and that no trust was created for the benefit of the children, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court, raising the same contention as had been raised in the Court below.

Messrs. *Howard* and *Hill*, for the appellant.

Mr. *Quarry*, for the respondent.

The following authorities were referred to at the hearing:

Curnick v. *Tucker* (1); *Le Marchant* v. *Le Marchant* (2); *Knight* v. *Knight* (3) cited in Tudor's Leading Cases in Equity, 4th ed., vol. ii p. 949; Jarman on Wills, 3rd ed., vol. i, p. 356; and *Fox* v. *Fox* (4) cited in Lewin on Trusts, 6th ed., p. 121.

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* First Appeal. No. 89 of 1878, from a decree of F. Bullock, Esq., Subordinate Judge of Debra Dun, dated the 10th May 1878.

(1) L.R. 17 Eq. 320.
(2) L R. 18 Eq. 414.
(3) 3 Beav. 172, S. C. 11 G. & F. 513.
(4) 27 Beav. 301.

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2 A. 55.

JUDGMENTS.

The material portions of the judgments delivered by the Court were as follows:

STUART, C. J.—I am clearly of opinion that the Subordinate Judge is wrong and that this appeal must be allowed. The portion of the will material for the question before us is as follows: "I give to my dearly beloved wife Mary Anne Raynor the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Firozpur, No. 50, together with all my plate and platedware, and whatever money, furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all monies due or which may afterwards become due, *feeling confident that she will act justly to our children in dividing the same when no longer required by her*. These last words undoubtedly create a trust in Mrs. Raynor for the benefit of her children, and limit her own estate in the property to a mere life-interest, or to the income of the property so long as she may require it. The testator feels confident that his wife will "act justly" to their children, that is, he tells her by this will he expects that she will act towards them not from mere caprice, but fairly, and he confides in her sense of justice towards them, and she is to act in this way by dividing the same, that is, by dividing all the property immediately before described: in fact the will makes Mrs. Raynor a trustee with a power of appointment [57] over the whole property comprised in the will in favour of the children.

The authorities referred to at the hearing strongly support this view of the relative position of Mrs. Raynor and her children, and the case of *Curnick* v. *Tucker* (1) cited by the counsel for the appellant appears to be directly in point. There the testator by his will said—"I hereby appoint my dear wife, Elizabeth Tucker, sole executrix, to whom I leave all my property, landed, personal, and of every description whatsoever and wheresoever, for her sole use and benefit, in the full confidence that she will so dispose of it amongst all our children, both during her lifetime and at decease, doing equal justice to each and all of them." In deciding the case Vice-Chancellor Hall observed:—"I consider that I am not at liberty to hold otherwise than that there is a gift to her for life, with a trust imposed upon the property in favour of the children, and with a power to her of disposition between or amongst them in such shares as she may think fit." And again: "I hold, therefore, that this is a gift to Mrs. Tucker for life, with a power of disposition amongst her children in her lifetime, or by deed or will, as she may deem fit." Indeed this is a stronger case than the present, for there the property was left to Mrs. Tucker "for her sole use and benefit," and yet the Vice-Chancellor held that the words which immediately followed created a trust in her for the benefit of the children, whereas in the present case there is no gift to the wife for her sole use and benefit, but the property is given to her openly without any such qualification, and with the declaration of the testator's expectation and intention that she is ultimately to divide the property among all the children. This is a trust which may be executed for the children, and not the mere expression of a feeling or sentiment in their favour. The same principle will be found stated with great clearness and force in Levin's well-known work on Trusts, 6th ed., p. 115 and in Jarman on Wills, 3rd ed., vol. i., p. 356.

(1) L.R. 17 Eq. 320.

PEARSON, J.—The terms of Captain Raynor's will are: "I give to my dearly beloved wife Mary Anne Raynor the whole of my property, both real and personal, including my Government promissory notes, Delhi Bank shares, my house at Firozpur. No. 50 together with my plates and plated-ware, and whatsoever money [58] furniture, carriages, horses, &c., may be in my possession at the time of my decease, together with all monies due or which may afterwards become due, feeling confident that she will act justly to our children in dividing the same when no longer required by her."

"Technical language," says Mr. Jarman in his Treatise on Wills "is not necessary to create a trust. It is enough that the intention is apparent. Thus it has been long settled that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him trustee for the person or persons in whose favour such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter on the object or objects of the intended trust (1)."

The doctrine thus stated is sanctioned by the authority of decisions to which we have been referred, and I accept it as sound. Applying it to Captain Raynor's will, I cannot doubt that his widow under its terms became a trustee of his estate for their children, and that her own interest in it was a limited one. She was at liberty indeed to use it for her own needs, but was bound to divide it among them when no longer required by her. She performed this duty by the will executed by her on the 5th September 1868, and by that instrument she bequeathed to the plaintiff the twenty-four shares in the Delhi and London Bank which are the subject-matter of the present suit. It would seem to follow that the shares in question belong to the plaintiff, and cannot be sold in execution of decree as the property of the late Mrs. Raynor.

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2 A. 58.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

NUR AHMAD (*Defendant*) v. ALTAF ALI (*Plaintiff*).* [18th November, 1878.]

Attachment of Land—Private alienation after Attachment—Act VIII of 1859 (*Civil Procedure Code*), *ss.* 239, 240.

Certain land was attached in the execution of a decree in the manner required by s. 235 of Act VIII of 1859, but a copy of the order of attachment [59] was not as required by s. 239 of that Act, fixed up in a conspicuous part or in any part at all of the Court-house of the Court executing the decree, nor was it sent to or fixed up in the office of the Collector of the district in which the land was situated. Subsequently to the attachment of the land the judgment-debtor privately alienated it by sale. *Held* that, as the attachment had not been made known as prescribed by law, the provisions of s. 240 of Act VIII of

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* First Appeal, No. 22 of 1878, from a decree of Maulvie Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 30th January 1878.

(1) 3rd Ed., Vol. II, p. 356.

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2 A. 58.

1859 did not apply, and the sale was not null and void. *Indra Chandra* v. *The Agra and Masterman's Bank* (1) followed.

[F., A.W.N. (1881) 65; 1 C.L.J. 565; R., 83 P.R. 1898; 137 P.L.R. 1905.]

THIS was a suit in which the plaintiff originally claimed that an order of the District Judge of Bareilly, dated the 8th September 1887, directing the sale of certain land in the execution of a decree against one Husaini Begam, might be set aside, and such sale might be prohibited, on the ground that the plaintiff was the proprietor of such land as purchaser of it from Husaini Begam. The plaintiff subsequently to the institution of the suit, the auction sale having taken place, claimed that such sale might be set aside, and the auction-purchaser was in consequence made a party to the suit as a defendant. The original defendant, in execution of whose decree the property in suit had been sold, set up as a defence, *inter alia*, that the plaintiff had purchased the land in suit from Husaini Begum while it was under attachment in the execution of his decree, and the sale was consequently null and void under the provisions of s. 240 of Act VIII of 1859. The District Judge of Bareilly the Court executing the decree, had, it appeared, ordered the land, to be attached on the 2nd February 1875. The written order required by s. 235 of Act VIII of 1859 issued but it was not made known as directed by s. 239 of that Act. It was not fixed up at all in the Court-house of the District Judge of Bareilly, neither was it fixed up in the office of the Collector of the district. On the 30th October 1876 the plaintiff purchased the land from Husaini Begum, the judgment-debtor. Subsequently the defendant applied for the sale of the land in execution of his decree, and obtained an order directing that the sale should take place on the 20th August 1877. The plaintiff objected to the sale, urging that the land had not been attached. The District Judge for certain reasons postponed the sale to the 20th September 1877, and on the 8th of that [60] month disallowed the plaintiff's objections to the sale. On the 19th September 1877 the plaintiff instituted the present suit in the Court of the Subordinate Judge of Bareilly, and on the day following the land was sold. The sale was confirmed on the 17th November 1877.

The Court of first instance gave the plaintiff a decree, holding that the sale was valid, the provisions of s. 240 of Act VIII of 1859 not applying, as the prohibitory order required by s. 205 of that Act had not been duly made known as required by s. 239.

The auction-purchaser appealed to the High Court, contending that as Husaini Begam and the plaintiff were well aware of such attachment proceedings as had been taken, the sale came within the real meaning and intention of s. 240 of Act VIII of 1859, and was null and void.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) Munshi *Hanuman Parshad* and Pandit *Bishambhar Nath*, for the appellant.

Mr. *Conlon* and Shah *Asad Ali*, for the respondent.

The judgment of the Court (PEARSON, J., and TURNER, J.), so far as it is material for the purposes of this report, was as follows:

JUDGMENT.

Under the provisions of s. 240 of Act VIII of 1859, a private alienation of property made after its attachment had been duly intimated and

(1) 10 W.R. 264=1 B.L.R.S.N. xx. See also *Dwarkanath Biswas* v. *Ram Chander Roy*, 13 W.R. 136, where the written order required by s. 235 did not issue, and it was held that, the property not having been duly attached, the provisions of s. 240 did not apply to an alienation of it.

made known in the manner prescribed by the Act is declared null and void. It is not shown that the attachment in this case was made known as by the Act directed. It is not proved that a copy of the order was posted in a conspicuous part, or in any part, of the court-house, nor that it was set to or posted in the office of the Collector. We are therefore unable to find that the alienation was made after the attachment had been made known as by the Act prescribed, and consequently the provisions of s. 240 do not apply—*Indra Chandra* v. *The Agra and Masterman's Bank* (1).

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APPELLATE CIVIL.

2 A. 58.

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2 A. 61 (F.B.) = 3 Ind. Jur. 321.

[61] FULL BENCH.

Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

PARTAB SINGH (*Decree-holder*) *v.* BENI RAM (*Judgment-debtor*).*
[14th November, 1878.]

Execution of Decree—Separate suit—Act X of 1877 (*Civil Procedure Code*), *s.* 244.

Moneys realized as due under a decree if unduly realized are recoverable by application to the Court executing the decree and not by separate suit. The opinion of STUART, C.J., in *The Agra Savings Bank* v. *Sri Ram Mitter* (2) differed from *Haramohini Chowdhrain* v. *Dhanmani Chowdhrain* (3) and *Ekowri Singh* v. *Bijaynath Chattapadhya* (4), distinguished.

[F., 24 A. 291 (294) = A.W.N. (1902) 67; A.W.N. (1881) 79; 2 O.C. 315 (317); D., 5 A. 94 (97) = A.W.N. (1882) 138; 7 A. 170 (174) = A.W.N. (1884) 319.]

ONE Beni Ram, against whom a decree for the possession only of certain land had been made in favour of one Partab Singh, applied to the Subordinate Judge of Bareilly, the Court executing the decree, for an order directing the decree-holder to refund a certain amount of the mesne profits of such land, which the decree-holder had realized in execution of the decree, on the ground that such amount had been unduly realized. The Subordinate Judge, finding that the decree-holder had unduly realized under the decree the amount claimed by the judgment-debtor, made an order directing the decree-holder to refund such amount.

The decree-holder appealed to the High Court against the order of the Subordinate Judge, contending that moneys unduly realized under a decree were not recoverable by application to the Court executing the decree but by separate suit.

The Court (PEARSON, J., and OLDFIELD, J.) referred to the Full Bench the question "whether moneys realised as due under a decree can be recovered, as having been unduly realised, in the execution department."

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), Mir *Akbar Husain*, Pandit *Bishambhar Nath*, and Munshi *Hanuman Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondent.

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* First Appeal, No. 18 of 1878, from an order of Maulvi Maksud Ali Khan, Subordinate Judge of Bareilly, dated the 9th March, 1878.

(1) 10 W.R. 264 = 1 B.L.R. S.N. xx. (2) 1 A. 388.
(3) 1 B.L.R.A.C. 138. (4) 4 B.L.R.A.C. 111.

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FULL BENCH.

2 A. 61 (F.B.) = 3 Ind. Jur. 321.

JUDGMENT.

[62] The judgment of the Full Bench was delivered by

TURNER, OFFG. C.J.—We are asked whether moneys realised as due under a decree can be recovered if unduly realised by application to the Court in the execution of decree. The language of the Codes, both the repealed and the existing Code, appears to us express on this point. The question whether moneys have been duly or unduly levied under a decree is clearly a question relating to the execution of the decree, and, if it arises between the parties to the suit or their representatives, the Code expressly declares it shall be determined by order of the Court executing the decree and not by separate suit. It has frequently happened that orders for the restitution of moneys, unduly levied under a decree have come before this Court in appeal, and with the exception of one instance in no case has it been held that such orders could not properly be passed. We refer to the numerous cases heard by this Court on appeal from the Judge of Bareilly known as Husaini Begam's case. In these cases the decree-holder, by executing the decree of an Original Court instead of the modified decree of the appellate Court, had recovered sums largely in excess of the sums she was entitled to recover and was compelled to make restitution by orders passed in the execution of the decree. In *The Agra Savings Bank* v. *Sri Ram Mitter* (1); the learned Chief Justice advanced in support of the opinion pronounced by him two cases decided by the Calcutta High Court. In *Haromohini Chowdhrain* v. *Dhanmani Chowdhrain* (2) no more was decided than this: that mesne profits which were neither decreed nor claimed in a suit for possession after the date of the institution of the suit could be claimed in a separate suit. In *Ekowri Singh* v. *Bijaynath Chattapadhya* (3) it was held that mesne profits which were not awarded by the decree could not be obtained by an order of the Court executing the decree. It appears to us that these cases, of which the authority is not impugned in this Court, and indeed there are decisions of this Court in accordance with them, do not bear on the question before us. In the cases cited there was no question whether the amount claimed was or was not decreed, for the decrees had admittedly awarded no mesne profits for the period for which they were claimed by separate suit.

[63] In the case before us the applicant complains that he has been compelled to pay what he was not bound to pay under the decree. We are of opinion that he adopted not only the proper course, but the only course open to him, in presenting his application to the Court executing the decree.

(1) 1 A. 388. (2) 1 B.L.R. A.C. 138. (3) 4 B.L.R. A.C. 111.

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APPEL-LATE CIVIL.

2 A. 63.

2 A. 63.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

GULZARIMAL (*Defendant*) v. JADAUV RAI (*Plaintiff*).*
[18th November, 1878.]

Suit for a Declaration of Right—Suit to set aside an Order under s. 246 *of Act VIII of* 1859, *disallowing a claim to property under attachment—Act VII of* 1870 (*Court Fees Act*), *s.* 7 (iii), *and sch.* ii, 17—*Consequential relief.*

Held that a suit for a declaration of the plaintiff's proprietary right to certain moveable property attached in the execution of a decree while in the possession of the plaintiff, and for the cancelment of the order of the Court executing the decree made under s. 246 of Act VIII of 1859, disallowing his claim to the property, could be brought on a stamp of Rs. 20, and need not be valued according to the value of the property under attachment.

Chunnia v. *Ram Dial* (1) followed. *Mufti Jaloluddin Mahomed* v. *Shohorullah* (2) dissented from. *Motichand Jaichand* v. *Dadabhai Pestanji* (3) and *Chakalingapeshana Naicker* v. *Achiyar* (4) distinguished.

[N.F., 13 C. 162; F., 6 A. 341 (344)=A.W.N. (1884), 113; 1 L.B.R. 1 (2); R., 7 A. 528 (532); 12 A. 129 (162); 31 C. 511 (512); A.W.N. (1885), 48.]

THIS was a suit in which the plaintiff claimed a declaration of his proprietary right to certain grain, valued at Rs. 1,200, and the cancelment of an order made by the Munsif of the city of Moradabad on the 17th May 1876, disallowing his claim to the same. The grain was attached by the defendant, when in the possession of the plaintiff, in the execution of a decree for money held by the defendant, as the property of the defendant's judgment-debtor. The plaintiff paid on his plaint an aggregate amount of court-fees, *viz.*, a fee of Rs. 10 in respect of his claim for a declaration of his proprietary right to the property in suit and a similar fee in respect of his claim for the cancelment of the Munsif's order. The defendant contended, amongst other things, that the plaint was not sufficiently [64] stamped, as the plaintiff should have paid on his plaint a fee according to the value of the property in suit. The Court of first instance held, on the issue arising out of this contention, that the plaint was sufficiently stamped, and, deciding the other issues arising in the suit in favour of the defendant, dismissed the suit. On appeal by the plaintiff the lower appellate Court, for reasons which it is unnecessary for the purposes of this report to state, reversed the decree of the Court of first instance and remanded the suit for a new trial.

The defendant appealed to the High Court, contending, amongst other things, that the plaintiff should have paid a fee on his plaint according to the value of the property in suit.

Lala *Lalta Prasad* and Babu *Ratan Chand*, for the appellant.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondent.

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* Second Appeal, No. 593 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 25th September 1877, reversing a decree of Maulvi Muhammad Wajib-ul-la Khan, Subordinate Judge of Moradabad, dated the 11th April 1877.

(1) 1 A. 360. (2) 15 B.L.R., Ap. 1=22 W.R. 422.

(3) 11 B.H.C.R.A.C.J. 186. In *Motichand Jaichand* v. *Dadabhai Pestanji*, however, it was held that a suit, having for its object the relief of property from attachment, seeks consequential relief.

(4) 1 M. 40.

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APPELLATE CIVIL.

2 A. 63.

JUDGMENT.

The judgment of the Court, so far as it related to this contention, was as follows:

SPANKIE, J.—We are of opinion that the plaintiff was at liberty to sue for a declaratory decree to establish his right to the property attached; a stamp of Rs. 10 was sufficient for this purpose. But the plaintiff also paid Rs. 10 besides, *i.e.*, Rs. 20 on the whole plaint, inasmuch as he sued also to set aside the miscellaneous order against him. In each of the two claims a ten rupee stamp is sufficient under the Court Fees Act. The Bombay case cited, *Motichand Jaichand* v. *Dalabhai Pestanji* (1) does not apply, as there the plaint included a claim for possession. Nor does the ruling of the Madras Court in *Chakalingapeshana Naicker* v. *Achiyar* (2) apply, for there the main object of the suit was held to be the recovery of possession of certain lands of which the plaintiff had been out of possession for years. We are not prepared to follow the decision of the Calcutta Court in *Mufti Jalaluddin Mahomed* v. *Shohorullah* (3). We do not think that in a suit like the one before us it is imperative that the court-fee should be according to the value of the property. When the suit was brought the property was under attachment, and as it is part of the claim of the plaintiff that it was in his possession when attached, he was not under any necessity of asking for more relief [65] than the circumstances of the case required. That relief was confined to a simple declaration of title and the setting aside of the order of the Munsif in the execution department by removal of the attachment, both requirements being included in sch. ii, art. 17 of the Court Fees Act. No ruling of this Court antagonistic to the view now taken has been cited; we therefore overrule appellant's objection on this point. (The learned Judge then proceeded to dispose of the other pleas in appeal.)

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2 A. 65=3 Ind. Jur. 419.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

PALAK DHARI RAI AND OTHERS (*Judgment-debtors*) *v.* RADHAPRASAD SINGH (*Decree-holder*).* [21st November, 1878.]

Appeal to Her Majesty in Council—Act X of 1877 (*Civil Procedure Code*), *ss.* 594, 595, 596—*Interlocutory Order—Order.*

The District Judge of Ghazipur recalled to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad and disallowed an application for the execution of the decree which had been preferred to that Judge. The High Court, on appeal from the order of the District Judge, annulled his order as void for want of jurisdiction, and remitted the case in order that the application might be disposed of on its merits, directing that the record of the case should be returned to the Subordinate Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, held that such order was in the nature of an interlocutory order, and was not one from which the High Court could or ought to grant leave to appeal to Her Majesty in Council.

THIS was an application for leave to appeal to Her Majesty in Council from an order of the High Court, dated the 21st December 1877, made under the following circumstances: A decree dated the 29th November

* Application, No. 8 of 1878, for leave to appeal to Her Majesty in Council.

(1) 11 B.H.C.R. A.C.J. 186. (2) 1 M. 40. (3) 15 B.L.R. Ap. 1=22 W.R. 422.

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1856, made by the Sudder Court on appeal, which modified a decree made by the District Judge of Ghazipur, dated the 14th April 1856, was transferred by the District Judge, while in course of execution, for execution by the Principal Sudder Ameen of Ghazipur. The Principal Sudder Ameen after the proceedings in execution of the decree were transferred to him, granted a certificate for the execution of the decree within the jurisdiction of the Subordinate Judge of Shahabad. On the 5th March [66] 1877, the judgment-debtors petitioned the District Judge of Ghazipur to call for the proceedings pending in the Court of the Subordinate Judge of Shahabad on the ground that there were irregularities in them. The District Judge complied with the petition, and having arrived at the conclusion that all the proceedings which had been taken in execution were void for want of jurisdiction, and that the execution of the decree was barred by limitation, disallowed on the 13th April 1877 an application for execution of the decree which had been made to the Subordinate Judge of Shahabad on the 19th March 1877, being in his own opinion warranted in so doing by the provisions of ss. 290 and 292 of Act VIII of 1859. He rested this opinion on the erroneous view that the decree was one of the Court of the District Judge of Ghazipur. The decree-holders having appealed to the High Court against the order of the District Judge, the High Court (PEARSON, J., and TURNER, J.) on the 21st December, 1877, pointing out the error of the District Judge, and observing that ss. 290 and 292 of Act VIII of 1859 did not empower the District Judge to meddle with the Court executing the decree in the Shahabad district, his Court not being either the Court which made the decree or having appellate jurisdiction in respect of the decree or the execution thereof, annulled the order of the District Judge dated the 13th April 1877 as void for want of jurisdiction, and remitted the case that the application for execution might be disposed of on the merits, and directed that the record of the case should be returned to the Subordinate Judge of Shahabad.

On the 19th June 1878 the present application was made on behalf of the judgment-debtors for leave to appeal to Her Majesty in Council from the order of the High Court dated the 21st December 1877.

Mr. *Howard*, for the petitioners.

Lala *Lalta Prasad*, for the opposite party

ORDER.

The Court (PEARSON, J., and TURNER, J.) made the following order:

TURNER, J.—This Court has simply set aside an order of the Judge of Ghazipur calling on to his own file proceedings ending in the Court of the Subordinate Judge of Shahabad and has directed that the proceedings be remitted to the Shahabad Court that the application [67] presented to that Court may be disposed of. When it is disposed of the decision may be appealed, and the superior Court which finally determines the application may have power to grant leave of appeal from its decision to Her Majesty in Council. The question of the competency of the Shahabad Court to entertain the application may then be raised. The order before us is in our judgment in the nature of an interlocutory order, and not an order from which we can or ought to give a certificate for appeal to the Privy Council. The learned counsel's argument, based on the provisions of s. 594 of Act X of 1877, that the word "decree" embraces judgment and order, does not support the contention that the Court can or ought to give leave to appeal for any order. The certificate is refused with costs.

Application refused.

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PRIVY COUNCIL.

2 A. 67 (P.C.)= 5 I.A. 233= 3 Ind. Jur. 186=3 Sar. P.C.J. 879.

2 A. 67 (P.C.)=5 I.A. 233=3 Ind. Jur. 186=3 Sar. P.C.J. 879.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

[*On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.*]

ZAIN-UL-ABDIN KHAN (*Defendant*) *v.* AHMAD RAZA KHAN AND OTHERS (*Plaintiffs*). [21st and 22nd November, 1878.]

Act VIII of 1859, *ss.* 109, 110, 111, 119, 147—Ex parte *Judgment—Appeal.*

The provision in s. 119 of Act VIII of 1859, that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," must be understood to apply to the case of a defendant who has not appeared at all, and not to the case of a defendant who, having once appeared, fails to appear on a subsequent day to which the hearing of the cause has been adjourned.

[**F.**, 21 C. 269 (274); 11 C.L.R. 537; **Ap.**, 23 B. 414 (424); **R.**, 8 A. 354 (360)=A.W.N. (1886), 110; 20 B. 380 (383); 34 C. 403 (409) (**F.B.**)=5 C.L.J. 247=11 C.W.N. 329 =2 M.L.T. 123; **D**, 7 A. 538=A.W.N. (1885) 144; 18 A. 241 (244); 20 A. 195 (197); 23 C. 739 (**F.B.**).]

THIS was an appeal from a decision of a Division Bench of the Allahabad High Court, dated the 26th August, 1875, dismissing an appeal from an order of the Subordinate Judge of Zila Moradabad, dated the 8th April, 1874.

The judgment of the High Court was as follows:

"The suit was instituted on the 14th September, 1872, and after much delay, owing to the residence of both parties in foreign territory, the hearing was, at the request of the pleaders of both parties [68] adjourned for the 5th January, 1873. Issues were framed, and the 28th October fixed for the hearing; the suit was not called on that date, but on the 7th November, 1873. It was again adjourned at the like request to the 2nd February, and subsequently to the 8th April, 1874. On 6th April the defendant-appellant submitted a petition praying for a further adjournment, on the plea that his pleader had gone to Calcutta to consult the Advocate-General and could not return in time. This petition was not presented by a pleader nor by any duly authorised agent, and was rejected. On the 7th April the defendant's pleader telegraphed to the Subordinate Judge requesting him to postpone the hearing. The Subordinate Judge refused to consider this irregular application, and on the 8th April the case was called on in due course. Although the defendant had an agent in Moradabad, no other pleader than Ganesh Parshad, who was absent in Calcutta, was appointed, and the defendant appearing neither in person nor by pleader, on the 8th April the case was heard and decided *ex parte* under the provisions of ss. 147 and 111. The appellant subsequently took the proper step of applying to the Subordinate Judge, under s. 119, for an order to set aside the judgment, but unfortunately he did not proceed with that application, and it was struck off for default, the appellant being advised by his late counsel to proceed by way of appeal. He is met by the objection that the appeal does not lie, as the judgment was passed *ex parte*. The appellant's counsel urges that the case was not heard by the Subordinate Judge *ex parte* under s. 111; that the default of the appellant was such a default as is contemplated in s. 145, and not such a default as is contemplated in s. 147. It appears clear to us that the former section applies where the

parties appear, but either of them fails to proceed with the case; while s. 147 applies to cases like the present, in which at an adjourned hearing a party failed to appear. If the Judge heard the suit at all in the absence of the appellant, he could only do so under the provisions of s. 111. Having the option of proceeding with the hearing or again adjourning the case, he proceeded to hear and determine it.

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"Then it is contended that the appellant was entitled to proceed either by way of appeal or by an application under s. 119, and *Kalee Churn Dutt* v. *Modhoo Soodun Ghose*, (1) is relied on; but [69] that ruling has not apparently been followed in *Administrator General of Bengal* v. *Lala Dyaram Das*, (2) and in *Purus Ram* v. *Jyunti Parshad*, (3) decided on the 21st May of that year, it has been held that no appeal lies.

"The omission to follow the procedure required by s. 119 has deprived the appellant of all remedy. The appeal must therefore be dismissed with costs."

Mr. *Leith*, Q. C. (Mr. *C. W. Arathoon* with him), for the appellant, contended that under the circumstances of the case the Judges of the High Court were wrong in holding that no appeal lay to them. In *Goluckbur* v. *Bishonath Geeree* (4) it was held by the Calcutta High Court that, where a defendant had appeared on the day fixed in the summons, although he put in no answer or written statement, a judgment afterwards pronounced against him was open to appeal as not being an *ex parte* judgment within the meaning of s. 119 of Act VIII of 1859. The present was a stronger case, since the defendant had appeared and put in his defence, and issues had been fixed. In *Gorachand Goswami* v. *Raghu Mandal* (5), it was held that the provision in s. 119 refers only to the case of a defendant who has never appeared, not to the case of a defendant who is only absent on an adjourned hearing. *Kalee Churn Dutt* v. *Modhoo Soodun Ghose* (1), noticed by the High Court, is to the same effect. See also *Amrithnath Jha* v. *Roy Dhunpat Singh* (6), in which the case of *Bhimacharya* v. *Fakirappa* (7), decided by the Bombay High Court, is distinguished. In *The Administrator General of Bengal* v. *Lala Dyaram Das* (2), cited by the Court below, the point decided was different, there having in fact been no appearance of the defendant. The only decision which supported the view taken by the High Court was that in *Purus Ram* v. *Jyunti Parshad* (3), which was a decision of the same Court and itself erroneous.

The respondents did not appear.

JUDGMENT.

[70] Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—The question in this case is whether the first part of s. 119 of Act VIII of 1859 applies to a case which has been decided under the provisions of s. 147 of the same Act. That part of s. 119 is in the following words: "No appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared." S. 119 must be read together with ss. 109, 110, and 111. S. 109 says: "On the day fixed in the summons for the defendant to appear and answer, the parties, shall be in attendance at the court-house in person or by a pleader, and the suit shall then be heard, unless the hearing be adjourned to a future day which shall be fixed by the Court." S. 110 says: "If on the day fixed for the defendant

(1) 6 W.R. 86. (2) 6 B.L.R. 688.
(3) 1 N.W.P.H. C.R. 154,
(4) Marsh. 32. (5) 3 B.L.R. Ap. 121. (6) 8 B.L.R. 44.
(7) 4 B.H.C.R. A.C.J. 206.

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to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned, neither party shall appear, either in person or by a pleader, when duly called upon by the Court, the suit may be dismissed." There the words are: "If on the day fixed for the defendant to appear and answer, or any other day subsequent thereto to which the hearing of the suit may be adjourned." Then comes s. 111, which says: "If the plaintiff shall appear in person"—it does not say "on the day fixed, or on any subsequent day," but simply "if the plaintiff shall appear in person or by a pleader, and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit *ex parte*." Ss. 109 and 111, taken by themselves, clearly relate to the appearance of parties and to their non-appearance at the first hearing of the suit. The 146th and 147th sections are enactments relating to adjournments. S. 147 enacts that "if on any day to which the hearing of the suit may be adjourned, the parties, or either of them, shall not appear in person or by pleader, the Court may proceed to dispose of the suit in the manner specified in s. 110, s. 111, or s. 114, as the case may be, or may make such other order as may appear to be just and proper in the circumstances of the case." There is no enactment in that section that, in case the Court disposes of the suit in the manner specified in s. 111 (the section which applies to the present case), the first part of s. 119 shall apply to such a judgment. Under Act VIII of 1859 the general rule is that an appeal lies to the High Court from a [71] decision of a Civil or Subordinate Judge, and a defendant ought not to be deprived of the right of appeal, except by express words or necessary implication. Looking at all the sections together, their Lordships are of opinion that the words "who has not appeared" as used in s. 119, mean "who has not appeared at all," and do not apply to the case of a defendant who has once appeared, but who fails to appear on a day to which the cause has been adjourned.

There are several cases to that effect decided by the High Court in Calcutta: Marshall's Report, page 32; 3rd Bengal Law Reports Appendix, 121, and the 6th Weekly Reporter, page 86.

Two cases were referred to by the learned Judges who decided this case,—a case in 6th Bengal Law Reports, 688, and one from the North-Western Provinces Reports of 1869, decided the 21st May of that year. Their Lordships have referred to those decisions. It appears to them that the case cited from the 6th Bengal Law Reports, 688, so far from being an authority in support of the decision of the High Court, is rather an authority against it. The case which is cited from the North-Western Provinces Reports of 1869, decided the 21st May of that year, is certainly in conflict with the several decisions in the High Court at Calcutta to which reference has been made, and which in the opinion of their Lordships were correctly decided.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the High Court was erroneous, and that the case be remanded to the High Court to hear and determine the appeal. The respondent must pay the costs of this appeal.

Agent for the appellant: Mr. *T. L. Wilson.*

2 A. 71.

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APPELLATE CIVIL.

2 A. 71.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

HAMID ALI (*Plaintiff*) v. IMTIAZAN AND OTHERS (*Defendants*).*
[1st November, 1878.]

Muhammadan Law—Husband and wife—Divorce—Repudiation by ambiguous Expression—Custody of Minor Children.

Where a Muhammadan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his [72] paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife, *held* that the expression used by the husband to the wife, being used with intention, constituted, under Muhammadan Law, a divorce which became absolute if not revoked within the time allowed by that law.

Held also, the divorce having become absolute, the parties being *Sunnis*, that the husband was not entitled to the custody of his infant daughter until she had attained the age of puberty (1).

[Appr., 12 M. 63 (67); R., 106 P.R. 1891.]

THIS was a suit in which the plaintiff, a Muhammadan of the sect of *Sunnis*, claimed, amongst other things, to recover his wife and his infant daughter. His wife set up as a defence to this claim that the plaintiff was not entitled to recover her as he had divorced her before the suit. It appeared from the evidence of the plaintiff that his wife's father and her brothers had come to his house with the object of taking his wife away to her father's house. His wife was willing to go, but the plaintiff objected to her going, and addressed her as follows: "Thou art my cousin, the daughter of my uncle, if thou goest" (2). His wife did not take any notice of these words, but left his house. On the issue whether the expression used by the plaintiff to his wife constituted a divorce, the Court of first instance held, relying on a passage in the Durul-Mukthar, that it did so, being an "ambiguous expression" used by the plaintiff, while in an angry state, with an intention to repudiate his wife. It also held that, as the repudiation had not been revoked within one year, the divorce had become final, and the plaintiff could not therefore recover his wife. It also held that the plaintiff could not recover his infant daughter till she attained puberty. The lower appellate Court, on appeal by the plaintiff, concurred in the view of the Court of first instance that the plaintiff had divorced his wife. It did not determine whether or not the plaintiff had revoked the divorce within the time allowed by Muhammadan law, or whether he was entitled to the custody of his infant daughter.

The plaintiff appealed to the High Court, contending that the expression used by the plaintiff to his wife did not constitute a divorce, under Muhammadan law, such expression having been used by him in anger only, and without the intention of divorcing [73] her; that, assuming such expression constituted a divorce, the plaintiff was entitled to revoke the divorce, which he had done by asking his wife to return to him; and that

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* Second Appeal, No. 1211 of 1887, from a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 15th August 1877, affirming a decree of Maulvi Nasar-ul-la Khan, Munsif of Mainpuri, dated the 31st March, 1877.

(1) See also *Mohomuddy Begam* v. *Oomdutoonisso*, 13 W.R. 454; and *Bee-Shun Bibee* v. *Fuzuloollah*, 20 W.R. 41, where the parties presumably were *Sunnis*.

(2) "*Ki tu mere chacha ki larki lahin hai, agar tu jaegi.*"

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the lower appellate Court had failed to determine whether or not the plaintiff was entitled to the custody of his minor daughter.

Mr. *Mahmood* and Pandit *Ajudhia Nath*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

ORDER OF REMAND.

The High Court remanded the case for the trial of the issue set out in the order of remand, which was as follows:

TURNER, J.—The words used by the appellant to his wife appear to fall within the class of ambiguous expressions. By saying, if you go to your father's house you are my paternal uncle's daughter, the appellant intended to declare that he would regard her in no other relationship, and not receive her back as his wife. This if spoken with intention (as it doubtless was), constituted a divorce, which became final if it was not revoked within the time allowed by law (1). The appellant alleges it was so revoked. The Court of first instance found that the appellant did not recall his wife for a year, a finding which appears possibly inaccurate. The whole of the questions on the merits were raised by the very general expressions used in the memorandum of appeal, but the issue as to revocation was not determined. The lower appellate Court must try the following issue: Was the divorce revoked within the period allowed by law? On the return of the finding ten days will be allowed for objections. Regarding the custody of the daughter, if it be found that the divorce was not revoked, the daughter must remain with her mother until she has attained the age of puberty.

The lower appellate Court found on this issue that the plaintiff had not revoked the divorce.

The High Court (PEARSON, J., and TURNER, J.) delivered the following judgment.

JUDGMENT.

TURNER, J.—No objection having been taken to the finding on the issue remitted we accept it. The appeal fails and is dismissed with costs.

Appeal dismissed.

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2 A. 74.

[74] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

UDA BEGAM (*Plaintiff*) *v.* IMAM-UD-DIN (*Defendant*).*
[6th November, 1878.]

Execution of Decree—Appeal from order—Act X of 1877 *(Civil Procedure Code), ss.* 2, 3, 244, 584, 588 *(j)—Act VIII of* 1859 *(Civil Procedure Code)—Repeal—Pending Proceedings—Act I of* 1868 *(General Clauses Act), s.* 6.

The Court executing a decree for the removal of certain buildings made an order in the execution of such decree directing that a portion of a certain building should be removed as being included in the decree. On appeal by the judgment-

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* Second Appeal, No. 30 of 1878, from an order of John Power, Esq., Judge of Shahjahanpur, dated the 22nd September, 1877, modifying an order of Rai Raghu Nath Sahai, Munsif of East Budaun, dated the 11th December, 1876.

(1) See Baillie's Digest of Muhammadan Law, p. 228.

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debtor the lower appellate Court, on the 22nd September, 1877, reversed such order. *Held, per* PEARSON, J., on appeal by the decree-holder from the order of the lower appellate Court, that the lower appellate Court's order, being within the scope of the definition of a "decree" in s. 2 of Act X of 1877, was appealable under s. 584 of that Act, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to s. 6 of Act I of 1868. The Full Bench ruling in *Thakur Prasad* v. *Ahsan Ali* (1), followed.

Held per STUART, C. J., *dissenting* from the Full Bench ruling in *Thakur Prasad* v. *Ahsan Ali* (1), that a second appeal in the case would not lie.

THE facts of this case were as follows: In executing a decree for the removal of certain buildings made by the High Court in special appeal, the Court of first instance, the Court executing the decree, on the 11th December, 1876, ordered the plaster on the walls of a "*sidhari*" numbered 6 in a map of the premises to be removed. The judgment-debtor appealed from this order to the lower appellate Court, which set aside the order on the 22nd September, 1877.

The decree-holder appealed to the High Court against the order of the owe r appellate Court, contending that the plaster on the "*sidhari*" was removable under the terms of the decree.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondents.

JUDGMENTS.

[75] The following judgments were delivered by the Court:

PEARSON, J.—The admissibility of this appeal has been virtually determined by a recent Full Bench judgment (1) which, until overruled, is binding on us. In my opinion the appeal is admissible, the lower appellate Court's order being a decree within the scope of the definition contained in s. 2, and consequently appealable under s. 584 of Act X of 1877, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to s. 6 of Act I of 1868. On the merits the appeal, in my opinion, fails entirely. The first Court dismissed the claim to No. 6. The High Court certainly did not decree that claim expressly; and there is nothing in its decree or its judgment, or the judgment of the first Court relating to the plaster on the "*sidhari*." The appeal appears to be frivolous and vexatious as well as groundless, and I would dismiss it with costs.

This opinion was recorded by me at the time of the hearing of this appeal on the 19th August last, and I have to-day for the first time been made acquainted with the views entertained by the Chief Justice, who in the judgment just now delivered by him, not only expresses his reasons for dissenting from the Full Bench ruling to which reference was made in the first part of my judgment, but sets aside that ruling and dismisses the appeal as inadmissible. Under the circumstances the proper course would have been, I conceive, to refer the point in question again for the consideration of the Full Bench; and in order that such course may be taken, if deemed advisable, I feel it to be my duty to require a reference of this appeal to another or other Judges of the Court under s. 575 of Act X of 1877.

STUART, C. J.—If I could regard this appeal as before me on its merits, I would probably concur in the opinion of my colleague Mr. Justice Pearson, that it is frivolous and groundless and ought to be dismissed.

(1) 1 A. 668.

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But there is a preliminary question for myself which this case affords me the first judicial opportunity I have had of considering, *viz.*, whether this appeal should have been admitted to a hearing at all. In other words, whether such an appeal lies. And with whatever result or consequence, I feel it my duty to record the opinion I have formed on that question.

[76] It is suggested that the admissibility of this appeal has been virtually determined by a recent Full Bench judgment of this Court (1). That judgment was delivered during my short absence from the Court on privilege leave and at once carried into practice, without any previous consultation or communication with myself, and, had the circumstances not been so exceptional, it might have been considered to be binding on me, although I was precluded from hearing the argument and judicially considering the reasons on which the judgment is founded. I would have preferred that so important a question, and raised for the first time under the new Code of Procedure, had been delayed till my return to the Court. When I left on short leave on account of the state of my health, I had no reason to believe that any such question would have been brought forward in my absence; and from the nature of the case I could not have anticipated, and I did not anticipate, that any such proceeding would have been entertained; for the question came up before the Full Bench on a reference made by Mr. Justice Turner, dated the 13th November 1877, and a number of other appeals of the same kind having in the meantime been presented, it was felt by the Court generally that owing to difficulties of interpretation arising out of the peculiarities of the provisions of the new Code, some action should be taken by the Court, and it was proposed by one of the Judges that the Legislative Department of the Government of India should be addressed on the subject, and a letter going fully into the difficulties of construction to which I have referred was proposed for adoption by the Court. That mode of proceeding was, however, ultimately abandoned, and the question was allowed to await judicial determination on a suitable opportunity. Such was the state of things when I left the Court on leave at the end of April last, and I very much regret that that opportunity was found almost immediately after my departure, and now all the more from my having formed a deliberate opinion contrary to the conclusion of the Full Bench ruling, for it is possible that, if my colleagues had been made acquainted with the reasons on which my opinion has been formed, they, or some of them, might not ultimately have concurred in the decision which they were induced to accept.

[77] The reference by Mr. Justice Turner, which gave rise to the case before the Full Bench, records an admission directly opposed to the subseqent Full Bench ruling, for the reference is in these terms: " It is admitted that no second appeal lies in this case under the new law, and it appears to me that the application is governed by the new law. I refer the point to the Full Bench at the request of the pleader, and because I am told that there is a difference of opinion in the Court on the point." The Court was then full, and the difference of opinion correctly referred to in this reference did, so far as the question had then been considered, undoubtedly exist; and if there was to be a judicial determination on the question, which had given rise to this difference of opinion, it was to the last degree expedient and desirable that that determination should have been arrived at by deliberation among all the Judges and not in the absence of, or to the exclusion of, the Chief Justice.

(1) 1 A. 668.

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I may also here observe that the difficulties of construction, which had been anticipated in relation to certain of the provisions of the new Code of Procedure, have to some extent been recognised by the Government of India; and a Bill to amend the Code has for the purposes been introduced into the Legislative Council, and by the kindness of his Excellency the Viceroy, I have been favored with a copy of that Bill, and of the statement of the objects and reasons in support of it. But, excepting in so far as we have the opinion of the Member of Council, who prepared that statement the Bill so introduced does not appear to me to touch the question of the competency of such an appeal as that now under consideration. By s. 31 of this Bill it is proposed, among other things, to enact that from cl. (*j*) the following words shall be omitted, *viz.*, "of the same nature with appealable orders made in the course of a suit;" and from the statement of the objects and reasons of the Bill, the opinion would appear to be entertained that "the result will be to restore the first of the two appeals given in effect by Act XXIII of 1861, s. 11, against all orders determining any question relating to the execution of a decree;" and if it had been proposed so expressly to provide in the Bill, no doubt the effect would be to allow a special or second appeal in such a case as that determined by the Full Bench ruling, and also in such a case as [78] that now before me. But the correctness of such an opinion depends on another question, no doubt expounded by that ruling, but as to which I have myself entertained serious doubts, *viz.*, whether the effect of s. 6 of Act I of 1868 (the General Clauses Act) is, notwithstanding the repeal of Acts VIII of 1859, and XXIII of 1861, and the express provisions of the new Code of Procedure, to keep alive the law provided by s. 11 of this latter Act, and to apply the remedy of special appeal in the case of orders passed in execution of a decree. I have said that I have entertained serious doubts whether such is the effect of s. 6 of Act I of 1868. Indeed, I may at once say that the opinion I have formed is that that Act cannot have any such effect, and I shall presently explain my reasons for holding that opinion, and that therefore the Bill which has been introduced to amend the new Code of Procedure will fail in effecting the object apparently intended by it in this respect. But that Bill has not yet been passed, and we cannot anticipate in what form or to what effect it may ultimately be adopted as an Act of the Legislature. But to put an end to all such doubts and difficulties, it would be far better to provide *expressly* that the law of s. 11 of Act XXIII of 1861, as interpreted and applied previous of the passing of the present law of procedure, shall, notwithstanding any provisions to the contrary in the new Code, continue to be the law of procedure to be observed by the Courts, than to leave it to the uncertainty implied in the statement of the objects and reasons. The former course would put an end to all controversy, while the latter would leave the matter open to dispute; and it is to be remembered that all the four High Courts have not yet pronounced an opinion on the question of the validity or otherwise of these appeals from orders.

With these general remarks, I now proceed to consider the question of the admissibility of the present appeal, and therein the argument for and against such a proceeding.

The order appealed against was one made in a suit to obtain possession of a house, and to demolish another which, as alleged by the plaintiff, had been improperly built on her land. The judgments of the lower Courts were both against the plaintiff's claim, and she preferred a special appeal to this Court, which reversed [79] the

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judgment of the lower Courts and decreed the plaintiff's claim in full. In the proceedings in execution of this Court's decree, the Munsif, under a misapprehension as to its full meaning and effect, made an erroneous order dated the 11th December 1876, but which on appeal to the Judge was corrected by an order dated the 22nd September 1877, and the execution of the decree so corrected was ordered by the Judge.

From that order of the Judge an appeal, in the nature of a special or second appeal, has been presented to this Court, and the question is whether such a proceeding is valid and admissible. According to the Full Bench ruling, delivered under the circumstances which I have explained, such an appeal is valid, and no doubt if the legal effect of s. 3 of the new Code and of s. 6 of the General Clauses Act (to both of which provisions I shall presently advert) is, in a case like the present, still to keep alive the entire procedure allowable under the old Code, such a ruling would be correct. But the opinion which I myself have formed, after having carefully and studiously considered the question, and the sound principles of legal construction which have ever been recognised by the Courts in England, and applied by them to the interpretation of statutory laws, is, that no such appeal lies.

By s. 3 of the present Procedure Code, Act X of 1877, it is provided that "nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before the Code came into force." In this provision the meaning of the word "herein" has to be considered. Does it mean the whole Code or merely the particular section of which it forms part? If the former, I would then be disposed to hold that the Full Bench ruling was right in its conclusion, although on different reasoning from that on which the judgment is based, for then there would be nothing to qualify or limit the application of this s. 3 or of s. 6 of the General Clauses Act, the entire new Code being thus simply exempted from any operation in the cases contemplated by s. 3; and, as another consequence, the application of s. 6 of the General Clauses Act would be left unimpeded by any legal considerations arising out of the new Code. But the Full Bench ruling by my colleagues appears to assume that, in the portion of s. 3 which I have quoted, the word "herein" applies [80] only to the particular section, s. 3, of which it forms part, and in this respect I concur in the ruling. I think it could never have been intended that the word "*herein*" should have the sweeping effect involved in the other view I have referred to, and that it was not contemplated that the other sections of the new Code relating to appeals should be excluded from consideration in connection with s. 3. The more sound construction therefore would appear to be that the repeal of the enactments, as provided by that section, should not affect the procedure prior to decree, so far as that procedure itself is concerned: and that to such extent the old procedure, notwithstanding its repeal in other respects, in still *pro tanto* saved as regards procedure prior to decree in suits instituted or appeals presented before the new Code came into force. In the present case the date of the Judge's order in appeal to him which is now sought to be the subject of a special or second appeal to this Court is the 22nd September 1877; and being an appeal undoubtedly contemplated by s. 3, and having been presented before the new Code came into force, the whole procedure, that is, the *whole* procedure *which led up to it,* is saved and unaffected by the new procedure.

The question, however, whether the saving of the old procedure in such a case as this of necessity includes and carries with it the right to a

second appeal to this Court is, in my opinion, a very different one. I am aware that it has been considered that an appeal is a mere stage or step in one course of procedure till final disposal of the suit. But that opinion I do not hold, nor do my colleagues apparently, for in one part of their judgment they state—"The Code, following the usage in this country, does not treat appeals as mere stages in a suit," although in a previous part of the same judgment they affirm that "an appeal is in fact a stage of a proceeding." My own opinion is that an appeal is not a necessary part of procedure. It is under the control of the parties after decree in the original suit. It is not therefore a necessary stage, but may be availed of or not, according as the original decree is regarded by the party against whom it is given. Irrespective of any such appeal, the procedure in an original suit, not only prior to but inclusive of a decree thereon, is not only complete, but a completed proceeding in itself, carrying with it a [81] final result within its own limits, in the shape of an operative decree capable of full execution and final satisfaction, and there is thus a *finis litis*. But if the unsuccessful party is dissatisfied with a decree so given against him, there are rules and regulations for an appeal to a higher tribunal, and of these he may take advantage; but such a proceeding is no *necessary* part of the original suit, but a separate and independent proceeding to be availed of, not at the mere bidding of the law or of the appellate Court, but as he himself, the defeated party, may in his discretion deem prudent, or as he may be advised. This view of the distinction between the procedure in an original suit, whether prior to or terminating in a decree, and an appeal therefrom, I shall further illustrate and support by authorities in a subsequent part of this judgment.

As to the procedure mentioned in s. 3 of the new Code, I understand by it the *complete* "procedure prior to decree," and that therefore after such decree the procedure provided by the new Code was to determine all that was to follow. Therefore if it be found in such cases that the new Code did not provide for a second appeal, no such second appeal should be allowed. Now, remembering that s. 3 of the new Code has the limited meaning given to it by the Full Bench judgment of my colleagues, concurring, as I repeat I do, in that view, and that only the repealed enactments mentioned in the first part of s. 3 and not the whole Code, are excluded from consideration, it appears to me that we are bound in the first place to read and apply s. 3 as limited and controlled by the other provisions of the Code relating to appeals, that is, to read them *together*, and not against each other, allowing effect to the old Code excepting in so far as it appears to be controlled by the new Code.

On the same principle I would read s. 6 of the General Clauses Act *with* and not against the new Code. It is, indeed, not a little remarkable that the new Code of Procedure from beginning to end makes no allusion to this Act; it is not referred to in any express provisions of the Code, nor is it to be found in the schedule of repealed Acts. My respect for the Legislature forbids me assuming that it was overlooked or disregarded by the framer or framers of the Code, but that the intention was to allow it, not unqualified [82] operation, but such legal effect as it might have consistently with the provisions of the new law; and it appears to me that a construction which makes two separate laws consistent, that is, capable of being read together, is to be favoured rather than one which makes them contradictory of each other. This view of the relative operation of these two laws I shall also presently illustrate and support by authority.

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But before proceeding further with the explanation of my own views on the subject of these appeals from orders, I would advert to the judgment adopted by my colleagues during my recent brief absence from the Court. After stating the case on the reference before them, and alluding to s. 3 of the new Code and s. 6 of the General Clauses Act, the judgment refers to a Full Bench decision of the High Court of Bombay, *In the matter of Ratansi Kalianji* (1), in support of the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with the execution of decree is prospective, and does not affect proceedings already commenced. The Court consisted of the Chief Justice and four other Judges, and of these two Judges, Mr. Justice Green and Mr. Justice West, concurred with the Chief Justice, while the other two Judges, Sir Charles Sargent and Mr. Justice Bayley, dissented. But the opinion of the Chief Justice, referred to in the judgment of my colleagues, was expressed in a totally different case from the present, for it was whether the imprisonment of a debtor in execution of a decree under the old Code should be determined by that Code or by the new Code, there being a considerable difference between the two in this respect. The Court held, and very reasonably, that the law under which the decree had been made must determine its execution, and that the new Code could not have adversely retrospective effect, and that the execution of the decree and the incarceration of the debtor under it was clearly "a proceeding commenced" within the meaning of s. 6 of the General Clauses Act. But that is a totally different question from that relating to an *appeal* from an order of this kind; it was simply a question which of two laws, generically of the same nature, should have operation, the law under which the decree was made or the new law? the latter plainly [83] intending decrees made under its own provisions. I have read the whole of this judgment by my learned and esteemed friend the present Chief Justice of Bombay with the greatest respect and with much sympathy, and, I may add, with admiration of its legal reasoning and the judicial language in which it is expressed. One of the other Judges, Mr. Justice Green, who concurred in the conclusion arrived at by the Chief Justice on the question before the Court, referred to a previous Full Bench ruling of the same Court in the case of *Ratanchand Srichand* v. *Hanmantrav Shivbakas* (2), by which it was decided that, under the words "proceedings commenced" in s. 6 of the General Clauses Act the right of appeal to the District Court from a decree made before the Bombay Civil Courts Act, 1869, came into operation by a Principal Sadar Amin was not taken away by that Act. This case was argued before a Full Bench consisting of the then Chief Justice, and Warden, Gibbs, and Melvill, JJ. But judging from the report of this case, it does not appear to have been very fully argued, and the judgment itself is comparatively brief, and it does not appear to me to examine the question before it in a comprehensive manner. It would have been more satisfactory if the judgment had contained a more searching examination of the legal principles applicable to the question and of the rules of construction of Statutes adopted and applied by the Courts in England. For myself I cannot regard it as an authority binding on me, and I consider myself free to form my opinion on the case before me in my own Court irrespective of it.

The Full Bench judgment of my colleagues then proceeds to deduce an argument by analogy with regard to the prospective operation of laws

(1) 2 B. 148.

(2) 6 B.H.C.R. A.C.J. 166.

from certain sections of the Code, ss. 311, 312, 283, and others. But such an argument I am quite unable to appreciate. At best it is far-fetched and fails in affording any material assistance in the solution of the question I am at present considering. The judgment then proceeds to allude to s. 588 of the new Code, and to state, for the reasons it gives, that it is not unreasonable to conclude that, in leaving the enactments of the new Code as they stand, the Legislature had in view the provisions [84] of the General Clauses Act. In this conclusion, as will be seen, I concur, although not for the reasons assigned, nor to the extent argued for, by the judgment. I may be permitted here to observe (if the allusion may be allowed in a judicial exposition) that such a general conclusion, equally entertained by my colleagues and myself, although on different grounds and to a different extent, is curiously at variance with a recent official announcement (1) publicly made in another place by the Hon'ble Member of Council who is primarily responsible for the language of the new Code, that in its preparation there had been "a strange forgetfulness of the General Clauses Act." Now, although it might fairly be contended that this remark goes to show that a second appeal from orders was never intended or contemplated by the Legislature, I quite agree that we are not bound to consider that there was any such forgetfulness, but on the contrary to assume that the same Legislature which passed both laws must be taken, when preparing the new Code of Procedure, to have had at the time in its mind the General Clauses Act; and it appears to me sufficient for this purpose to point out, as I have already done, that this same General Clauses Act, I of 1868, is passed over in silence in the new Code, and is not to be found in the schedule of repealed Acts.

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The decision of the Bombay Court, as adverted to by Mr. Justice Green, is then referred to by my colleagues, and in connection with it the opinion is expressed "that an appeal is in fact a stage of a proceeding," which, however, as I have shown is at variance with another opinion shortly after stated in the same judgment that "the Code following the usage in this country does not treat appeals as mere stages in a suit."

The rest of the judgment is occupied with the exposition of views in which I am unable to concur for reasons I shall now proceed to explain.

[85] The section of the new Code chiefly, if not solely, to be considered in the case now before me is s. 588, which forms the commencement of ch. XLIII, and is headed "Of appeals from orders;" but before any further reference to that section I would notice an opinion expressed by one of my colleagues, who, although he concurred in the conclusion approved by the other members of the Court who formed the Full Bench during my absence, simply recorded a brief judgment to that effect, and refrained from adopting the reasoning accepted by the others. The opinion in question was to the effect that, not only was there an appeal to this Court from such an order as he was then considering (and which was of the same nature as that now before me) under the old Code, Act VIII of

(1) The announcement to which the learned Chief Justice probably refers is the speech of the Hon'ble Mr. Stokes on moving for leave to introduce a Bill to amend the Code of Civil Procedure on the 20th of June last, when the Hon'ble Member is reported to have said:—"It had not been thought necessary to provide" (in the amending Bill) " 'against difficulties which had arisen from a strange forgetfulness' " (query in *construing* the Code) " of the provisions of the General Clauses Act (I of 1868). s. 6, and the decision of the Bombay High Court (6 B.H.C.R.A.C.J. 166) on that section."

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1859, as in his opinion kept alive by s. 6 of the General Clauses Act, but that the order was also appealable as an order falling within the definition of "decree" in s. 2 of the new Procedure Code, and that it was therefore appealable under s. 584. But with the greatest deference to my hon'ble colleague such a view of that section has surprised me not a little, for that section, forming the beginning of ch. XLII, and headed "of appeals from appellate decrees," plainly contemplates a decree determining the *merits* of the suit in which it is made, and has no application whatever to an order of this kind passed merely in execution of such a decree. And this to my mind is sufficiently shown by the express and peculiar provision made respecting appeals from orders by the subsequent s. 588. But as I have stated, my hon'ble colleague justifies his opinion that such an order as this is appealable under s. 584, by referring to the definition of "decree" in s. 2 of the new Code, where that term is defined to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied;" and then, as an illustration of what is meant by this determination, it is added,—"an order on appeal remanding a suit for retrial is not within this definition," so that, according to the intention of the definition, a remanding order directing a re-trial of a suit on its merits is not within its meaning, although an order merely directing the execution of the decree, and not touching the merits of the suit, is within the definition! This surely is a little startling, and possibly on reconsideration my hon'ble colleague may hesitate [86] before adhering to such a view. But further it is well known to lawyers and the Courts at home that legislative definition or interpretations of this kind, being necessarily of a very general nature, not only do not control, but are controlled by, subsequent and express provisions on the subject-matter of the same definition, and that we cannot therefore apply this definition of decree to an order of the kind now before me, seeing that it belongs to a class of orders which, with reference to the remedy of appeal, are expressly and specially dealt with in a subsequent chapter and section, *viz.*, s. 588, to the provisions of which I hold the definition in question must yield. In Sir F. Dwarris' well-known Treatise on Statutes, second ed., 1848, page 509, there is the following observation:—"Interpretation clauses are by no means to be strictly construed, and convenience seems likely, to lead to their being practically disregarded;" and then in support of such opinion he quotes from a judgment of Lord Chief Justice Denman, reported in 7 A. and E., page 480, in which, with reference to the contention for the strict application of a legislative definition, I find the following remarks:—" But we apprehend that an interpretation clause is not to receive so rigid a construction that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances:" and again in the same judgment—" We cannot refrain from expressing a serious doubt whether interpretation clauses of so extensive a range will not rather embarrass the Court in their decision than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy, and the application of them to particular cases may give rise to endless doubts." And there are other illustrations of the same kind in Dwarris all going to show that a legislative definition or interpretation clause must yield to enactments of a special and precise nature, and like words in schedules they are received rather as general examples than as overruling provisions. Applying these views, the demonstration is obvious that the kind of "order" that was

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before the Full Bench, and is now considered by me in the present case, is in no way appealable under s. 584.

The argument founded on s. 6 of the General Clauses Act, as modifying if not preventing the application of s. 588 to such [87] a case as this, is more pertinent, but as I shall show equally fallacious.

Section 588 provides that "an appeal shall lie from the following orders under this Code, and from no other such orders." These orders are then enumerated from *a* to *w* inclusive, and at the end of such enumeration there is the very distinct provision that "the orders passed in appeal under this section shall be final," and it is under (*j*) that the present case has to be considered. The orders therein described are "orders under s. 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit." For the order sought to be appealed against is clearly one falling under (*c*) of s. 244, being a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree. As to the words "of the same nature as appealable orders made in the course of a suit," I concur in the remark publicly made in another place, that it is not very easy to understand them; and it is satisfactory to know they have been left out in the Bill brought in to amend the Code, and I trust if the Bill passes into law that it will be allowed to stand with this omission. The order then, being thus plainly one falling within not only the meaning but the express terms of *j* in s. 588, is on the face of that section not further appealable. But it is said that, because the decree for the execution of which the order was made, was a decree passed under the old Code, it was a "proceeding commenced" within the meaning of s. 6 of Act I of 1868, the General Clauses Act. That is an opinion, however, which can only be maintained by holding that that Act, unless expressly repealed *in toto*, must be understood to override in their entirety the whole provisions of a subsequent Act dealing with the same subject-matter, no matter how carefully or specially such provisions may be expressed. Such a view of the law appears to me to be only stated in order to be at once rejected as an incongruity in the highest degree unreasonable. A reading of the law on the contrary, which would make the two Acts consistent, by allowing a subsequent one to modify the previous Act, is surely to be preferred. Nor do I find in s. 6 of Act I of 1868 anything to [88] interfere with, much less to exclude, such a principle of construction while it is strongly supported by the very clear and unmistakable language of the new Code. Of the literal meaning of s. 588 on the face of it, there can be no doubt whatever. It is expressed in terms which, of themselves, are applicable to all possible cases, and it is not to be contradicted in this respect, in the sense of being abrogated, unless that intention appears, not by way of doubtful implication or inference, but by precise and express language; and the new Act and not the old should have the benefit of any such doubt. Section 6 of Act I of 1868 is in these terms:—"The repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or any proceedings commenced, before the repealing Act shall have come into operation." There is nothing here said about *appeals* and the force of the application of this section to the present case turns on the words "shall not affect any proceedings commenced" and the argument appears to be that the expression "shall not affect" saves the right of appeal given by the old Code of Procedure Act VIII of 1859, notwithstanding the express provisions of the new Code. But this section is clearly and literally capable of a construction which

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does not necessarily include an appeal, for the words "shall not affect any proceedings commenced" may be read with or without a limitation, that is, either to admit of its application to the full extent allowed by the law of procedure existing at the time of the passing of the General Clauses Act, or as limited by a subsequent Act, the provisions of which are on the face of them complete in themselves, although inconsistent with, because, controlling, the full application of the former. On this principle of construction the expression "proceedings commenced" will have effect given to them up to the point where the new Act comes into operation, and then stop. And this is a reading of both Codes which is quite consistent with the ruling of the Bombay Court with respect to the period of imprisonment to be applied to judgment-debtors against whom process issued under the old Code, and in particular with the judgment of the Chief Justice, Sir Michael Westropp. For the warrant had issued under the old Code and execution of it had gone on for a considerable period, and there was therefore clearly a "proceeding commenced"; if not something more. [89] But an appeal is a different matter. In the present case the "proceedings commenced" ended with the order dated the 22nd September, 1877, and nothing in the new Act could invalidate them; but the appeal from that order was not taken till the 30th May 1878, and the opinion I hold under these circumstances is that such appeal must be determined by the new and not by the old Code: in other words, that the appeal is inadmissible. This it is obvious is the only construction that can make the two Acts consistent, but I think that for that reason, if for no other, it ought to be favoured and allowed by legal interpretation to supply the law.

I have pointed out that there is nothing in s. 6 of the General Clauses Act about an appeal, and I have before shown that an appeal is not necessarily a mere stage in a suit, but a separate and independent proceeding, under the control of the parties, the original suit with the decree made in it being complete in itself and *pro tanto* finally operative. In the absence of express language, therefore, such a right of appeal is not, as an available stage in a suit, to be assumed, but ought to be expressly kept alive or expressly given. In the case of *Rex* v. *The Justices of Surrey* (1), Ashurst, J., said:—"The power of appealing from the judgment of the Justices seems to be of this kind" (*i.e.*, by special provision), "and does not attach without being expressly given." In another case, *Reg.* v. *The Recorder of Bath* (2), Lord Denman said:—"As it seems to us hardly possible to suppose it to have been the intention of the Legislature that an individual interested and aggrieved should not have the power of questioning the validity of a vote at the sessions, we cannot avoid noticing with regret that recourse should have been had to the method of giving an appeal by reference to another statute, instead of giving it plainly and directly by the statute itself." And so also in *Reg.* v. *Stock* (3) it was held that a right of appeal cannot be implied, but must be given by express words. These considerations appear to me to acquire even increased force when the principle of interpretation so applied is used, not for the mere purpose of taking away a right which previously existed, but for reconciling and making consistent two separate Acts of the same Legislature, instead of making them opposed to and contradictory of each other. [90] Nor are we entitled to assume that the more recent Legislative measure, expressed as it is in language complete in itself, and capable of universal application, is of less weight and significance than a previous

(1) 2 Term Reports, 504. (2) 9 A. & E. 871. (3) 8 A. & E. 405.

Act, the terms of which are loose and inexact. Any such assumption, indeed, would be opposed to every rule of construction that has ever been applied by the Courts to the combined interpretation of successive laws.

Such is the view I feel compelled to take of s. 588 of the new Code in relation to s. 6 of Act I of 1868, and it is a view which appears to me to be fully borne out by the general character and objects of the Code. That Code is Act X of 1877, entitled "An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature;" and the preamble is: "Whereas it is expedient to consolidate and amend *the laws* relating to the Courts of Civil Judicature." By the expression "the laws" in these two quotations I understand *all* the laws, and there is thus afforded, as it appears to me, a key to the solution, to a considerable extent, of the legal question now raised. As I have stated, there can, I imagine, be no question that it means all the laws in operation at the time of passing of the new Code, and therefore, not only the old Code, Act VIII of 1859, and the supplementary Act, XXIII of 1861, but the General Clauses Act, I of 1868, are here meant, for it could not have been intended that these laws were to be "amended" by being allowed to stand in their original condition, and in that condition to contradict, if not to abrogate, the provisions of the new law which purports to amend them. And this meaning and effect of the title and preamble, and especially of the preamble, of the Code, must be understood to overlie the whole Act, giving colour to and controlling its provisions, and by showing the intention of the Legislature supplying *pro tanto* the rule for the interpretation of these provisions. For if one thing is more clear than another, and beyond all doubt it is the distinct intention of the Legislature by this Code to abolish these second appeals from orders, and that intention being clear, it ought not to be defeated by the strained application of general expressions of a loose and doubtful nature contained in a previous law, such as the General Clauses Act.

For these reasons I am of opinion that a second appeal in the case before me does not lie, and I must refuse to admit it.

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2 A. 91.

[91] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

MURLI DHAR (*Judgment-debtor*) v. PARSOTAM DAS AND ANOTHER (*Decree-holders*).* [28th November, 1878.]

Execution of decree—Appeal from Order—Assignment of Decree—Cross-Decrees—Act X of 1877 (*Civil Procedure Code*), *ss.* 2, 232, 233, 246, 540.

An order made in the execution of a decree disallowing the objections taken by the judgment-debtor to execution of the decree being taken out by a transferee by assignment of the decree, being the final order in a judicial proceeding, and therefore a "decree" within the meaning of s. 2 of Act X of 1877, is appealable under that Act. *Thakur Prasad* v. *Ahsan Ali* (1), followed.

S and two other persons held a decree for costs against *M*, which did not specify the separate interests of each in the decree, and *M* held a decree for money against *S* alone, which he wished to treat as a cross-decree under s. 246 of Act X of 1877.

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* First Appeal, No. 6 of 1878, from an order of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 1st October, 1877.

(1) 1 A. 668.

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2 A. 91.

Held that the decree held by *S* and the other persons was not a decree between the same parties as the parties to the decree held by *M*, and *M*'s decree could not therefore be treated as a cross-decree under that section.

THE facts of this case were as follows:—One Murli Dhar preferred an appeal to the High Court from an original decree, which appeal the High Court dismissed, giving the respondents a decree against Murli Dhar for Rs. 682-9-0, being the amount of costs incurred by them in the High Court. Sarju Prasad, one of the respondents, transferred this decree to Parsotam Das and Sital Prasad by assignment, who applied for its execution as the transferees. Murli Dhar objected, but his objections were disallowed by the Court of first instance, the Subordinate Judge of Azamgarh, the Court executing the decree. He appealed to the High Court, contending that he held a decree for money against Sarju Prasad, the assignor of the decree under execution, of which he was entitled to set off a portion of the amount against the amount of the decree under execution.

Munshi *Kasi Prasad* and *Ram Prasad*, for the appellant.

Lala *Lalta Prasad*, for the respondent.

ORDER OF REMAND.

[92] The High Court remanded the case for the trial of the issue set out in the order of remand, which was as follows:—

TURNER, J.—The opinion of the Full Bench (1) established that an appeal lies in this case, the order being the final order in a judicial proceeding and therefore a decree as defined in s. 2.

Sarju Prasad was competent to sell his title to the costs which he anticipated he would recover, and there can be no objection to the validity of the substitution of the names of the respondents for that of Sarju Prasad. Of course the respondents took the decree for costs subject to any equities which may have subsisted between the decree-holder and the judgment-debtor (2). The appellant then was entitled to set off so much of any valid and subsisting decree held by him against Sarju Prasad as might amount to the decree purchased by the respondents (3). The lower Court must determine whether, as alleged by the appellant, he held a decree of which he was entitled to set off a portion of the amount against the decree acquired by the respondents so as to satisfy the decree held by respondents. The lower Court will try this issue and return its finding to this Court, when ten days will be allowed for objections.

From the finding of the lower Court it appeared that the decree held by Murli Dhar was one for money against Sarju Prasad alone made by the Subordinate Judge of Benares, which had been transferred to the Court of the Subordinate Judge of Azamgarh for execution. On the return of the finding the following judgment was delivered by the High Court (PEARSON, J., and TURNER, J.):

JUDGMENT.

TURNER, J.—The Court below has found that the decree in which the respondents purchased the interests of Sarju Prasad was a decree for costs held by Sarju Prasad and two other persons without any specification of the separate interests of each. We are compelled to hold then

(1) 1 A. 668. (2) See s. 233 of Act X of 1877.
(3) See s. 246 of Act X of 1877, Explanation ii.

that the decree is not a decree between the same parties as the parties to the decree held by the appellant, inasmuch as in the latter decree Sarju Prasad is the sole judgment-debtor. We must consequently dismiss the appeal, but we order each party to bear his own costs.

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Appeal dismissed.

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2 A. 93.

[93] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

JIWAN BAKHSH (*Defendant*) v. IMTIAZ BEGAM (*Plaintiff*).*
[9th December, 1878.]

Muhammadan Law—Gift.

A defined share in a landed estate is a separate property, to the gift of which the objection which attaches under Muhammadan law to the gift of joint and undivided property is inapplicable.

[R., 13 B. 352 (356); 38 C. 518=13 C.L.J. 492=15 C.W.N. 541=9 Ind. Cas. 635.]

THIS was a suit in which the plaintiff, the daughter of one Ilahi Bakhsh, deceased, sued to set aside a gift of her father's estate made by him in his lifetime to the defendant, his eldest son, and for possession of her share, under the Muhammadan law of inheritance, in such estate. The gift to the defendant by his father comprised, amongst other property, one-third shares in certain joint and undivided zamindari villages. As the holder of these shares the defendant's father was entitled to a one-third share of the profits of the villages, after payment of the Government revenue, village expenses, and costs of collection. The plaintiff contended that the gift of these shares was invalid on the ground that the gift of "*musha*," or an undivided part in property capable of partition, was invalid according to Muhammadan law. The Court of first instance held referring to *Amee-oon-nissa Khatoon* v. *Abad-oon-nissa Khatoon* (1), that the shares were separate property, and disallowed the plaintiff's contention. On appeal by the plaintiff the lower appellate Court held that the shares were joint and undivided property, and that the gift of them was consequently invalid under Muhammadan law.

The defendant appealed to the High Court, contending that the gift of the shares was not invalid.

Mr. *Conlan* and Lala *Lalta Prasad*, for the appellant.

Pandit *Bihsambar Nath* and Mir *Zahur Husain*, for the respondent.

JUDGMENT.

[94] The judgment of the Court, so far as it related to this contention, was as follows :—

PEARSON, J.—The main question raised by this appeal is whether the gift of a defined share of landed estates is open to the objection which attaches, under Muhammadan law, to the gift of joint and undivided property. On this question our opinion is in accord with that of the Court

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* Second Appeal No. 504 of 1878, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 27th September, 1877, modifying a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 7th May, 1877.

(1) 15 B.L.R. 67=23 W.R. 208.

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of first instance that a defined share in a landed estate is a separate property to the gift of which that objection is inapplicable, and we conceive that the view of the matter which we take in common with the Subordinate Judge is sanctioned by the rulings of the Privy Council as well as well founded in reason.

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2 A. 94.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

SHAFI-UD-DIN AND OTHERS (*Plaintiffs*) *v.* LOCHAN SINGH AND ANOTHER (*Defendants*).* [16th December, 1878.]

Execution of decree—Resistance to execution—Act X of 1877 *(Civil Procedure Code),* s, 332—*Act VIII of* 1859 *(Civil Procedure Code)*, s. 230—*Repeal.*

A mortgagee who is in possession of the mortgaged property under the mortgage is in possession "on his own account" within the meaning of s. 230 of Act VIII of 1859 and s. 332 of Act X of 1877.

Where, in pursuance of an order made in the execution of a decree while Act VIII of 1859 was in force, certain persons were dispossessed of certain property after that Act was repealed and Act X of 1877 came into force, and such persons applied under s. 332 of Act X of 1877 to be restored to the possession of such property on certain of the grounds specified in that section, *held* that such persons were entitled to the benefit of that section.

A person claiming under s. 332 of Act X of 1877 need not prove his title but only the fact of possession.

[N.F., 6 O.C. 110 (112); R., 21 T.L.R. 183.]

THE facts of this case were as follows :—On the 17th February 1876 one Mahtab Singh and his two brothers mortgaged a certain village, which they held as a joint and undivided estate to Shafi-ud-din and two other persons, putting the mortgagees into possession of the entire village. On the 7th August 1877 Lochan Singh and Beni Singh, the sons of Mahtab Singh, obtained a decree against their father for the partition and possession of two-thirds of the [95] estate. On the 13th November 1877, or after Act X of 1877 came into force, the mortgagees were dispossessed of two-thirds of the estate under an order made in the execution of the decree above mentioned on the 17th September 1877, or before Act X of 1877 came into force. The mortgagees subsequently applied under s. 332 of Act X of 1877 to the Court executing the decree to be restored to the possession of the property, disputing the right of the decree-holders to dispossess them under the decree, on the ground that they were in possession on their own account, and that they were not parties to the suit in which the decree was made. This application was numbered and registered as a suit between the parties in accordance with that section. The Court granted the mortgagees an order for the possession of the property. On appeal by the defendants the lower appellate Court reversed the order of the Court of first instance on the ground that the suit was not one which could be brought under s. 332 of Act X of 1877, inasmuch as the mortgagees derived their title from the judgment-debtor, and it could not therefore be said that they were in possession on their own account.

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* Second Appeal, No. 506 of 1878, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 2nd May 1878, reversing a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 19th December 1877.

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APPELLATE CIVIL.

2 A. 94.

The mortgagees appealed to the High Court against the order of the lower appellate Court.

Mr. *Conlan* and Mir *Zahur Husain*, for the appellants.

Pandit *Ajudhia Nath* and Lala *Harkrishen Das*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—The grounds on which the Judge has dismissed the suit cannot be sustained; the mortgagees were in possession on their own account. The question then arises whether in this suit the mortgagees may rely on their possession only and claim to be restored to possession, or whether they must prove their title. Seeing that they were not actually dispossessed until November, 1877, when Act X of 1877 was in force, it appears to us that they were entitled to the benefit of s. 332 of that Act. It is true that the order under colour of which the decree-holders ousted them was passed before the Act came into operation, but until the ejectment of the mortgagees no right accrued to them to oppose the misuse of the order, and when that right accrued it is governed by the law then in force. We decree [96] the appeal, and reversing the decree of the lower Court restore that of the Court of first instance with costs.

The respondents are of course at liberty in a suit properly instituted to try the question of title and to apply for the ejectment of the appellants

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2 A. 96=3 Ind. Jur. 470.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

KARAN SINGH (*Defendant*) v. RAM LAL (*Plaintiff*).*
[19th December, 1878.]

Act VIII of 1871 (*Registration Act*), *ss.* 17, *cl.* (2), 49—*Registration—Mortgage.*

A bond for the payment of Rs. 83-8-0 on demand together with interest thereon at the rate of two per cent. per mensem, which charges immoveable property with such payment, does not, though the amount due on it may in time exceed Rs. 100, purport to create an interest of the value of Rs. 100, within the meaning of the Registration Act, and its registration is therefore optional (1).

[F., 2 A. 216; 2 A. 688 (689).]

THIS was a suit for Rs. 116-6-0, being the principal money and interest payable thereon due on a bond dated the 3rd August, 1876. This bond, which was not registered, secured the payment on demand of Rs. 83-8-0, together with interest on that sum at the rate of Rs. 2 per cent. per mensem, and charged certain immoveable property with such payment. The plaintiff asked for a decree for the sale of the property, making the auction-purchaser of it a defendant in the suit. The plaint in the suit stated that payment of the sum due on the bond was demanded on the 31st December 1877. The Court of first instance held that, inasmuch as on that date the sum due on the bond exceeded Rs. 100, the bond operated to create an interest in immoveable property of the value of upwards of Rs. 100, and its registration was therefore compulsory, and being unregistered it could not

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* Second Appeal, No. 69 of 1878, from an order of Maulvi Farid-ud din Ahmad, Subordinate Judge of Aligarh, dated the 15th June, 1878, reversing a decree of Munshi Mohan Lal, Munsif of Aligarh, dated the 30th April, 1878.

(1) See also *Narasayya Chetti* v. *Guruvappa Chetti*, 1 M. 378.

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affect the property comprised in it. It consequently refused to give the plaintiff a decree for the sale of the property. On appeal by the plaintiff the lower appellate Court held that the registration of the bond was not compulsory and remanded the suit for a re-trial.

[97] The auction-purchaser appealed to the High Court from the order of the lower appellate Court, contending that the registration of the bond was compulsory, inasmuch as when it was executed it was probable that it would create an interest in the property comprised in it of the value Rs. 100.

Pundit *Ajudhia Nath* and Babu *Oprokash Chandar*, for the appellant.

The respondent did not appear.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.—We see no reason to depart from the view of the law we have long held in this Court.. The bond was for a sum of Rs. 83-8-0 payable on demand with interest. It did not certainly secure Rs. 100, and therefore its registration was optional. The appeal is dismissed.

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2 A. 97.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

INAYATKHAN (*Plaintiff*) *v.* RAHMAT BIBI (*Defendant*).*
[24th January, 1879.]

Suit for rent of the nature cognizable in a Small Cause Court—Determination of Title— Res judicata.

The incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title (1).

[F., 4 A.L.J. 517 = A.W.N. (1907) 218.]

THE facts of this case were as follows: In 1872 one Digambari sued Rahmat Bibi in the Court of the Munsif of Mirzapur for Rs. 7-5-0, being the "*parjote*" or ground-rent of a house situated in Wellesley Ganj, in the city of Mirzapur, belonging to and occupied by Rahmat Bibi. Rahmat Bibi, who had acquired the house by purchase, set up as a defence to this suit, amongst other things, that the plaintiff was not entitled to the rent claimed, the land being rent-free, and "*abadi*" land in the city of Mirzapur not being liable to the payment of ground-rent. The Munsif gave the [98] plaintiff a decree, finding that ground-rent had been paid to the plaintiff for the land. The District Judge, on the 24th December 1872 on appeal by the defendant, dismissed the suit, his reasons for so doing as stated in his judgment being as follows: "The respondent (Digambari) does not allege that it is the custom to claim "*parjote*" rent, nor does she show any paper or document by which she could claim such a rent: she is not a zemindar, and there is nothing on record to show that she or her ancestors ever possessed the right to claim such a rent." The plaintiff appealed to the High Court against the decree of the District

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* Application, No. 8 of 1878, for a review of the judgment in Second Appeal No. 895 of 1877, decided the 6th December, 1877.

(1) See also *Raghu Ram Biswas* v. *Ram Chandra Dobey*, B.L.R., Sup. Vol. 34 = W. R. Sp. 127; and *Sunkur Lall Paltuck* v. *Ram Kalee*, 18 W.R. 104.

Judge, but her appeal was rejected by the High Court on the ground that the suit was of the nature cognizable in a Court of Small Causes, and therefore no special appeal would lie. In August 1876 the present suit was instituted in the Court of the Munsif of Mirzapur by the representative of Digambari against Rahmat Bibi, in which he claimed to establish his right to receive ground-rent in respect of the same house at a certain rate, and also claimed arrears of such rent at that rate. Both the Munsif, and the District Judge, on appeal to him by the defendant, gave the plaintiff a decree, both officers holding that the question whether the plaintiff was entitled to ground-rent in respect of the house was not *res judicata*, with reference to the decision of the District Judge dated the 24th December, 1872.

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On appeal by the defendant to the High Court it was contended by her that that question was *res judicata*, with reference to that decision. The High Court (TURNER, J., and SPANKIE, J.), on the 6th December 1877, allowed the defendant's contention, and dismissed the plaintiff's suit.

The plaintiff applied for a review of the judgment of the High Court on the ground that a question of right could not be determined finally in a suit of the nature cognizable in a Court of Small Causes.

Munshi *Kashi Prasad* and Lala *Lalta Prasad*, for the petitioner, respondent.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the opposite party, appellant.

JUDGMENT.

The High Court (TURNER J., and SPANKIE, J.) delivered the following judgment in review of its former judgment :

[99] TURNER, J.—The respondent's pleader, in support of his application for a review of judgment, has adduced a precedent of this Bench (1), which, it must be admitted, is in his favour. On reconsideration of the point raised, we are of opinion that the application for review should be granted. The former suit between the parties was a suit for rent cognizable by a Court of Small Causes, and the special appeal presented against the decree of the lower appellate Court in that suit was rejected on the ground that the suit was of that character. In a suit for rent instituted in a Small Cause Court the question of title would only be determined incidentally. It appears to us that it would be inequitable to rule that no special appeal lies in a suit of such a nature when instituted in a Civil Court, and nevertheless to hold that the decision of the issue of title in the trial of such a suit should finally estop the parties from raising the same issue in a suit brought to try the title. For these reasons, and following the precedent quoted, we allow the review of judgment, and inasmuch as no other point arises in the special appeal than the point already argued at the hearing of the application, we proceed to dispose of the appeal.

The only objection taken to the decrees of the Courts below proceeding on the contention that the issue respecting title was finally determined in the former proceedings, and that the parties are concluded by the former finding on that issue, we overrule the objection and dismiss the appeal with costs, including the costs of the application for review.

Appeal dismissed.

(1) Unreported.

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2 A. 99.

2 A. 99.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Turner.

ZAHUR (*Defendant*) *v.* NUR ALI (*Plaintiff*).* [24th January, 1879.]

Muhammadan Law—Pre-emption.

Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, *held* that a right of pre-emption under Muhammadan law attached to such house.

[R., 52 P.W.R. 1907.]

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The plaintiff claimed to [100] enforce his right of pre-emption under Muhammadan law in respect of a dwelling-house, situated in a certain mohalla in the city of Gorakhpur, basing his claim on vicinage. The vendee, who alone defended the suit, set up as a defence to it, amongst other things, that the plaintiff had not asserted his right of pre-emption in the manner required by Muhammadan law, that is to say, that he had not made the "*talab-i mawasabat*," or immediate claim to the right of pre-emption, and the "*talab-i-ishhad*," or affirmation by witness, and that his claim was consequently invalid. The Court of first instance dismissed the suit, finding that the plaintiff had not complied with the requirements of the Muhammadan law. On appeal by the plaintiff the lower appellate Court was of opinion that the plaintiff had complied with the requirements of that law, and gave him a decree.

The vendee appealed to the High Court, contending that the sale of the house without the site did not give the plaintiff a right of pre-emption under Muhammadan law.

Baboo *Sital Prasad Chatterji* and Maulvi *Mehdi Hasan*, for the appellant.

Lala *Lalta Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

The judgment of the High Court, so far as it related to this contention, was as follows:

TURNER, J.—The parties are Muhammadans, and under the law administered here they can claim pre-emption on all sales of property made between the members of their creed, when the property is of the description to which by their law pre-emption attaches. It is contended that to the property in suit pre-emption does not attach, and passages are cited from the Hedaya and other works (1) to show that, when a house is sold apart from land, pre-emption does not attach, and it is argued that, inasmuch as the seller had no right in the land, all he could sell was the house.

In fact and in law this contention appears erroneous. The seller not only sold the materials of the house, but such interest as [101] he

* Second Appeal, No. 875 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 14th May 1878, reversing a decree of Maulvi Azmat Ali Khan, Munsif of the City of Gorakhpur, dated the 23rd February 1878.

(1) See Baillie's Digest of Muhammadan law, pp. 473, 474, 475.

possessed as an occupier of the soil. The house was sold as a house to be inhabited on the spot with the same right of occupation as the seller had enjoyed.

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The text on which the appellant relies applies to the sale of the materials of a house or a house capable of and intended to be removed from its site. It is then equally moveable property as goods, boats, or trees, cut or sold to be cut and carried away, but it does not apply to a house sold with the right of occupation of the soil. The appeal fails and is dismissed with costs.

Appeal dismissed.

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2 A. 101.

CRIMINAL JURISDICTION.

Before Mr. Justice Turner.

EMPRESS OF INDIA v. BUDH SINGH. [24th January, 1879.]

Act XLV of 1860 *(Penal Code)*, ss. 425, 441—*Act X of* 1872 *(Criminal Procedure Code)*, s. 454—*Criminal Trespass—Mischief.*

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, and without any intention to intimidate, insult, or annoy such other person, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass (1).

So also, if a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of mischief (2).

The mere assertion, however, in such cases of a claim of right is not in itself a sufficient answer to charges of criminal trespass and mischief. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, *held* that such person could not, under cl. iii of s. 454 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established.

[F., 13 Cr. L.J. 27=13 Ind. Cas. 219=5 S.L.R. 135 ; R., 10 A. 58 (65) ; A.W.N. 1882, 236 ; 4 Bom. L.R. 936 ; 2 Cr. L.J. 83=13 P.R. 1905, Cr.=81 P.L R. 1905 ; 4 Cr. L.J. 293=12 P.R. 1906, Cr=54 P.L.R. 1907 ; U.B.R. (1892—1896), 264.]

[102] THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner was convicted on the 12th June 1878 by Mr. H. B. Joyce, Magistrate of the first class, of committing criminal trespass and mischief. On appeal by the petitioner to the Sessions Judge, Mr. W. C. Turner, this conviction was affirmed on the 17th August 1878. The facts of the case and the grounds on which the petitioner applied for revision are sufficiently stated, for the purposes of this report, in the judgment of the High Court.

Mr. *L. Dillon*, for the petitioner.

The Junior Government pleader (Babu *Dwarka Nath Banarji*), for the Crown.

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(1) See also *In the matter of Shistidhur Parui*, 9 B.L.R., Ap. 19=18 W.R. Cr. 25, where it was held that a person exercising a supposed right of fishery in a *bona fide* manner without any intent to intimidate, insult, or annoy, or to commit an offence, could not be convicted of criminal trespass ; and see also the observations of Markby, J., in *The Queen* v. *Surwan Singh*, 11 W.R. Cr. 11.

(2) See also *Bakar Halsana* v. *Dinobhandu Biswas*, 3 B.L.R. A. Cr. 17.

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JUDGMENT.

TURNER, J.—It is found that the petitioner, in order to appropriate the wall of his neighbour, the complainant, to which he knew he had no right whatever, caused workmen to cut niches in the wall, to lay rafters on the wall, and to put water-spouts in the wall; and that he also caused workmen to remove bricks belonging to the complainant from the yard of the complainant and to place them on the wall, in order to form a parapet for buildings he was erecting on the other side of the wall; and that he threatened the complainant with violence when he attempted to interfere to protect his property. The Magistrate on these findings convicted the petitioner of criminal trespass and of mischief, and sentenced him in respect of each offence to pay a fine of Rs. 100, and in default to undergo simple imprisonment for fifteen days. In appeal the Sessions Judge affirmed the convictions and sentences.

Revision of the orders of the Courts below is now sought on the following grounds: It is argued that the offence of criminal trespass has not been established because the petitioner did not enter on the premises of the complainant with the intent of insulting, intimidating or annoying the complainant, nor with the intent to commit an offence, but with the intent of benefiting himself. It is also argued that the offence of mischief is not established because the petitioner did not cause the destruction of any property nor any change in such property, or in the situation thereof, as destroyed or diminished its value or utility, and that, if [103] he did so, he did not do so with the intent of causing wrongful loss or damage to the complainant but of benefiting himself. It is argued in respect of both charges that the complainant should have been referred to the Civil Court, and that the Criminal Court should not have entertained them; and lastly it is contended that, inasmuch as it has been found it was the object of the criminal trespass to commit the offence of mischief, the petitioner could not legally receive a double punishment.

The objection that the Criminal Courts ought to have declined jurisdiction because the petitioner set up a claim to the wall and to the bricks cannot be sustained on the findings of the Magistrate.

If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, but without any intention to intimidate, insult, or annoy the person in possession, or to commit an offence, then although he may have no right to the land he cannot be convicted of criminal trespass, because the entry was not made with any such intent as constitutes the offence. So also if a person deals injuriously with property in the *bona fide* belief that it is his own he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause *wrongful* loss or damage to any person. But the mere assertion of a claim of right is not in itself a sufficient answer to such charges. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming of course that the other facts are established which constitute the offence.

In the case before the Court the Magistrate in effect finds not only that the petitioner had no right, but that he could not have been ignorant that he had no right. The facts found by the Magistrate show that the

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petitioner caused a change in the property of the complainant which affected it injuriously, nor is it any answer to the charges on which the petitioner has been convicted that the petitioner's intention was to benefit himself. That benefit was to be acquired as he must have known by causing wrongful loss to the complainant. The objections taken by the petitioner's pleader to the propriety of the convictions cannot be sustained. I may, [104] however, observe that, inasmuch as the acts of trespass and mischief were committed not by the petitioner himself but his workmen at his instigation, he would more properly have been convicted of the abetment of the offences, but there being no difference in the punishment to which he would be liable it is unnecessary to interfere with the convictions on this ground.

It remains for me to deal with the objection to the punishment. It must be admitted that the object of the trespass was to commit the "mischief" imputed to the petitioner, and consequently under the third clause of s. 454 of the Code of Criminal Procedure, as explained by the illustrations, the petitioner must not receive a punishment more severe than might have been awarded for either of those offences. This provision of the law does not, as the petitioner's pleader suggests, prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offences collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination. Where an offence is constituted by the combination of other offences or includes another offence, sentence should ordinarily be passed on the charge relating to that offence only, but the law does not prohibit several sentences, so that collectively they do not exceed the prescribed limit. For the offence of criminal trespass the maximum punishment sanctioned by the Penal Code is imprisonment for a term of three months and fine to the extent of Rs. 500. The imprisonment in default of payment of fine must therefore be limited to one-third of three months. The maximum punishment for the offence of mischief is imprisonment for three months and fine without limit, but the imprisonment in default of payment of fine is limited to one-third of the term of imprisonment. The Magistrate has sentenced the petitioner to pay two fines each of Rs. 100, or collectively less than the amount of fine which might be imposed for either offence, and in default of the payment of each fine to undergo imprisonment for the term of fifteen days. The Magistrate has not declared that the terms of imprisonment are to be undergone the one on the expiry of the other, and if default were made in the payment of both fines the sentences would run concurrently, so that in the whole the punishment would not exceed the punishment allowed by the law for either of [105] the offences of which the petitioner has been convicted. I therefore see no reason to interfere.

Application dismissed.

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CRIMINAL JURISDICTION.

Before Mr. Justice Turner.

EMPRESS OF INDIA *v.* MULA. [24th January, 1879.]

Attempt—Fabricating False Evidence—Act XLV of 1860 (*Penal Code*), *ss.* 193, 511.

M instigated *Z* to personate *C* and to purchase in *C's* name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed *C's* name on such paper as the purchaser of it. *M* acted with the intention that such endorsement might be used against *C* in a judicial proceeding. *Held* that the offence of fabricating false evidence had been actually commited, and that *M* was properly convicted of abetting the commission of such offence. *Queen* v. *Ramsaran Chowbey* (1) distinguished and observed on.

[F., 25 A. 75 (77)=A.W.N. (1902) 196.]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. On the 24th August 1878 the petitioner was convicted by Mr. J. Kennedy, Officiating Magistrate of the district of Shahjahanpur of attempting to fabricate false evidence. On appeal by the petitioner to the Officiating Sessions Judge, Mr. W. Duthoit, that officer, on the 18th September 1878, being of opinion that the offence of fabricating false evidence had been actually committed, and that the petitioner had abetted such offence, altered the conviction accordingly. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *L. Dillon*, for the petitioner, contended that the offence of fabricating false evidence had not been completed. He referred to *Queen* v. *Ramsaran Chowbey* (1).

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) for the Crown.

JUDGMENT.

TURNER, J.—The petitioner Mula is a money-lender in Shahjahanpur, with whom Chattar Singh, *thakur*, had had dealings, but prior to the date of the occurrence which led to the present charge Chatter had discharged his debt to the petitioner. In a suit instituted by Mula against Natha and Dhaunkal, Chattar gave evidence on behalf of the defendants, and thereupon Mula threatened him he [106] would make him pay Rs. 50. On the 28th July, Zabar, a debtor of Mula, applied to Mathura Prasad for a stamp of the value of four annas. He gave his name as Chatter Singh, *thakur*, and the name of Chatter Singh's father, and also Chatter Singh's address. These details were, in accordance with the usual practice, endorsed on the back of the stamp. As Zaba was leaving the stamp-vendor's shop, it occurred to the stamp-vendor again to question him as to his name. He then made a mistake and gave a different name as the name of Chattar Singh's father. The suspicions of the stamp-vendor being excited, he further questioned Zabar, who then stated he had purchased the stamp at the request of Mula, who had given him four annas for that

(1) H. C. R. N. W. P. (1872) p. 46. As to other facts which it was held would justify a conviction for an attempt to fabricate false evidence, see *Queen* v. *Nunda*, H. C.R. N.W.P., 1872. p. 133. As to an attempt to commit bigamy, see *Queen* v. *Peterson*, 1 A. 316. As to an attempt to commit mischief by fire, see *Queen* v. *Dayal Bawri*, 3 B.L.R. A.Cr. 55.

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purpose. The stamp-vendor very properly took Zabar to the police-station and reported what had occurred. It is shown by other evidence, which the Courts below have accepted as reliable, that Mula gave four annas to Zabar and requested him to purchase a stamp; that he left his place of business and accompanied Zabar on his way to the stamp-vendor's; that he remained near the stamp-vendor's shop when Zabar entered it, and ran away on perceiving that Zabar was detained. With this corroboration the Magistrate and the Sessions Judge have accepted as reliable the statement of Zabar that he was induced by Mula to personate Chattar Singh, and to procure the stamp in Chattar Singh's name. The Magistrate held that on the facts proved Mula was guilty of the offence of attempting to fabricate false evidence for the purpose of using it in judicial proceedings. The Sessions Judge more correctly held that the facts afforded proof that the fabrication was complete, and that the petitioner was liable to conviction for abetment of the offence alleged rather than of an attempt to commit it, and amended the conviction accordingly. In this Court it is argued that, although the petitioner may have made preparations to commit the offence, yet the offence had not actually been completed, and in support of this contention the petitioner's pleader has referred to *Queen* v. *Ramsaran Chowbey* (1), in which case it was held that under similar circumstances the accused could not be convicted of forgery.

It appears to me that the cases may be distinguished. The endorsement of the stamp-vendor forms no part of the document [107] which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp-paper. The offence of forgery had therefore not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication: something had been done. It is true that no judicial proceeding had been instituted, but the petitioner's pleader is unable to suggest any other object for which the false endorsement should have been procured. The petitioner had undoubtedly threatened Chattar Singh that he would make him pay Rs. 50. He could not have carried out his threat without the intervention of the Court. The object of the endorsement made by the vendor of stamp is to afford proof of the person to whom it is sold, and in suits brought on documents written on stamp-paper it is the usual course, when the execution of the document is denied, to advert to the endorsement and to the stamp-vendor's memory assisted by the endorsement as evidence of the person to whom the stamp was sold, and therefore as evidence of the probability that the document was made by the person by whom the paper was procured. I do not say that in the case cited the accused should have been discharged. Had the point been taken the Court might have held the accused guilty of the offence of which the petitioner has been convicted, but I am of opinion that in the case before the Court the evidence for the prosecution warranted, the inference that the petitioner procured the false endorsement for the purpose of thereafter using it in a judicial proceeding, and consequently that the conviction is not open to the objection taken to it. I affirm it, and dismiss the application.

Application dismissed.

(1) H. C. R. N. W. P. (1872), p. 46.

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APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Spankie.

THE COURT OF WARDS *on behalf of the* RAJA OF KANTIT (*Plaintiff*) *v.* GAYA PRASAD AND OTHERS (*Defendants*).* [28th January, 1879.]

Substitution or addition of new Appellant or Respondent—Act XV *of* 1877 (*Limitation Act*), s. 22—*Appellate Court, Powers of—Sale in Execution* [108] *of Decree—Act* VIII *of* 1859 *(Civil Procedure Code)*, ss. 256, 257—*Suit for recovery of purchase-money*—Caveat Emptor—*Irregularity.*

An appellate Court has discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal.

The right, title, and interest of *G* in certain immoveable property was attached and notified for sale in the execution of a money-decree held by *T*. It was also attached and notified for sale in the execution of a money-decree held by *S* and *R*. The same date was fixed for both sales. The officer conducting sales first sold the property in execution of *T's* decree, and *T* purchased the property. He then sold the property in execution of the decree held by *S* and *R*, and *K* purchased the property. The Court executing the decrees confirmed the sale to *T*, granting him a sale-certificate and disallowing *K's* objection to the confirmation. It also confirmed the sale to *K*, ordering the purchase-money to be paid to *S* and *R*, and disallowing *K's* objection to the confirmation; but it refused to grant *K* a sale-certificate on the ground that, as the sale to *T* had been confirmed and a sale-certificate granted to him, it could not give *K* possession of the property. In a suit by *K* against *S* and *R* to recover his purchase-money, *held*, distinguishing the suit from the cases in which it had been held that, when the right, title, and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title, or interest, and therefore the auction-purchaser cannot recover his purchase-money if it turns out that the judgment-debtor had no interest in the property, that the rule of *caveat emptor* did not apply, and the suit was maintainable.

The provisions of s. 257 of Act VIII of 1859 apply to applications made under s. 256 of that Act and to those only.

Held therefore that, inasmuch as K objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in s. 256 of Act VIII of 1859, K was not precluded by the terms of s. 257 of that Act from maintaining his suit.

Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in the conduct of the sales.

THIS was an appeal from an appellate decree dated the 11th March 1878. This appeal was filed on the 31st May 1878, the original respondents being Gaya Prasad and Girdhari Prasad, two of the defendants in the suit out of which the appeal arose. On the 28th June, 1878, a *vakalatnama* was filed appointing a pleader to defend the appeal on behalf of Ram Manorath, the third defendant in the suit. On the 22nd August 1878 an application was made to the High Court on behalf of the appellant in which it was [109] stated that by an oversight Ram Manorath had not been made a party to the appeal, and praying that, as he had appeared to defend the appeal, he might be made a respondent. On the same date the Court (Oldfield, J.) made an order in accordance with this application. The

* Second Appeal, No. 517 of 1878, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 11th March 1878, reversing a decree of Mirza Abid Ali Beg, Subordinate Judge of Mirzapur, dated the 27th November 1877.

remaining facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Pandit *Ajudhia Nath*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

TURNER, J.— The first question arising in this appeal is whether or not the appeal so far as it affects Ram Manorath is barred by limitation. By some carelessness he was not at first made a respondent, and the period prescribed for appeal had expired before he was brought on the record as a respondent. By the 22nd section of the Limitation Act it is provided that when after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party. There is no analogous provision with respect to appeals, and therefore it is competent to the Court to exercise its discretion in allowing a party to be added to the record after the period prescribed for the admission of an appeal has elapsed. The lower appellate Court throughout its judgment alludes to the decree held by Gaya Prasad and Ram Manorath, as "the decree of Gaya Prasad," and omits any mention of Ram Manorath, and this circumstance may have led the appellant's pleader to suppose that Ram Manorath was not a material party to the appeal, as the appeal was in other respects filed within time and prosecuted with due diligence. We are not prepared to set aside the *ex-parte* order for making Ram Manorath a respondent to the appeal.

The circumstances which have led to the present proceedings are as follows. The rights and interests of Girdhari Prasad Singh in mauja Tilai were attached and advertised for sale, under separate orders, in execution of a decree held by Thakur Sayal and in execution of a decree held by Gaya Prasad and Ram Manorath. The same [110] date, the 20th September, was fixed for the sale in execution of both decrees. On the 20th September the officer conducting the sale at first put up the property in execution of the decree of Thakur Dayal, which it would appear was entitled to priority of satisfaction, and the property was purchased by the decree-holder. He then again put up the property for sale in execution of the decree of Gaya Prasad and Ram Manorath, and it was purchased by the agent of the appellant. The Court executing the decrees confirmed the sale in execution of Thakur Dayal's decree, and delivered a sale-certificate to the auction-purchaser. It also confirmed the second sale, and ordered the purchase-money to be paid to the decree-holder, but it held that, inasmuch as the sale to the purchaser in execution of Thakur Dayal's decree had already been confirmed and a certificate issued, it could not give possession to the appellant as the purchaser in execution of the decree of Gaya Prasad and Ram Manorath, and therefore refused to grant a certificate in respect of that sale.

The appellant instituted the present proceedings to obtain a refund of the purchase-money paid under the second sale. The Court of first instance decreed the claim on the ground that although the property ought to have been put up for sale once for all in execution of both decrees, yet having in fact been sold in execution of Thakur Dayal's decree and the sale confirmed, it was not competent to the Court executing the decree to confirm the second sale, as was shown by its inability to issue a certificate

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and deliver possession. The lower appellate Court reversed the decree on the ground that, when the appellant's objection to the confirmation of the second sale had been disallowed, he ought to have appealed, and that, having failed to appeal, the order confirming the sale became final under s. 257 of the Civil Procedure Code. The lower appellate Court also adverts to cases (1) in which it has been held that, when the right, title and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title or interest, and therefore that he cannot [111] recover his purchase-money if it turn out that the judgment-debtor had no interest in the property.

It appears to us that there is a circumstance in the present case which distinguishes it from the cases in which the rule referred to by the Judge was laid down. In these cases the Court advertised for sale whatever interest the judgment-debtor had in the property, and although it did not guarantee that he had any interest in the property, it sold and confirmed to the purchaser whatever interest there was to sell. In the case before the Court the interest advertised for sale had immediately before the sale to the appellant been already sold by the order of the Court executing the decrees in execution of the decree of Thakur Dayal, and when that sale was confirmed the subsequent sale was practically disallowed and nullified. The Court had advertised for sale the interest of the judgment-debtor as it existed before the sale made in execution of Thakur Dayal's decree. When the sale had been declared absolute, the Court could not confirm to the purchaser at the second sale the interest it had advertised for sale, and although in terms it passed an order confirming the second sale, it in fact did not confirm the second sale, as the Court of first instance observes, for it found it impossible to carry out its order by the issue of a certificate and delivery of possession to the purchaser at the second sale, seeing it had already confirmed the sale of the same interest, and transferred the property to the purchaser at the first sale. The rule of *caveat emptor* does not apply, for the interest offered for sale was the interest advertised, and if the first sale had been disallowed, that interest would have passed to the purchaser at the second sale, but when the first sale was confirmed the second sale could not be carried out, for the interest advertised had been already sold.

The question remains whether the appellant is precluded from maintaining this suit because he failed to appeal from the orders confirming the sales. The lower appellate Court finds there was no irregularity in the conduct of the sales, inasmuch as the officer conducting the sale simply carried out the orders he had received, and it appears to us the lower Court has properly arrived at this conclusion. It is no doubt true that the officer conducting the sale [112] might have put up the property to sale once for all in execution of both decrees, and have left the Court executing the decrees to determine the rights of the respective decree-holders to the purchase-money realised by the sale, but we cannot go so far as to say he was bound to put up the property once for all for sale in execution of the decrees. There being separate orders for sale, the decree-holders might have called upon him to execute them separately, each desiring to dispute the right of the other. There was certainly no irregularity in the conduct of the sale in execution of the decree of Thakur Dayal; and if that sale had been set aside for any irregularity or otherwise, it

(1) These cases were *Rajib Lochan* v. *Bimalamini Dasi*, 2 B. L. R. A. C. 82; and *Sowdamini Chowdrain* v. *Krishna Kishor Poddar*, 4 B.L.R., F.B. 11=12 W.R. F.B., 8.

does not appear that any irregularity would have been proved to vitiate the sale in execution of the decree of Gaya Prasad and Ram Manorath, and this being so the purchaser at the second sale could not have maintained an objection to either sale on any of the grounds mentioned in s. 256 of Act VIII of 1859. His objection was in fact of a different nature. His objection to the sale in execution of Thakur Dayal's decree having been overruled, he resisted the order confirming the second sale on the ground that the Court was incompetent to confirm a sale which had by its previous order been nullified. The provisions of s. 257 apply to applications made under s. 256 and to those only, and consequently the appellant is not in our judgment precluded by the terms of that section from maintaining this suit. We therefore reverse the decree of the lower appellate Court, and restore that of the Court of first instance with costs.

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Appeal allowed.

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2 A. 112.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

BHICHUK SINGH AND OTHERS (*Judgment-debtors*) *v.* NAGESHARNATH AND OTHERS (*Decree-holders*).* [28th January, 1879.]

Special Appeal—Suit of the nature cognizable in a Small Cause Court—Act XXIII of 1861, *s.* 27—*Act XLIII of* 1860, *s.* 1.

Held, where a suit of the nature cognizable in a Court of Small Causes was instituted before Act XLIII of 1860 came into force, and an order was made on regular appeal in execution of the decree in such suit after the passing of Act XXIII of 1861, that the provisions of s. 27 of Act XXIII of 1861 applied, and accordingly no special appeal would lie from such order (1).

[113] THE facts of this case were as follows: On the 22nd December 1876 the holders of a decree for money dated the 9th May 1843 which had been made in a suit of the nature cognizable in Courts of Small Causes, applied for the execution of such decree. On the 13th April 1877 the Court of first instance refused this application, on the ground that the execution of the decree was barred by limitation. On the 24th December 1877 the order of the Court of first instance was affirmed by the lower appellate Court on appeal by the decree-holders. On the 25th June 1878 the decree-holders having appealed to the High Court from the order of the lower appellate Court, the High Court (TURNER, J., and OLDFIELD, J.) set aside the orders of the lower Courts, and remanded the case to the Court of first instance for proper orders.

The judgment-debtors now applied to the High Court for a review of its judgment dated the 25th June, 1878; on the ground that no second appeal would lie to it from the order of the lower appellate Court, such order having been made in a suit of the nature cognizable in Courts of Small Causes.

Lala *Lalta Prasad*, for the judgment-debtors, respondents.

The Senior Government Pleader (Lala *Juala Prasad*), for the decree-holders, appellants.

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* Application, No. 4 of 1878, for a review of the judgment in Appeal from orders, No. 13 of 1878, dated the 25th June 1878.

(1) See also *Gora Chand Misser* v. *Raja Baykanto Narain Singh*, 12 B.L.R. 261.

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2 A. 112.

JUDGMENTS.

The High Court (TURNER, J., and OLDFIELD, J.) delivered the following judgments :

TURNER, J.—I cannot say that, if the point raised in this case had come before the Court in the absence of authority, I should not have been disposed to hold that the language of s. 27 of Act XXIII of 1861 prohibited a special appeal in suits of the nature triable by Courts of Small Causes instituted prior to the passing of Act XLIII of 1860. It appears to me that, on a strict construction of the terms of s. 1 of that Act and of the analogous provisions of s. 27 of Act XXIII of 1861, it would be held that the language of the Acts was prospective and applied to suits which should be thereafter instituted rather than to suits which had been already instituted and determined (1). But seeing that it has been ruled by [114] a Full Bench of the High Court of Calcutta (2) that the terms on which the appellant relies are merely words of description and do not relate to the time of institution, for such I take it is the effect of the decision, and seeing also that the cases must be few in which the point can arise, for all doubt is removed by the language of the amended Code, I do not consider myself justified in unsettling the law as it has been settled by that decision, and consequently agree that this Court had not jurisdiction to hear the appeal, that the review of judgment must be allowed, and the appeal dismissed, but as the point was not taken at the hearing of the appeal, I would order that each party should bear his own costs in this Court.

OLDFIELD, J.—The decree which was in execution in this case is dated 9th May 1843. The first Court disallowed execution on the ground that it was barred by limitation. On regular appeal the Judge affirmed that order. A special appeal was admitted by this Court, and we reversed the orders of the Courts below. It is now pleaded, by way of review of judgment, that there was no special appeal with reference to the provisions of s. 27 of Act XXIII of 1861. There is no doubt that the suit out of which the execution proceedings arose is a suit of the nature cognizable in Courts of Small Causes, and that there will be no special appeal if the law of s. 27 of Act XXIII of 1861 is applicable to this case, but it is urged that it does not apply since the suit was instituted before the passing of the Act.

In my opinion the Act does apply, since the order in regular appeal was passed after Act XXIII of 1861 was enacted, and the terms of s. 27 are explicit, that "no special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act in any suit of the nature cognizable in Courts of Small Causes." The order being passed after the Act was passed there is no question of giving retrospective effect to the Act. Nor can I think, as suggested, that the words in the concluding part of the section "when the debt, damage, or demand for which the original suit *shall be* instituted" were meant to imply that the Act only operates on decrees or orders made in suits to be instituted [115] after the Act came into force. I cannot understand why the Legislature should have so intended, for though a suit may have been instituted before the Act was passed no right of special appeal would accrue, so the Act cannot be said to operate unjustly in taking away by retrospective action and right of appeal already accrued, when it is made to apply to

(1) So held in *Bholanath Dutt* v. *Mokadeb Sheet*, 3 W. R. Mis. 19.

(2) See *Soorjo Coomar Surma Roy* v. *Krishto Coomar Chowdhry*, 12 B.L.R. 224 = 14 W. R. F. B., 30.

decrees or orders passed after it came into force. The provisions of the new Civil Procedure Code may not be applicable for deciding this case, but it may be noticed that the provisions of s. 586 of Act X of 1877 admit of no doubt on the point, and they were presumably intended to re-enact the old law on the point, and the view I take is in accordance with a Full Bench of the Calcutta Court (1).

On the above view of the law, I am of opinion that this Court had no jurisdiction to bear the appeal, and I allow the review of judgment and dismiss the appeal. Each party should pay his own costs in this Court.

Appeal dismissed.

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2 A. 115.

APPELLATE CIVIL.

Before Mr. Justice Turner and Mr. Justice Oldfield.

BHAGIRATH (*Defendant*) v. NAUBAT SINGH (*Plaintiff*).*
[30th January, 1879.]

Mortgage—Contribution.

M, *B*, and *N* held mauza *D* in equal one-third shares, and *M* also held a share in mauza *A*. On the 3rd January 1863 *M* and *B* mortgaged their shares in mauza *D* to *L* to secure a loan of certain moneys. On the 16th March 1870 *M*, *B*, and *N* mortgaged mauza *D* to *R* to secure a loan of Rs. 600, and on the same day, by a separate deed, they mortgaged mauza *D*, and *M* mortgaged his share in mauza *A*, to *R*, to secure a loan of Rs. 1,600. On the 8th December 1875 *L* obtained a decree for the sale of the shares of *M* and *B* in mauza *D* for the satisfaction of the mortgage-debt due to her. On the 18th April 1876 *R* obtained a decree for the realisation of the mortgage-debts due to him by the sale of mauza *D* and *M*'s share in mauza *A*. On the 23rd October 1876 the shares of *M* and *B* in mauza *D* were sold in the execution of *L*'s decree, and were purchased by *R*. A portion of the purchase-money was applied to satisfy *L*'s decree, and the balance of it was deposited in Court. Instead of applying to the Court to pay him this balance in execution of his decree dated the 18th April 1876, *R* attached and obtained payment of such balance in execution of a decree for money which he held against *M* and *B*. On the 20th June 1877 *R*, in [116] execution of his decree dated the 18th April 1876, brought to sale *N*'s one-third share in mauza *D*, and became its purchaser. On the 20th July 1876 *R*, in execution of a decree for money against *M*, brought to sale his share in mauza *A*, and became its purchaser. *Held*, in a suit by *N* against *R* in which he claimed that the sum due by him under the two mortgages dated the 16th March 1870 and the decree dated the 18th April 1876 might be ascertained, and that, on payment of the amount so ascertained, the sale of his one-third share in mauza *D* might be set aside, and such share declared redeemed, that the sale of *N*'s share in mauza *D* could not be set aside.

Held also that, if it were shown that the sum realised by the sale of his one-third share in mauza *D* exceeded the proportionate share of his liability on the two mortgages, he was entitled to recover one moiety of such excess as a contribution from mauza *A*.

As it appeared that there was such an excess the Court gave *N* a decree for a moiety of such excess together with interest on the same from the date of the sale of *N*'s share at the rate of twelve per cent. per mensem, and further directed that, if such moiety together with interest were not paid within a certain fixed period, *N* would be at liberty to recover it by the sale of the share in mauza *A*, or so much thereof as might be necessary to satisfy the debt.

[R., 26 A. 407 (435, 439, 444) (F.B.); A.W.N. (1904), 74.]

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*Second Appeal, No. 836 of 1878, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 13th June 1878; reversing a decree of Maulvi Muhammad Sami-ul-la Khan, Subordinate Judge of Moradabad, dated the 6th March 1878.

(1) 12 B. L. R., 224=14 W. R. F. B., 30.

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THIS was a suit in which the plaintiff claimed a declaration of the amount due by him under certain mortgages, and the decree enforcing those mortgages, and that, on payment of the amount so declared, the sale of his interest in the mortgaged property might be set aside and such interest declared redeemed. The Court of first instance dismissed the suit. The lower appellate Court, on appeal by the plaintiff, gave him a decree, against which the defendant preferred the present appeal to the High Court. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Bishambar Nath*, Mir *Zahur Husain*, and Munshi *Hanuman Prasad*, for the appellant.

Munshis *Kashi Prasad* and *Sukh Ram*, for the respondent.

The High Court (TURNER, J., and OLDFIELD, J.) delivered the following

JUDGMENT.

Mahtab Singh, Balwant Singh, and Naubat Singh, the respondent, held mauza Darni in equal one-third shares and Mahtab Singh also held a 2½ biswa share in mauza Atwa. On the 3rd January 1863 Mahtab Singh and Balwant Singh hypothecated their share in mauza Darni to secure a loan advanced by Ladli Begam. On the 16th March 1870 Mahtab Singh, Balwant Singh, and [117] Naubat Singh hypothecated mauza Darni to the appellant to secure a loan of Rs. 600, and by another deed executed on the same date the same persons hypothecated mauza Darni, and Mahtab Singh his 2½ biswa share in mauza Atwa, to the appellant to secure a loan of Rs. 1,600. On the 8th December 1875 Ladli Begam obtained a decree for the sale of the shares of Mahtab Singh and Balwant Singh in mauza Darni for the satisfaction of the mortgage debt to her. These shares were accordingly sold on the 23rd October 1876 and purchased by the appellant for Rs. 7,000. Of this sum Rs. 5,954-12-0 were applied to satisfy the decree held by Ladli Begam and the balance Rs 1,322-4-0 after deducting Rs. 18 commission on the sale, were deposited in Court. On the 18th April 1876 the appellant obtained a decree for the realisation of the mortgage-debts due to him by sale of mauza Darni and the 2½ biswa share in mauza Atwa. In execution of this decree he might and it may be should have applied to the Court to pay to him the surplus remaining in Court after the satisfaction of the decree of Ladli Begam, but instead of so doing he attached and obtained payment of the sum of Rs. 1,322-4-0 in execution of a money-decree which he held against Mahtab Singh and Balwant Singh. On the 20th June 1877 the appellant in execution of his decree of the 18th April 1876 brought to sale the one third share of Naubat Singh in mauza Darni and became the purchaser of that share for the sum of Rs. 2,600, the amount due under the decree being Rs. 5,004. On the 20th July 1877 the appellant in execution of a money-decree against Mahtab Singh brought to sale the 2½ biswa share belonging to Mahtab Singh in mauza Atwa, and although the property was knocked down to one Daya Ram was himself registered as the purchaser.

The respondent Naubat Singh filed the suit now before the Court in appeal, praying that the sum due by him under the mortgages of the 16th March 1870 and the decree of the 18th April 1876 may be ascertained, and that on payment of the amount so ascertained the sale of his one-third share in mauza Darni may be set aside and the share declared redeemed.

The Subordinate Judge held that on the facts above stated the sale could not be set aside and dismissed the suit. The District [118] Judge

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has reversed the decree of the Court of first instance, and decreed that on payment of the respondent's share of the decree of the 18th April 1876, which by the way is not ascertained in the judgment, nor in the decree, the sale of the respondent's one-third share in Darni shall be set aside and the mortgage-debt redeemed.

We are compelled to hold that the sale of the one-third share of Naubat Singh cannot be set aside. If the respondent could have shown that there were grounds on which the sale should not have taken place, he should have resisted the order for sale, but in fact there were no grounds. He could not have shown that there was nothing due from him on the mortgages to which he was a party jointly with Mahtab Singh and Balwant Singh without any specification of their several liabilities. He might perhaps have called upon the Court executing the decree to have declared the amount outstanding on the decree reduced by the sum of Rs. 1,322-4-0, and had he brought into Court the amount found due the Court would have set aside the order for sale. The respondent would in that case also have been at liberty to make the owner of the $2\frac{1}{2}$ biswa share of Atwa contribute to the payment of any sum paid by him in excess of his own share of the mortgage-debt for which that property was pledged together with mauza Darni.

The respondent's one-third share of Darni was, however, sold and realised Rs. 2,600, and if it be shown that the proportionate share of the appellant's liability on the two mortgages does not amount to so much, he is entitled to recover one moiety of the excess paid on account of the mortgage for Rs. 1,600 as a contribution from mauza Atwa. It appears that the debts of Rs. 600 and Rs. 1,600 respectively amounted, with interest, &c., at the time the decree was executed, to Rs. 5,961-10-5. The debt of Rs. 600 was then swollen to Rs. 1,625-14-$5\frac{16}{22}$ and the debt of Rs. 1,600 to Rs. 4,335 11-$11\frac{16}{22}$. The respondent's one-third share of the liability of Rs. 1,625-14-$5\frac{16}{22}$ amounted to Rs. 541-15-$5\frac{20}{22}$; the shares of his co-debtors to Rs. 1,083-14-$11\frac{18}{22}$. The respondent's share of the liability for Rs. 4,335-11-$11\frac{16}{22}$ amounted to Rs. 1,445-3-$11\frac{50}{66}$. After applying the Rs. 2,600 realised by the sale of the respondent's share to the discharge of these liabilities, it will be seen that a balance of Rs. 2,058-0-$6\frac{2}{12}$ remains, after discharging [119] Rs. 541-15-$5\frac{20}{22}$ his liability under the mortgage, for Rs. 600; and after discharging from this balance Rs. 1,445-3-$11\frac{50}{66}$, his liability under the mortgage for Rs. 1,600, a surplus of Rs. 612-12-$6\frac{22}{66}$; he has a right to claim contribution from mauza Atwa to the extent of one moiety of this amount, *viz.*, Rs. 306-6-$3\frac{1}{6}$. Although then we must reverse the decree of the Court below setting aside the sale, the respondent is entitled to a declaration that Rs. 306-6-$3\frac{1}{6}$ are due as a contribution from mauza Atwa, and to interest on that sum from the date of sale at the rate of 12 per cent. per annum; and in order to avoid future litigation we consider it not improper to order in this suit that, in the event of that sum with interest to the date of payment not being paid within three months from the date of decree, the respondent shall be at liberty to recover it by the sale of the $2\frac{1}{2}$ biswa share in Atwa or so much thereof as may be necessary to satisfy the debt. We order that the respondent bear his own costs and pay two-thirds of the costs of the appellant in all Courts, the costs so awarded are to be set off against so much of the amount declared due to the respondent under the decree.

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JAN. 31.

APPELLATE CIVIL.

2 A. 119.

2 A. 119.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

GOSHAIN GIRDHARIJI (*Defendant*) *v.* DURGA DEVI (*Plaintiff*).*
[31st January, 1879.]

Arbitration—Act XVIII of 1873 (*N.W.P. Rent Act*)—*Act XIX of* 1873 (*N.W.P. Land Revenue Act*).

Under the general law parties to suits may, if they are so minded, before issue joined, refer the matters in dispute between them to arbitration, and after issue joined, with the leave of the Court.

Act XVIII of 1873 does not prohibit the parties to the suits mentioned therein from referring the matters in dispute between in such suits to arbitration.

Where therefore the parties to a suit under that Act agreed to refer the matters in dispute between them to arbitration, after issues had been framed and evidence recorded, and applied to the Court to sanction such reference, *held* (STUART, C. J., *dissenting*) that the Court was competent to grant such sanction, and on receiving the award to act on it.

THIS was an appeal to the High Court heard by a Division Bench composed of Stuart, C.J., and Spankie, J., which was referred [120] by Stuart, C. J., to the other Judges of the Court, under s. 575 of Act X of 1877, the Judges composing the Division Bench differing on a point of law. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the Judges composing the Division Bench and in the judgment of the other Judges to whom the appeal was referred.

Mr. *Leach* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Nand Lal*, for the respondent.

The judgments of the Judges of the Division Bench were as follows:

SPANKIE, J.—The Assistant Collector in this case referred a rent suit, under s. 93 of Act XVIII of 1873, to arbitration by consent of parties. He determined the suit and made his decree in accordance with the award. In appeal the Judge maintained the decree. It is contended in second appeal that, in the absence of any provision in the rent law permitting reference to arbitration, the Assistant Collector had no authority to act as he did act, and that his decree and the decision of the Judge supporting it are bad.

It is argued that s. 96 of the Rent Act expressly authorizes reference to arbitration by consent of parties on *applications* made under s. 95 of the Act, but the law is silent as regards arbitration in suits. This is so, and I feel the weight of the argument.

It might perhaps be answered that Revenue Courts, as defined in s. 3 of Act XIX of 1873, published simultaneously with Act XVIII, have general authority under s. 220 of Act XIX of 1873 (which amends and consolidates the law as to land revenue and the jurisdiction of revenue officers), with consent of parties, to refer any dispute before them to arbitration. But the Revenue officers who can do so are the Commissioner of a Division, the Collector of a District, an Assistant Collector of the first class, and an officer in charge of a Settlement, or an Assistant Settlement Officer.

* Second Appeal, No. 595 of 1878, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 8th March 1878, affirming a decree of Pandit Debi Prasad, Assistant Collector of Muttra, dated the 23rd November 1877.

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Now Assistant Collectors of the *second* class can try certain suits under Act XVIII of 1873, but they are not included in s. 220 of Act XIX of 1873. To this objection it might be said that, when the Assistant Collector of the second class tries suits under s. [121] 93 of Act XVIII of 1873, within the limits of s. 98, he is practically exercising the full powers of an Assistant Collector of the first class. This, however, would not be a very satisfactory solution of the objection. It is, I think, more probable that the framers of Act XVIII of 1873 either accidentally omitted to provide for reference to arbitration in suits, or overlooked altogether the necessity of doing so. At the same time it might be urged, as indeed the lower appellate Court urges, that it is difficult to "believe that it was in the intention of the Legislature, in enacting s. 96 of Act XVIII of 1873, to deprive parties of an wholesome privilege which they enjoyed before: rather it should seem their intention was to strengthen and extend the privilege by applying to applications a power which before only applied to suits." Be this as it may, I would rest my judgment in this case on the circumstance that, though there is no provision in the Act for a reference to arbitration, there is no prohibition of it. It appears to be the rule that, with few exceptions, if any, now all suits may as a matter of right be referred to arbitration by consent of parties, and it would be intolerable perhaps if litigants were not allowed full liberty to adjust their differences in the mode which, after the case has been taken into Court, might be found most convenient and most likely to lead to a friendly and final settlement of disputes.

This is not a case in which it was sought to divest the ordinary jurisdiction of the Revenue Court. There was no agreement to keep out of Court. The reference to arbitration sprung out of the introduction of the case into Court.

The suit was instituted on the 1st June 1877: defendant filed a written statement in reply on the 9th July: witnesses were examined on behalf of both parties on the 6th and 16th August: and reference to the arbitrator was made on the 27th August: and after hearing objections against the award, it was made the basis of the decree by the first Court. Under s. 144 of the Act, the Court may, from time to time, in order to the production of further evidence, *or for other sufficient reason* to be recorded by the Court, adjourn the hearing of any case to such day as to it may seem fit. In some degree this reference to arbitration was adjournment to the case for "sufficient reason," that is to say, to meet the written [122] wishes of both parties and to settle the dispute. But the judgment of the Court (s. 151) is in accordance with the provision of the section. With this view of the case, I cannot say, in the absence of any prohibition in the Act to the submission of the record in its final stage to a referee on the motion and by consent of parties, that the suit was not heard and determined in the *manner* provided by the Act, which is all that is obligatory, assuming that there was no illegality, the decision being in accordance with the award.

I would not allow the appeal on the objection taken, but would affirm the judgment of the lower appellate Court.

STUART, C. J.—This is a second appeal to this Court from the judgment of the Judge of Agra, in appeal to him from a decree of the Assistant Collector of Muttra.

The suit was originally instituted in the Court of the Assistant Collector of Muttra, for the recovery of Rs. 484-8-0, principal and interest, on account of arrears of rent for the rabi crop for 1281 Fasli; and in the

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course of the procedure before that officer the parties filed a consent to refer the matter in dispute to arbitration, upon which the Assistant Collector made an order referring the suit to arbitration accordingly, and an award was made in the plaintiff's favour by an arbitrator, with some alleged irregularities on his part which, however, need not here be referred to, as they are immaterial to the appeal now before us. The Assistant Collector upheld the award and made a decree in conformity with it, and from this decree an appeal was taken to the Judge, in which it was contended, among other things, that there was no provision in the Rent Act, XVIII of 1873, authorising such an arbitration as had taken place in this case, and that the whole proceedings therefore in the disposal of the suit were irregular. This plea the Judge disallowed, and the defendant has now preferred a second appeal to this Court on the same plea, and it is the only reason of appeal before us.

I am of opinion that the Judge is wrong, that the plea is well founded, and that therefore the present appeal must be allowed. In his judgment the Judge appears to me to misapprehend the case before him when he says that it is " a question as to whether an [123] award willingly resorted to by the parties ought to be set aside ;" and he goes on to observe that the present Rent Law, "as is notorious, is very defective in regard to procedure, having been entirely carried through the Legislature by officials who had no judicial experience." Now the material question as regards the arbitration was not whether it was willingly resorted to but whether, willingly or not, it was a valid and competent proceeding in itself ; and as to the Rent Act, it may have its defects, but I do not think it deserving of the sweeping censure passed upon it by the Judge ; and in regard to the question in this appeal respecting the arbitration that was ordered and took place, the Act appears to me to be very clear indeed. In my opinion this question must be determined solely with reference to the express provisions of the Rent Act. By s. 93, which is the commencement of " Ch. V, Jurisdiction of Courts," it is provided that "except in the way of appeal as hereinafter provided, no Courts other than Courts of Revenue shall take cognizance of any dispute or matter in which any suit of the nature mentioned in this section might be brought, and such suits shall be heard and determined in the said Courts of Revenue in the manner provided in this Act, and not otherwise :" and the very first class of suits mentioned as falling under this absolute and exclusive provision are suits for arrears of rent on account of land, which is the nature of the suit in the present case, and there is not a word in this section about referring suits to arbitration, whether with or without the consent of the parties. Nor is this the less remarkable from the fact that a subsequent s. 96 provides for the reference to arbitration of "applications " as these are enumerated in s. 95. Section 96 provides that all applications under s. 95 "shall be made, &c., and may, with the consent of the parties, be referred to arbitration under ss. 220 to 231, both inclusive, of the North-Western Provinces Land Revenue Act, 1873." There is here not a word about the reference to arbitration of the suits mentioned in s. 93, which on the contrary provides that such suits "shall be heard and *determined* in the manner provided by the Act, and *not otherwise*." Of course there is nothing to prevent parties to such suits themselves of their own private consent referring them to arbitration, and agreeing that the award under such a private arbitration shall be binding [124] on themselves. But so far as arbitrations of such suits before or by the order and authority of the Revenue Courts are concerned, there is no procedure for, because there is no law authorising, them. On the contrary, s. 93 may fairly in this

respect be argued to be prohibitory by force of the absolute and exclusive language of its sanction, the suits mentioned in it being, as I have already pointed out, enacted to be heard and determined in the manner provided and not otherwise. To say the least indeed, this s. 93 is abundantly pregnant with a meaning sufficient to exclude references of such suits as the present to arbitration before the Court, and it appears to me plainly to show such an intention. But, on the other hand, such suits are not in the least inconsistent with express provisions for a reference to arbitration, if this had been intended and incorporated with the other provisions of Act XVIII of 1873. We must, however, take that Act as we find it, and a careful examination of it has satisfied me that, giving even the widest meaning to its terms, there can, under s. 93 or any other part of it, be no reference to arbitration before the Court in such a suit as the present.

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But it was suggested at the hearing that, although the Rent Act does not provide for the arbitration of such suits, it does not expressly prohibit them, and that it is legitimate to argue in their favour from the provisions as to arbitrations in the contemporaneous Revenue Act, XIX of 1873. By s. 220 of that Act it is provided that a Commissioner of a Division and other Revenue officers mentioned "may, with the consent of the parties, by order, refer any dispute before him to arbitration, and that certain other Revenue officers may, by order, refer any dispute before him to arbitration without the consent of the parties." And the subsequent sections of the Revenue Act, from ss. 221 to 231 inclusive, contain anxious provisions for the regulation of and procedure to be observed in such arbitrations and for the enforcement of awards made in them. Now there can be no doubt that, if such an attempt to supply the supposed defects of the Rent Act, by importing into it the anxious arbitration provisions of the Revenue Act, could be entertained, such an arbitration as was ordered in the present case was a reasonable and valid proceeding, as of course on the same grounds *all* the suits mentioned in s. 93 of the Rent Act could [125] be referred to arbitration, its exclusive and prohibitory language notwithstanding. But the fair argument is to my mind of a very different and indeed totally opposite nature. For it appears to me that the very fact of these arbitration provisions in the Revenue Act having been left out in the Rent Act, which was passed on the same day, may not only be fairly contended to show, but must be judicially considered by us as showing, that it was not in the mind and intention of the Legislature to allow them, and that the necessary force of the exclusive language of the Rent Act, without the use of any express prohibition on the subject, has this effect.

I must not omit to notice another argument that was used at the hearing against the validity of arbitrations before the Court of suits of the kind described in s. 93 of the Rent Act, XVIII of 1873. That argument was derived from the previous Rent Act, XIV of 1862, and to my mind it has considerable cogency. By s. 14 of the latter Act it is enacted that "the provisions of ch. VI (relative to arbitration) of the Code of Civil Procedure shall apply to suits under the said Act X of 1859 (the previous Rent Act) and under this Act." So that, until the present Rent Act was passed, there was full provision for a reference to arbitration in such a suit as the present, but there is no corresponding provision in the present Act, and the very fact that it has been left out in the present Rent Act may I consider be allowed to lend no little force to the contention that the express provision of the present Act must be understood as limited in this respect.

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Such is the conclusion to which I find myself driven by the language of the present Rent Act, XVIII of 1873. The question before us is not one respecting any principle of rent law, or as to who are or who are not Revenue officers in such a case, but whether Revenue Courts in administering s. 93 of that Rent Act, be the officers who they may, have power to refer the suits therein mentioned to arbitration. To this question there can be but one answer. Most clearly these Courts have no such power, and the order of reference made in the present case, with the recorded consent of the parties, was altogether *ultra vires* of the officer who made it.

At the same time it is difficult to understand why such should be the law, for there appears to be no reason in equity or policy [126] why such suits as are mentioned in s. 93 of Act XVIII of 1873 should not be referred to arbitration, in the same way that "applications" under s. 96 of the same Act and "disputes" as provided by the contemporaneous Revenue Act XIX of 1873 may be. However, it is not our duty to speculate about these considerations, but to accept and apply this written law as we find it. If the intention of the Legislature was not of the nature which I have, in the way of argument, given it credit for, and there has been an accidental omission in the present Rent Act, this can be supplied by the same legislative authority which passed it; but, however that may be, we, as a Court of justice, bound to interpret and apply the law according to recognised principles of legal construction, can only look for the legislative intention to the letter of the Act itself, and behind or beyond its own terms we cannot go; and that being so, I think it must be conceded that the reasoning I have applied to the present case must be given effect to, and that our judgment should be for the appellant.

I would therefore allow this appeal, setting aside the arbitration proceedings complained of, the award therein, and the orders of both the lower Courts, and I would remand the case for re-trial on the merits under s. 562 of Act X of 1877. The costs of this remand to be costs in the suit, and to abide the result of the re-trial.

JUDGMENT.

The judgment of the Judges to whom the appeal was referred (PEARSON, J., TURNER, J., and OLDFIELD, J.) was delivered by

TURNER, J.—The appellant instituted in the Revenue Court a suit for rent against the respondent. The respondent denied liability to the appellant and questioned the amount. The cause came on for trial before Pandit Debi Prasad, an Assistant Collector of the first grade. After evidence had been taken the parties agreed to refer the matters in dispute to the arbitration of a single arbitrator whom they named. Having executed an agreement to this effect they presented a petition to the Assistant Collector, informing him of the agreement at which they had arrived and praying that the record might be sent to the arbitrator. The agreement was produced in the Revenue Court, and thereupon the Assistant Collector assented to the proposed arbitration and sent the record [127] to the arbitrator, requesting him to submit his award in a week. The arbitrator ordered the parties to attend on a day named, and when no one appeared for the appellant at the time fixed for the meeting, the arbitrator first recorded a proceeding declining to enter upon the arbitration, but having received a letter from the appellant stating he would attend at 4 P. M., and that the evidence on his part was on the record, the arbitrator withdrew his refusal and proceeded to determine the matters referred to him without any objection being taken on the part of the appellant. A few

days after the day named by the Court, the arbitrator submitted an award in favour of the respondent. The appellant objected that the arbitrator having once declined to act had no power to proceed with the reference without a fresh agreement executed by the parties, and that the award could not be accepted inasmuch as it was not submitted within the time appointed by the Court. The Assistant Collector overruled both these objections and passed a decree in favour of the respondent on the basis of the award.

The appellant appealed to the District Court respecting the objections he had taken to the award, and urging a new objection that the Rent Act XVIII of 1873 contained no provision for the reference of suits to arbitration, and that the Revenue Court was not otherwise empowered to make the reference. The Judge, pointing out that the parties had willingly resorted to arbitration, considered that the Procedure Code, Act VIII of 1859, which was in force when the suit was tried, should be equitably followed in the silence of the Rent Law; that the Legislature could not have intended to deprive parties of a wholesome privilege which they had enjoyed before the Rent Law of 1873 was passed, but that it was rather the intention to extend the privilege by applying it to applications as well as to suits; the Judge also held that the Assistant Collector had rightly overruled the objections taken by the appellant in the Revenue Court, no misconduct having been proved on the part of the arbitrator.

The appellant then appealed to the High Court on the ground that, in the absence of a provision in the Rent Act, the Assistant Collector was not competent to refer the case to arbitration, and that no decree could legally pass against him on the award. The [128] appeal came on for hearing before a Bench composed of His Honor the Chief Justice and Mr. Justice Spankie. (After referring to the judgments of Staurt, C. J., and Spankie, J., and stating the grounds on which the judgments of these Judges respectively proceeded, the judgment continued :) There is no doubt force in the reasoning of the learned Chief Justice. It is remarkable that, whereas the Legislature had previously to the passing of the Rent Act of 1873 facilitated the reference of matters in dispute to arbitration by the application of the provisions of the Procedure Code to rent suits, and whereas both in respect of applications under the Rent Act of 1873 and in respect of any dispute under the Revenue Act of the same year, special provision had been introduced to facilitate such reference, no similar provision was made in the Rent Act of 1873 regarding the suits triable under s. 93. But unless we are constrained to hold that the words " shall be heard and determined in the manner provided in this Act and not otherwise " necessitate the decision of every suit to which the provision refers after trial by the Court, we are unable to regard the arguments to which we have adverted conclusive. As we understand the general law, parties to suits may, if they are so minded, before issue joined, refer the matter in dispute to arbitration, and after issue joined with the leave of the Court. The special provisions introduced into the Procedure Code and the Land Revenue Act of 1873 did not create this right, but facilitated its exercise and provided for the summary adjudication of questions which might arise respecting the reference and award. Parties to suits and proceedings to which these special provisions have not been applied are not in the absence of special prohibition deprived of the liberty to submit their disputes to arbitration, but they cannot take advantage of the facilities afforded by these provisions, and questions arising out of the reference and on the award cannot be determined summarily.

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It is admitted that, unless we are to find it in the terms of s. 93, there is no other provision in the Rent Act which prohibits parties to the suits mentioned in that section from referring the matters in dispute to arbitration. Do then the terms of s. 93, on which His Honor the Chief Justice has laid stress, necessarily impart such a prohibition? We consider that when read with the context they do not constrain us to this conclusion. The object of [129] the whole clause was to confine the cognizance of the matters therein mentioned to Courts of Revenue, and to prohibit other Courts from taking cognizance of them, and it was declared that such suits as were mentioned in the section should be heard and determined by the Courts of Revenue in the manner provided in the Act and not otherwise, in order the more emphatically to assert the sole jurisdiction of the Courts of Revenue in such matters, and not with a view to deprive the Courts of Revenue of any ordinary power possessed by Courts of Justice, nor the parties of any liberty or privilege which are ordinarily enjoyed by parties to suits.

In the case before the Court, the parties of their own motion consented to a reference, and issues having been joined properly applied to the Court for its sanction. The Revenue Court was in our judgment competent to accord sanction, and on receiving the award to act on it. The appeal should then in our judgment be dismissed, and with costs.

Appeal dismissed.

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2 A. 129=3 Ind. Jur. 518.

APPELLATE CIVIL.

Before Mr. Justice Turner, and Mr. Justice Oldfield.

BINDA PRASAD (*Plaintiff*) *v.* MADHO PRASAD AND OTHERS (*Defendants*).* [31st January, 1879.]

Act VIII of 1859 (*Civil Procedure Code*), s. 194—*Decree payable by Instalments—Act X of* 1877 (*Civil Procedure Code*), s. 210.

Quære.—Whether "a decree for the payment of money" means merely what is commonly known as a money-decree, or includes a decree in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting such property, within the meaning of s. 194 of Act VIII of 1859 and s. 210 of Act X of 1877.

Where a Court, on the ground that the defendant was "hard pressed," directed the amount of a decree to be paid by instalments extending over ten years and allowed only one half of the usual rate of interest, *held* that there was no "sufficient reason" for directing payment of the amount of the decree by instalments, and that such Court had exercised its discretion injuriously to the plaintiff by the length of the period over which the instalments were extended, and by allowing a rate of interest less than the ordinary rate.

[F., 2 N.L.R. 179 (187).]

THIS was a suit on a bond for the payment of money which charged certain immoveable property with such payment. This bond was dated the 6th January 1874, and the obligors, defendants [130] in this suit, agreed therein to pay the principal sum, Rs. 4,800, together with interest at 12 per cent. per annum, by the end of December 1874. The suit was instituted on the 27th September 1877, the plaintiff claiming

* First Appeal, No. 61 of 1878, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th February 1875.

Rs. 6,945-5-6, principal and interest, calculating the interest from the 6th January 1874 to the 27th September 1877 at 12 per cent. per annum. The defendants admitting the execution of the bond, contended in their written statement that the plaintiff was not entitled to interest after the end of December 1874, and prayed that the amount of the decree which the Court might make might be paid by instalments of Rs. 700 per annum, without interest. The Court of first instance held that the plaintiff was entitled to the interest claimed by him ; and, observing that the plaintiff was willing to take a decree directing that the amount claimed by him should be paid by the defendants by three annual instalments, but that the defendants desired annual instalments of Rs. 700, continued as follows: "I, considering them (defendants) to be hard pressed, hold it to be not unfair to the plaintiff if instalments be fixed at the rate of Rs. 800 per annum, accompanied with the stipulation for payment of interest at eight annas per cent. per mensem on each instalment: the plaintiff's suit with costs and future interest at eight annas per cent. per mensem is therefore thus decreed against the defendants and the property hypothecated; the whole sum claimed and the costs of the suit are payable by instalments at the rate of Rs 800 per annum, the first instalment being payable by the end of the year from this date, and interest at the said rate should be paid on each instalment from this date: if any instalment with interest on it be not paid by the due date, the plaintiff will have the right to realise at once all the unpaid and unexpired instalments, together with interest at the said rate from this date until liquidation, from the hypothecated property in the first instance, and if any balance remain due, the same from the other properties of the defendants as well as their persons."

The plaintiff appealed to the High Court against this decree, contending that the Court of first instance was not competent to direct payment of the amount by instalments, and that, even if competent to do so, it had improperly exercised its discretion in so doing.

[131] Pandits *Bishambhar Nath* and *Ajudhia Nath*, for the appellant.

Babus *Oprokash Chandar*, *Ram Das*, and *Beni Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the High Court:

TURNER, J.—The appellant, being the holder of a mortgage for Rs. 4,800 and interest, brought this suit to recover the debt by the sale of the mortgaged property, and also by the ordinary process of execution against the person and property other than that mortgaged of the debtor. The term of the mortgage had expired, and the defendant made no defence save that interest was not payable after the expiry of the term, but he prayed the Court would order the payment of the debt by instalments of Rs. 700 per annum, and without interest. The Court below held that, even if the terms of the mortgage-deed did not distinctly provide for the payment of interest after the expiry of the term, the plaintiff was entitled to recover interest as damages, and to this finding no objection has been taken on appeal, but it has also considered that, inasmuch as the defendant was hard pressed, it might fairly award that the debt should be payable by instalments of Rs. 800, and should bear interest at the rate of 6 per cent. The plaintiff has contended in appeal that the decree varies the contract specifically affecting the security, and that the Court was incompetent to direct payment of the mortgage-debt by instalments, that if it had the power to do so it has not properly exercised its discretion in so doing, in

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that there were no sufficient reasons for ordering payment by instalments, that the instalments ordered defer the complete payment of the debt for a longer period than is equitable, *viz.*, ten years, and that on deferring the satisfaction of the debt for so long a period the Court ought to have allowed the usual rate of interest, *viz.*, 12 per cent. per annum.

The Code recognizes the distinction which is well known in our Courts between money-decrees and decrees for the recovery of a debt by the sale of property mortgaged for its satisfaction. I may refer to the provisions of ss. 322 and 323, and I therefore incline to the opinion that the provisions of s. 210 were intended to apply to what are commonly known as money-decrees, and not to decrees [132] in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting the property.

There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the creditor by ordering payment by instalments, the Court may be well intrusted with a discretion to arrange the payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for the purpose of enabling the creditor to obtain punctual payment, the circumstance that the payment is secured by an hypothecation of property ought not to deprive him of that right. We have, moreover, to interpret the law without examining its policy, and it would, in my judgment, probably be held that the provisions of s. 210 apply, as in terms they appear to apply, only to decrees for the payment of money.

In the case before the Court the plaintiff sought not only a money-decree but a dereee for the sale of the property in pursuance of the contract by which it was specifically affected, and therefore, if the construction I incline to put on the terms of s. 210 be right, in the absence of consent on the part of the plaintiff the Court had no power to vary the contract and direct payment by instalments, but if it had that power, I am of the same mind with my honorable colleague, that there was no sufficient reason for its exercise in this case, and that it has exercised it injuriously to the plaintiff by the length of the period over which the instalments are extended, and by allowing a rate of interest less than the ordinary market rate on mortgages of land when the payment is so long deferred. On this ground I also concur in the result of the judgment of my honorable colleague.

The proceeding to which the Subordinate Judge adverts as containing a consent on the part of the appellant to take payment by instalments has been considered. The appellant's pleader on doubt stated his client was willing to take payment by instalments spread over three years, but his offer was not accepted, and he was therefore at liberty to insist on the payment of the debt forthwith. I concur then in the decree proposed by my honorable colleague.

[133] OLDFIELD, J.—The plaintiff sued for the recovery of a sum of money with interest secured by the mortgage of immoveable property. The lower Court found in favour of the plaintiff as to the amount due, but made a decree to the effect that the whole sum and the costs of the suit should be paid by instalments of Rs. 800, the first instalment being payable by the end of the year, and interest at the rate of 6 per cent. per annum should be paid on each instalment from date of decree, and if any instalment with interest on it be not paid by the due date, the plaintiff will have the right to realise at once the amount due from the hypothecated property in

the first instance, and then from other properties of the defendants as well as their persons. 1879 JAN. 31.

The question in the appeal preferred by the plaintiff is whether the order directing the payment by instalments can be set saide, and an order made for enforcement of the hypothecation by sale of the property in the event of the immediate non-payment of the debt. APPELLATE CIVIL.

The lower Court's order has been made under s. 194 of Act VIII of 1859, and a question has been raised whether that section is applicable to decrees for the payment of money by sale of immoveable property. I should hesitate to hold that the section contemplates a distinction of the kind suggested, and I incline to think that, whether the decree decrees the payment of money simply, or proceeds to direct its realization by sale of particular property mortgaged as security in event of non-payment, it is still a "decree for the payment of money" in the words of the section, when the Court may order the amount to be paid by instalments. There seems no reason why a simple debt should, when decreed, be payable at the discretion of the Court by instalments, and not a debt secured by the mortgage of immoveable property. On the contrary when there is such security there is all the less risk to the creditor from delay in payment incident to payment by instalments. 2 A. 129 = 3 Ind. Jur. 518.

But it is only on sufficient reason being shown that a Court can exercise the power allowed, and no sufficient ground is disclosed here. All that the Subordinate Judge says on the point is that the defendants are hard pressed, and he holds it not unfair that the instalments should be paid at the rate of Rs. 800 per annum. The reason [134] assigned amounts to nothing more than an inability to pay, but that is no sufficient reason why execution should not at once proceed. It is denied that the plaintiffs were willing to allow the defendants to pay the debt by instalments, but at any rate any offer made was not accepted, and there is no reason why the claim should not be decreed. The decree should be modified and the claimed decreed, with costs and interest at 6 per cent. from date of the institution of the suit, by sale of the property hypothecated, and this appeal decreed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

SARASUTI (*Defendant*) v. MANNU (*Plaintiff*).* [23rd January, 1879.]

Declaratory Decree—Hindu Law—Inheritance.—Sudra—Illegitimate Son.

In a suit merely for a declaration of right in respect of certain property, the lower appellate Court, considering that the suit was really one for the possession of such property, allowed the plaintiff to make up the full amount of Court-fees required for a suit for possession. The plaint in the suit was not amended, and the lower appellate Court eventually gave the plaintiff a declaratory decree. *Held*, on second appeal by the defendant, who objected that a suit merely for a declaratory decree could not be maintained, that such objection ought not to be allowed under the circumstances.

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* Second Appeal, No. 833 of 1878, from a decree of W. Young, Esq., Officiating Judge of Mainpuri, dated the 29th June, 1878, reversing a decree of Maulvi Hamid Hasan Khan, Subordinate Judge of Mainpuri, dated the 22nd February, 1877.

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The illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. Under the Mitakshara law the son of a female slave by a Sudra takes the whole of his father's estate, if there be no sons by a wedded wife, or daughters by such a wife, or sons of such daughters. If there be any such heirs the son of a female slave will participate to the extent of half a share only. *Held*, therefore that *M*, the illegitimate son of an *ahir* by a continuous concubine of the same caste, took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's lifetime.

[N.F., 28 C. 194 (202); F., 6 A. 329 (334) = A.W.N. (1884) 100; 7 M. 407 (411); 6 C P. L.R. 144 (146); R., 21 A. 99 (101); 30 A. 508 = 5 A.L.J. 629 = A.W.N. (1908) 229; 32 B. 562 = 10 Bom. L. R. 736; 34 M. 68 = 5 Ind. Cas. 919 = 20 M.L.J. 350 = 7 M.L.T. 161 = (1910) M.W.N. 138; 16 C.L.J. 335 = 17 C.W.N. 442 = 17 Ind. Cas. 276; Expl., 19 C. 91 (104 & 105).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala *Lalta Prasad*, for the appellant.

Mr. *Conlan* and Babu *Barodha Prasad*, for the respondent.

JUDGMENT.

[135] The judgment of the High Court was delivered by

OLDFIELD, J.— The plaintiff, who is an *ahir*, brought this suit for a declaration of his right as heir to all the property left by his father, Baldeo Prasad. The Court of first instance found the plaintiff to be an illegitimate son of Baldeo Prasad, and therefore not entitled to inherit. The appeal came before the Judge, Mr. Tyrrell, and, on an objection as to the insufficiency of the stamp, he permitted the plaintiff to make up the full amount of fees required for a suit for possession of the property, which the Judge considered was the real object of the suit. He also found plaintiff to be the illegitimate son of Baldeo Prasad by a woman of the *ahir* class, and he remanded the suit for a finding as to the custom prevailing in respect to the right of inheritance of such a son. The appeal was finally disposed of by Mr. Young, before whom the finding on the issue remitted came, which was to the effect that the issue of a concubine of the same caste inherits property equally with the children of the lawful wife. Mr. Young has held on the precepts of Hindu law, and without allowing distinctions with reference to the kind or degree of illegitimacy that the illegitimate offspring of a Sudra by a woman of the same caste will have a right of inheritance in default of legitimate male issue, and he has given a decree declaring the plaintiff to have established his right in the property in suit.

The first plea in appeal takes the objection that a suit for a declaration of right cannot be maintained. We consider the plea cannot now be allowed under the circumstances. There is no doubt that the claim is one for a declaration of a right only, and that the plaint has never been amended, and the decree passed is only for a declaration of a right, but the plaintiff has paid full institution fees, and we are not disposed to throw out the suit at this stage.

The next plea is to the effect that it is only the son born of a female slave as distinct from a concubine who can inherit the property of a Sudra. We consider that the plaintiff's right of inheritance is one which should be determined by Hindu law, and the law of succession applicable is stated in Mitakshara, ch. i, s. xii, vv. 1 and 2, and is to the effect that the son begotten on a [136] female slave takes the whole estate if there be no sons of a wedded wife or daughters of such a wife or sons of daughters; but if there be any of the above-named heirs the son of a female slave will

participate for half a share only,—*Rahi* v. *Govind* (1); *Chuoturya Run-murdun Syn* v. *Sahib Purhlad Syn* (2) and *Inderan Valungypuly Taver* v. *Ramaswamy Pandia Talavar* (3) may be referred to for authority that illegitimate sons of Sudras inherit as heirs; and there is authority for holding that there is no such distinction as is contended for between a son born of a slave and of a concubine. The question will be found very fully discussed in the decision of the Bombay High Court above cited, which held that the illegitimate offspring of a kept woman or continuous concubine (and that is what the plaintiff before us is found to be) amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra, and this view accords with the opinion expressed in a decision of the Madras High Court (4), and is in accordance with Strange's Hindu Law, 4th ed., p. 69; West and Buhler, 2nd ed., p. 110; and Colebrooke's Dayabhaga, ch. ix, vv. 29, 30, 31, and Digest, Bk. v, ch. iii, v. clxxiv. It is opposed to a decision of the Calcutta High Court (5) and to a note to be found in Macnaughten's Hindu Law, vol. ii, p. 15. The former is a case decided by the law of the Bengal school, and the decision proceeds very much on rejecting the hitherto accepted translation by Colebrooke of passages in the Dayabhaga, and the opinion expressed in Macnaughten's Hindu Law does not seem to accord with what was held in a case reported at p. 256 of the same volume.

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The plaintiff is heir in preference to the defendant, who is the daughter of a legitimate son of Baldeo Prasad, who died in his father's lifetime, and it is not urged that there are any nearer heirs living. The other pleas in appeal have no weight. We dismiss the appeal with costs (6).

Appeal dismissed.

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2 A. 137.

[137] APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KALIAN DAS (*Plaintiff*) v. TIKA RAM AND ANOTHER (*Defendants*).*
[3rd February, 1879.]

Act XVIII of 1873 (*N.W.P. Rent Act*), *s.* 95 (*m*) *and* (*n*)—*Jurisdiction—Civil Court—Revenue Court.*

T, the occupancy-tenant of certain lands, gave *K* a lease of his occupancy-rights for a term of twenty years. In the execution of a decree for the ejectment of *T* from such lands obtained by the landholder against *T* in a suit to which *K* was no party, *K* was ejected from such lands. This decree was subsequently set aside, and *T* recovered the occupancy of such lands. *Held*, in a suit by *K* against *T* and the landholder, in which *K* claimed the occupancy of the lands and mesne profits for the period during his dispossession, in virtue of the lease, that the suit was one cognizable in the Civil Courts and not one on the subject-matter of

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* Second Appeal, No. 878 of 1878, from a decree of G. L. Lang, Esq., Officiating Judge of Aligarh, dated the 11th June 1878, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 22nd December 1877.

(1) 1 B. 97. (2) 7 M.I.A. 18. (3) 3 B.L.R.P.C. 1.

(4) *Pandaya Telaver* v. *Puli Telaver*, 1 M.H.C.R. 478.

(5) *Narain Dhara* v. *Rakhal Gain*, 1 C. 1.

(6) The plaintiff in this case was presumably not the offspring of an incestuous or adulterous intercourse. Such offspring it has been held cannot inherit—see *Dalti Parisi Nayudu* v. *Dati Bangaru Nayudu*, 4 M.H.C.R. 204.

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which an application of the nature mentioned in s. 95 of Act XVIII of 1873 could have been made, so as to give the Courts of Revenue exclusive jurisdiction in such matter.

THE facts of this case were as follow: Balkishen and Seva Ram were the tenants with a right of occupancy of certain lands. Gobind Ram, the Karinda of Thakur Das, the zemindar of these lands, sued in his own name Balkishen and Seva Ram in the Revenue Court for arrears of rent and to eject them, and eventually obtained a decree on the 25th August 1871. On the 26th August 1871 Balkishen and Sheva Ram gave Kalian Das a lease of their occupancy rights in the lands for a term of twenty years. On the 25th July 1872 the decree dated the 25th August 1871 was in effect set aside by the appellate Court on the ground that the Revenue Court of first instance had no jurisdiction. Notwithstanding this execution of that decree was taken out by Gobind Ram, and on the 18th April 1873 Kalian Das, who had obtained possession of the lands as lessee of Balkishen and Seva Ram, was dispossessed. Subsequently the appellate Court granted a review of the judgment, dated the 25th July 1872, and on the 1st July 1874, it dismissed Gobind Ram's suit on the ground that Gobind Ram could not sue in his own name. The decision of the appellate Court dated the 1st July 1874 was affirmed by the High Court on special appeal. While the special appeal was pending Balkishen and Seva Ram both died, and Thakur Das also died. On the deaths of these persons [138] Tika Ram, the heir of Balkishen and Seva Ram, and Ganga Kuar, the widow of Thakur Das, entered into an agreement with each other, under which Tika Ram recovered the occupancy of the lands. In August 1877 Kalian Das brought the present suit in the Civil Court against Tika Ram and Ganga Kuar, claiming a declaration of this right to, and possession of, the lands in virtue of the lease, and also certain mesne profits. The Court of first instance gave him a decree, holding that the suit was cognizable in the Civil Courts. On appeal by the defendant Tika Ram, the lower appellate Court dismissed the suit, referring the plaintiff to the Revenue Courts, on the ground that the subject-matter of the suit was one on which applications of the nature mentioned in (*m*) and (*n*), s. 95 of Act XVIII of 1873, might be made, and of which, therefore, no Courts other than Courts of Revenue could take cognizance under the provisions of that section.

The plaintiff appealed to the High Court contending that the suit was cognizable in the Civil Courts.

Babu *Jogindra Nath Chaudhri*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—The plaintiff, appellant, is a sub-tenant, claiming under a lease for a term of twenty years. The occupancy-tenant, defendant, under whom he holds was ejected in execution of a decree held by the zemindar, also impleaded in this suit. Though plaintiff, appellant, was no party to the suit in which a decree had been made against the occupancy-tenant, he nevertheless lost his possession when the decree was executed. Subsequently the decree of which execution was taken out was set aside, and the defendant, the occupancy-tenant, resumed possession of his holding, but refused to give it up to the plaintiff, his sub-tenant. The suit is one which, in our opinion, is cognizable by the Civil Court, and the claim not one regarding which application could have been preferred to the Collector under s. 95 of the Rent Act. We are fortified in this

opinion by a precedent of this Court (1) [139] dated 1st March 1878. We decree the appeal, reverse the judgment of the lower appellate Court, and return the case to that Court for retrial on the merits. Costs will abide the result of a new trial.

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Cause remanded.

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2 A. 139.

CRIMINAL JURISDICTION.

Before Mr. Justice Pearson.

EMPRESS OF INDIA *v.* RAM ADHIN AND OTHERS. [5th and 13th February, 1879.]

Act XLV of 1860 *(Penal Code)*, ss. 71, 146, 147, 319, 323—*Offence made up of several offences—Rioting—Hurt.*

Rioting and causing hurt in the course of such rioting are distinct offences and each offence is separately punishable.

[R., 7 A. 29 (31); 6 C. 718=8 C.L.R. 390.]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioners, eight in number, in pursuance of a common object, assaulted another party composed of seven persons. In the affray which ensued members of both parties were injured. The petitioners were separately charged with, convicted of, and punished for offences under ss. 147 and 323 of the Indian Penal Code by Mr. E. White, Joint Magistrate of Allahabad, on the 4th November 1878; and these convictions and sentences were affirmed by Mr. H. Lushington, Sessions Judge of Allahabad, on the 16th December 1878.

Mr. *Colvin*, for the petitioners, contended that they could not be punished both for the offence of rioting and for that of voluntarily causing grievous hurt.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

PRELIMINARY JUDGMENT.

PEARSON, J.—It is contended that both sentences under ss. 147 and 323 of the Indian Penal Code cannot stand. In support of the contention reference is made to the case of *Queen* v. *Rabiulla* (2) disposed of by Norman and Seton-Karr, JJ., on 16th January 1867. In that case the prisoners had been convicted under ss. [140] 147 and 304, and it was held that a separate charge for the former offence was not sustainable, and that the fact of his having been present as a member of the unlawful assembly should have been treated as part of the evidence of the major offence. Reference is also made to Mr. Justice Oldfield's ruling in the case of *Queen* v. *Mangrao* (3). The prisoner had been convicted of an attempt to kidnap and of wrongful confinement; and it was held that the two convictions could not be upheld. The case is postponed for a week to enable the learned counsel for the petitioners to search for more precedents in point.

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(1) S.A., No. 1115 of 1877, not reported.

(2) 7 W. R. Cr. 13.

(3) H. C. R., N. W. P., 1874, p. 293.

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The following judgment was delivered by the Court at the adjourned hearing of the case:

FINAL JUDGMENT.

PEARSON, J.—To day it is brought to my notice that the learned Judges Norman and Seton-Karr in the case of the *Queen* v. *Kallachand* (1), disposed of by them on the 29th April 1867, held rioting armed with deadly weapons to be a distinct offence from stabbing a person on whose premises the riot took place, and each to be separately punishable. It appears that in the case of *Queen* v. *Hargobind* (2), decided by this Court on the 7th July 1871, Mr. Justice Turner held that persons found guilty of rioting may, if the circumstances warrant it, be convicted of the several offences of rioting armed with deadly weapons, culpable homicide, and grievous hurt. The learned Judge referred to the case of *Rabi-ulla* mentioned above, and expressed his dissent from the ruling therein, and observed that a different view of the law had heretofore obtained in this Court. It further appears that the learned Judges of the Calcutta Court who disposed of *Rabi-ulla's* case ruled in a different direction in the case disposed of by them in the following month of April. On the whole the precedents which have been produced are opposed to the contention in this case. It is obvious to remark that rioting and unlawful assembly are offences against the public tranquillity, while assault, hurt, &c., are offences affecting the human body. Seeing no sufficient reason for interference, I reject this application.

Application rejected.

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2 A. 141.

[141] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

BHIKHAM DAS (*Plaintiff*) v. PURA AND ANOTHER (*Defendants*).*
[7th February, 1879.]

Hindu Law—Family dwelling-house—Ancestral property—Mortgage—Sale in Execution of decree.

L, a Hindu, mortgaged the dwelling-house of his family, such dwelling-house being ancestral property. *Held*, in a suit against *L's* mother and wife to enforce the mortgage, brought after *L's* decease, that the mortgage could be enforced. *Mangala Debi* v *Dinanath Bose* (3) and *Gauri* v. *Chandramani* (4) distinguished.

[R., 27 M. 45 (51) = 12 M.L.J. 270 (275); 36 P.R. 1907 = 118 P.W.R. 1907; D., A.W.N. (1887) 279.]

THIS was a suit against the widow and the wife of one Lachmi Narain, deceased, for certain moneys charged by the deceased on, amongst other properties, the dwelling-house of the family, such dwelling house being ancestral property. The defendants set up as a defence to the suit that they had no other place to reside in except the family dwelling-house, and that they possessed a right of residence therein, and Lachmi Narain

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* Second Appeal, No. 968 of 1878, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 20th May 1878, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 14th February 1878.

(1) 7 W.R. Cr. 60.
(2) H.C.R.N.W.P. 1871, p. 174.
(3) 4 B.L.R.O.J. 72 = 12 W.R.O.J. 35.
(4) 1 A. 262.

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was therefore not competent to mortgage the same. The Court of first instance refused to give the plaintiff a decree for the sale of the dwelling-house on the ground that the defendants possessed a right of residence therein, and Lachmi Narain was consequently not entitled to mortgage it. In support of this ruling the Court referred to *Mangala Debi* v. *Dinanath Bose* (1) and *Gauri* v. *Chandramani* (2). On appeal by the plaintiff to the lower appellate Court, that Court agreed in the views of the Court of first instance.

The plaintiff preferred a second appeal to the High Court, contending that Lachmi Narain was competent to mortgage the house and the mortgage was enforceable.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

Pandit *Bishambar Nath*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The decisions to which the lower Courts have referred do not rule that an ancestral house cannot be sold in execution [142] of a decree, if the judgment-debtor's widow be residing in it. They relate to the question, not at present raised in this case, as to whether the widow could be ousted by the auction-purchaser. In the present case the house was hypothecated before the rights of the respondents arising out of the demise of Lachmi Narain had accrued. We accept and decree the appeal with costs, and in modification of the decree of the lower Court's decree that portion of the claim which was dismissed by them.

Appeal allowed.

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2 A. 142.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

SAHAI PANDEY AND OTHERS (*Defendants*) *v.* SHAM NARAIN AND ANOTHER (*Plaintiffs*).* [10th February, 1879.]

Mortg age—First and second mortgages—Assignment by mortgagee—Rights of assignees.

In March 1865 the proprietors of a certain share in a certain village mortgaged the share to *R*, giving him possession of the share, and stipulating that the mortgagee should take the profits of the share in lieu of interest, and that the mortgage should be redeemed on payment of the principal sum without interest. In April 1865 *R* mortgaged his rights and interests under the mortgage of March 1865 to *S*, retaining possession of the share. In February 1869 the proprietors of the share again mortgaged it to *R* for a further loan. Under this mortgage, *R* was entitled to take the profits of the share in lieu of interest, and the mortgage was redeemable on payment both of the principal sum due thereunder and of that due under the mortgage of March 1865 without interest, or the mortgagors were entitled to redeem a certain portion of the share on payment of a proportionate amonnt of such sums, without interest, on a particular day in any year. In August 1872, *S* obtained a decree on the mortgage of April 1865, directing the sale of *R's* rights and interests under the mortgage of March 1865 in satisfaction of such decree. In May 1874 *R* assigned by sale to *N* his rights and interests under the mortgage of February 1869 retaining possession of the share. In April 1877 *R's* rights and interests under the mortgage of March 1865 were sold in

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* Second Appeal, No. 948 of 1878, from a decree of C. Daniell, Esq., Officiating Judge of Gorakhpur, dated the 18th July 1878, affirming a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 7th May 1878.

(1) 4 B.L.R.O.J. 72=12.W.R.O.J. 35. (2) 1 A. 262.

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execution of the decree of August 1872, and were purchased by *S*, who obtained possession of the share. *Held*, in a suit by *N* against *S* to obtain possession of the share in virtue of the assignment of May 1874, that, under the circumstances of the case, *S* was entitled as against *N* to the possession of the share as first mortgagee.

THE facts of this case were as follows: In March 1865 Gaya Prasad and Shimbu Prasad, the owners of a four-anna share in a certain village mortgaged the share to one Ramzan for [143] Rs. 4,400, placing the mortgagee in possession. Under the terms of this mortgage the mortgagee was entitled to the profits of the share in lieu of interest, and the mortgagors were entitled to redemption on payment of the principal sum advanced without interest. On the 19th April 1865 Ramzan sub-mortgaged the share to Sahai Pandey and certain other persons for Rs. 2,351, retaining the share in his own possession. Under the terms of this mortgage the mortgage-money was to be repaid together with interest at nine per cent. per annum within one year. On the 5th February 1869 Gaya Prasad and Shimbu Prasad again mortgaged the share to Ramzan for a further advance of Rs. 1,600. Under the terms of this second mortgage the mortgagee was entitled to the profits of the share in lieu of interest, and the mortgagors were entitled to redeem the whole share on payment of the principal sums due under both mortgages without interest, or a certain portion of the share on the payment of a proportionate amount of such sums without interest on the 15th Jeth Sudi of any year. On the 1st August 1872 Sahai Pandey and his co-mortgagees obtained a decree against Ramzan on the mortgage dated the 19th April 1865, directing that his rights and interest under the mortgage of March 1875 should be sold in satisfaction of such decree. On the 16th May 1874 Ramzan assigned by sale to Sri Niwas and Sham Narain his rights and interests under the mortgage dated the 5th February 1869, he retaining possession of the share. In April 1877 the rights and interest of Ramzan under the mortgage of March 1865 were sold in the execution of the decree dated the 1st August 1872, and were purchased by Sahai Pandey and his co-mortgagees, the decree-holders, who obtained possession of the share. The present suit was brought by Sri Niwas and Sham Narain against Sahai Pandey and his co-mortgagees for the possession of the share in virtue of the assignment dated the 16th May 1874, and for certain mesne profits. The Court of first instance gave the plaintiffs a decree for possession of sixteen-sixtieths of the share as representing Ramzan's interests under the second mortgage, the remaining fifty-four sixtieths representing his interests under the first mortgage. On appeal by the defendants the lower appellate Court affirmed the decree of the Court of first instance.

[144] The defendants appealed to the High Court contending that they were entitled as first mortgagees to the possession of the entire share.

Mr. *Conlan*, Pandit *Adjudhia Prasad*, and Lala *Lalta Prasad*, for the appellants.

Pandit *Bishambar Nath* and Maulvi *Mehndi Hasan*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—The facts found are these: The owner of the property in suit, a four-anna share in a certain mauza, mortgaged it to Ramzan in 1272 Fasli for Rs. 4,400 and put the mortgagee in possession;

a condition of the mortgage being that the mortgagee should enjoy the profits in lieu of interest, and the mortgage should be redeemed on payment of the principal. After this in the same year Ramzan sub-mortgaged the same four-anna share to the defendants (appellants) for Rs. 2,351, retaining possession of the share himself. Subsequently in 1276 Fasli the owner of the property made a second mortgage of the same share to Ramzan for Rs. 1,600, on the same footing as to interest and enjoyment of rents as the first mortgage, the mortgage being redeemable on payment of the principal due on both mortgages, or a one-anna, one-pie share of the estate being redeemable on payment of a proportionate amount of the debt. Ramzan in 1281 Fasli sold his interest under this second mortgage to the plaintiffs for Rs. 1,800, but as has been found retained possession of the mortgaged share. The defendants in 1279 Fasli (*i.e.*, 1872 A.D.) sued Ramzan on the mortgage in their favour and obtained a decree for its enforcement, and in 1877, in execution thereof, sold Ramzan's interest, which they themselves bought, and were put in possession of the share. The plaintiffs now seek to dispossess them by virtue of the right under the second mortgage made to Ramzan which they purchased.

On the facts found it appears to us that the defendants by reason of their interest as sub-mortgagees of the whole four-anna share under the first mortgage made to Ramzan, and as purchasers under the decree they obtained against him of his interest under the first mortgage, are entitled to possession of the property as [145] mortgagees in preference to the plaintiffs, who have only obtained an assignment of the interest of Ramzan under the second mortgage made to him. We therefore reverse the decrees of the lower Courts, and decree the appeal and dismiss the suit with costs in all Courts.

Appeal allowed.

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2 A. 145 (F.B.).

FULL BENCH.

Before Mr. Justice Turner, Offg. Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

BHAGWANTI (*Defendant*) *v.* RUDR MAN TIWARI (*Plaintiff*).*
[17th February, 1879.]

Act XVIII of 1873 (*N.-W.P. Rent Act*), *s.* 9—*Tenant at a fixed rate—Ex-proprietary Tenant—Occupancy Tenant—Inheritance to Rights of Occupancy.*

Held, that the proviso to the last clause of s. 9 of Act XVIII of 1873 refers only to the holdings of ex-proprietary tenants and occupancy tenants and not to tenants at fixed rates.

THIS was a suit for, amongst other things, the possession of certain land, being the holding of one Behsa, deceased, a tenant at a fixed rate. The plaintiff, who was the third cousin of the deceased husband of Behsa, claimed the holding by right of inheritance. The Court of first instance gave the plaintiff a decree. On appeal by the defendants they contended that the plaintiff, being a collateral relative of Behsa, and not having

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* Second Appeal, No. 1435 of 1877, from a decree of H. A. Harrison, Esq., Officiating Judge of Mirzapur, dated the 18th September 1877, affirming a decree of Maulvi Ruh-ul-la, Officiating Munsiff of Mirzapur, dated the 16th June 1877.

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shared in the cultivation of her holding, was not entitled to inherit the holding, under the provisions of the proviso to s. 9 of Act XVIII of 1873. The lower appellate Court held that that proviso was applicable to tenants with a right of occupancy and not to tenants at fixed rates.

The defendants preferred an appeal to the High Court contending again that the plaintiff was not entitled to inherit with reference to the provisions of s. 9 of Act XVIII of 1873. The Court (PEARSON, J. and OLDFIELD, J.) referred to the Full Bench the question whether the proviso in the last clause of s. 9 of Act XVIII of 1873 refers only to the holdings of persons having rights of occupancy, or also to the holdings of tenants at fixed rates.

Mr *Niblett*, for the appellant.

[146] Pandit *Ajudhia Nath*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

TURNER, O. C. J.—The ninth section of the Rent Act XVIII of 1873 declares what powers of alienation and succession attach to the rights of occupancy described in the preceding sections. It deals first with tenants at fixed rates, and declares simply that their right is heritable and transferable. It then proceeds to declare that no other right of occupancy is transferable by grant, will, or otherwise, except to a particular class, namely, co-sharers in such right, and then declares, in respect of such last-mentioned right, that is to say a right of occupancy other than the right of a tenant at fixed rates, that if the person entitled to it dies it shall devolve as if it were land, subject to the proviso that no collateral relative of the deceased who did not then share in the cultivation of his holding shall be entitled to inherit under this section; that is to say, it limits the right of succession under this provision of the Act to the lineal descendants of the desceased occupier, and in default of them to such of the collaterals as at the time of the death of the deceased occupier shared in the cultivation of the holding. It has been urged that the words "under this section" indicate that the right of succession is limited as well in the case of tenants at fixed rates as in the case of other tenants with a right of occupancy, and that the proviso applies to all rights of succession declared in that section. It is not necessary to determine whether the words on which reliance is placed are mere surplusage, nor whether it would have been more correct to substitute for them the words "under the preceding clause," nor whether, as has been suggested at the bar, they were introduced to show that the limitation of inheritance did not extend to right of succession derived from custom, but to rights of succession created by the section in favour of tenants with a right of occupancy other than tenants at fixed rate, for the language of the section is of itself sufficiently clear. The proviso is limited to such of the collateral relatives of "the deceased" as "then" shared in the cultivation of the holding. These terms clearly relate to the person and the time mentioned in the preceding clause, "When any person entitled to such last mentioned right dies." The section having first mentioned and dealt with the rights of a **[147]** tenant at fixed rates, the right last mentioned is the right of occupancy other than a right at fixed rates. Moreover, the construction contended for would leave a tenant at fixed rates at liberty to transfer his estate in his lifetime to whomsoever he pleased, while it would place on the devolution of the right by inheritance an onerous restriction. The proviso is undoubtedly limited to the devolution by

inheritance of those rights of occupancy dealt with in the preceding clause, and does not affect the succession to the rights of tenants at fixed rates.

PEARSON, J.—In my opinion the proviso does not refer to the holdings of tenants at fixed rates. The words in the third clause of the section "last-mentioned rights" clearly refer to the right mentioned in the preceding section, which is the right of occupancy-tenants other than those who hold at fixed rates; and the clause declares how, when any person entitled to such last-mentioned right dies, the right shall devolve; while the proviso immediately following that no collateral relative of *the* deceased who did not *then* share in the cultivation of his holding shall be entitled to inherit, clearly refers to the person entitled to the same *last-mentioned right* who has died, and to him alone. The use of the word "clause" instead of "section" would apparently have been more proper.

SPANKIE, J.—Under the first clause of s. 9 of the Rent Act the right of tenants at fixed rates is declared to be heritable and transferable. The words are "shall be" heritable and transferable. There is no limitation and proviso to this declaration. The clause deals with tenants having a right of occupancy defined in s. 6 of the Act as "tenants at fixed rates." The next clause deals with other tenants having a right of occupancy, but *not* at fixed rates. It declares that no other right of occupancy shall be transferable by grant, will, or otherwise, except as between co-sharers in such right. The third clause declares that, when any person entitled to "such last-mentioned right dies, the right shall devolve as if it were land." What is "the right last mentioned," not rights, be it observed? Clearly, that other right of occupancy that is held by tenants who are not "tenants at fixed rates." The proviso therefore that no collateral relative of the deceased who did not share at the time of his death in the cultivation of his [148] holding "shall be entitled to inherit under this section" applies only to those tenants having rights of occupancy but not at fixed rates. The words "under this section" are awkwardly expressed, but there can be little doubt, I think, that the proviso applies only to those tenants who are occupancy-tenants within the meaning of s. 8 of the Act, those persons alone possessing the "last-mentioned right" referred to in the third clause to which the proviso is attached. It is possible, perhaps probable, that the proviso was due to the somewhat uncertain wording of s. 6 of Act X of 1859, which acknowledges the right of occupancy of a ryot cultivating or holding land for twelve years. Then it is declared that the holding of "the father or other person from whom a ryot inherits" shall be deemed to be the "holding of the ryot within the meaning of this section." Under the Rent Act, XVIII of 1873, the right in such cases shall devolve as if it were land, with this proviso that "no collateral relative of the deceased who did not then share in the cultivation of this holding shall be entitled to inherit under this section." This view of the case seems to show that the liberty of tenants at fixed rates to deal with their right is absolutely without limit, and inheritance follows the usual course with regard to the devolution of property, according to the law which applies to the deceased tenant, whereas that law, whatever it may be, is so far controlled by s. 9 of the Rent Act that, in cases of rights of occupancy acquired under s. 8 of the Act, no collateral relative of the deceased who did not share in the cultivation of his holding shall be entitled to inherit.

OLDFIELD, J.—I concur in the view taken by Mr. Justice Spankie.

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CIVIL JURISDICTION.

2 A. 148.

2 A. 148.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

KALI CHARAN RAI AND OTHERS (*Plaintiffs*) *v.* AJUDHIA RAI AND OTHERS (*Defendants*).* [21st February, 1879.]

Suit for the Cancellation of a Document—" Subject-matter in dispute"—Appeal—Jurisdiction—Act VI of 1871 (*Bengal Civil Courts Act*), s. 22.

The plaintiffs sued for the cancellation of a bond for the payment of Rs. 6,000 together with interest thereon at the rate of four per cent. per [149] mensem, alleging that they had executed such bond under the impression that it was a bond for the payment of Rs. 3,000 together with interest thereon at the rate of one and a half per cent per mensem, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court Rs. 3.000 together with interest at the rate of one and a half per cent. per mensem. *Held* that the value of the subject-matter in dispute was the difference between Rs. 3,000 and Rs. 6,000 or thereabouts, and therefore the appeal from the decree of the Court of first instance preferred to the District Judge was cognizable by him.

THIS was a suit for the cancellation of a bond for Rs. 6,000, dated the 17th November, 1877, in which it was stated that interest was payable on the principal sum at the rate of Rs. 4 per cent. per mensem. The plaintiffs, the obligors of the bond, sued alleging that, having borrowed Rs. 3,000 from the defendants, they had agreed to give them a bond for the payment of that sum together with interest at the rate of Re. 1-8-0 per cent. per mensem, and that they had executed the bond in suit under the impression that it was the bond they had agreed to give, and that they had subsequently discovered that the defendants had fraudulently caused them to execute a bond for the payment of Rs. 6,000 with interest at Rs. 4 per cent. per mensem. The plaintiffs paid Rs. 3,000 into Court together with interest at the rate of Re. 1-8-0 per cent. The Court of first instance gave the plaintiffs a decree. On appeal by the defendants to the District Judge the Judge held that the value of the subject-matter of the suit exceeded Rs. 5,000, and that consequently he had no appellate jurisdiction in the matter, but that the appeal lay to the High Court.

The defendants applied to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877, on the ground that the District Judge had refused to exercise the jurisdiction vested by law in him.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the petitioners.

Pandit *Bishambhar Nath* and Lala *Lalta Prasad*, for the opposite parties.

JUDGMENT.

The judgment of the High Court was delivered by

PEARSON, J.—The value of the subject-matter in dispute in this suit appears to us to be the difference between Rs. 3,000 and [150] Rs. 6,000 or thereabouts. We are therefore of opinion that the appeal preferred to the Zila Judge was cognizable by him, and we accordingly allow this application with costs, set aside the lower Court's order, and direct it to re-place the appeal on its file and to dispose of it according to law.

Application allowed.

* Application, No. 37-B of 1878, for revision of an order of R. Wall, Esq., Officiating Judge of Ghazipur, dated the 26th August 1878.

2 A. 150 (F.B.).

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FULL BENCH.

2 A. 150 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice. Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Oldfield and Mr. Justice Brodhurst.

NEHALO (*Defendant*) *v.* KISHEN LAL AND OTHERS (*Plaintiffs*).*
[24th February, 1879.]

Hindu Law—Widow's Estate, Forfeiture of—Unchastity during Widowhood.

Held, under the Mitakshara law, that a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. The ruling of the majority of the Full Bench of the Calcutta High Court in *Kery Kolitany* v. *Moneeram Kolita* (1), followed.

[Appr., 5 C. 776 (791) (P.C.) = 6 C.L.R. 322 = 7 I.A. 115 = 4 Sar. P.C.J. 103; R., 17 Ind. Cas. 133 = 8 N.L.R. 128.]

THE facts of this case were as follows: Nehalo, who had succeeded to the separate estate of her deceased husband, Ganga Bishan, made a gift of such estate to Umrao Singh, a minor, the grandson of Sheo Singh, her deceased husband's elder brother. Kishen Lal and certain other persons, claiming to be the next reversioners to the estate of Ganga Bishan, sued Nehalo and Umrao Singh to set aside this gift, and to obtain possession of the property, alleging that Nehalo had become unchaste after her husband's death, and had consequently forfeited his estate. Nehalo admitted that since her husband's death she had given birth to an illegitimate child, but contended that the suit was not maintainable, inasmuch as Umrao Sing was the adopted son of Ganga Bishan, having been adopted by her after her husband's death, with the permission of her husband, and he was consequently the heir to the estate of Ganga Bishan. The Court of first instance allowed this contention and dismissed the suit. On appeal by the plaintiffs the lower appellate Court reversed the decree of the Court of first instance, holding that [151] by reason of her unchastity Nehalo had forfeited her husband's estate, and that the adoption of Umrao Singh was invalid, as Nehalo had no authority from her husband to adopt a son. The lower appellate Court remand the suit to the Court of first instance to determine whether or not the suit was maintainable by the plaintiffs in the presence of other heirs of which there appeared to be several.

The defendants appealed to the High Court contending that Nehalo had not forfeited her husband's estate by reason of her unchastity.

The Division Bench before which the appeal came for hearing (PEARSON, J., and TURNER, J.) having regard to *Kery Kolitany* v. *Moneeram Kolita* (1) referred to the Full Bench the question whether, under the Hindu law prevailing in these Provinces, a widow who has once inherited the estate of her deceased husband is or is not liable to forfeit that estate by reason of unchastity.

Babu *Jogindro Nath Chaudhri* and Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

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* Special Appeal, No 1202 of 1873, from a decree of R. H. Smith, Esq., Subordinate Judge of Meerut, dated the 19th July 1873, reversing a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 29th April 1873.

(1) 13 B.L.R. 1 = 19 W.R. 367.

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JUDGMENTS.

The following judgments were delivered by the Full Bench :

STUART, C.J.—After repeated consideration of the arguments and authorities referred to in this case, I feel that I can add nothing to what is clearly laid down in the judgment of the Calcutta High Court. But in expressing this opinion I desire to confine myself to the principles and authorities of the Hindu law, for I can derive no useful analogy from any rule or principle of the law of England or from any other European system of jurisprudence.

PEARSON, J.—The question referred to the Full Bench has been exhaustively considered and discussed by the learned Judges of the Calcutta High Court. It seems unnecessary to repeat at length the arguments used by them on both sides of the question and impossible to add thereto. After full consideration, the conclusion to which I have come is that the question was rightly answered in the negative by the majority of those learned Judges, and that we [152] should return the same answer to the Bench which has put the question to us.

The opposite conclusion is certainly not an unavoidable inference from the text of Catyayana mainly relied on in support of it : "Let the sonless widow, preserving (unsullied) her husband's bed and residing with her venerable relative, eat or enjoy moderately" not so long, be it observed, as she remains chaste or resides with her protector but "until her death." The text is in its form and may well be in substance a mere injunction. It enjoins submission to the venerable relative, purity of life, and moderation in enjoyment, and presents a marked contrast to the text under the authority of which a virtuous widow succeeds to her husband's estate "Let the wife who is not unchaste take her husband's wealth.". This text, though an injunction in form, is much more in substance. It speaks of chastity as a condition of succession. On the contrary, as regards the text first quoted, the Privy Council has ruled that a widow does not forfeit the estate which has devolved upon her from her husband merely because she ceases to reside with the venerable relative who represents her husband's family ; or, in other words, that such residence is not a condition of her retaining that estate.

Then there is the text which says that a "woman who acts maliciously and is shameless and a destroyer of property and addicted to immorality is *unworthy* of wealth." This cannot, without violence, be construed to mean that she is to be deprived of property which has come into her possession.

Nor can the text which authorises the husband's brothers to withhold maintenance from his widow if she becomes unchaste be fairly so construed. The termination of a duty of giving food and clothing to a person is a very different thing from the commencement of a right to take away from that person property belonging to her.

The penalty of forfeiture for unchastity, if not warranted by the texts, can hardly rest firmly on other grounds. The argument that an unchaste widow can no longer perform acts beneficial to her husband's soul is met by the consideration that there is no [153] essential connection between such acts and the property, and that an appointment which has been made by reason of an existing capacity in the person appointed is not always avoided *ipso facto* by the subsequent loss of the particular capacity. The argument that she takes the estate or continues to hold it after her husband's death as half of her husband's body, and cannot be regarded as

such, or as such retain it, after having become unchaste, is met by the consideration that, if the estate was still possessed by the husband after his death in the person of his widow, a son would not take it in preference to the widow. The argument that the estate does not vest in the widow because her rights in it are of a limited and qualified nature is not weighty; for a limited right may vest as well as a perfect one.

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TURNER, J.—Although at the hearing I was inclined to hold otherwise, and although I have been a party to one or more rulings to the contrary, further consideration has satisfied me that there is not sufficient authority for holding that a widow who has inherited her husband's separate estate will, under the law we are bound to administer, forfeit her estate. The only arguments which can be adduced in support of the contention that the estate having once vested is forfeited by unchastity appear to me to be the following, *viz.*, (i) that she takes the estate because she is able to confer spiritual benefits on the deceased superior to those which can be conferred by any other heir, and that forfeiting the capacity by unchastity she forfeits the wealth; (ii) that from the use of the present participle "*palayanti*" in the text of Menu, "a woman *preserving* her husband's bed, &c.," a condition "*dum easta fuerit*" is to be inferred; (iii) that inasmuch as the allotment made by a joint family to a widow in lieu of maintenance may be resumed if she becomes unchaste (Smriti Chandrika, ch. XI, s. 1, vv. 47 and 48), it may be inferred that a widow who has inherited the separate property of her husband would forfeit her estate by similar misconduct; and (iv) that on re-marriage the estate is forfeited.

To these arguments I think a sufficient answer may be made. The text of Menu refers to the period at which the inheritance devolves and the succession is to be ascertained, and merely prescribes as a rule of inheritance that a chaste wife succeeds to the separate [154] estate of her husband in default of male issue, and does not attach a condition to the estate taken by the widow; and it is a strong argument in favour of this view that the commentators who are generally exhaustive in their comments on texts have omitted any mention of the condition.

Again, the allotment of property in lieu of maintenance is the voluntary act of the family, and differs in this material particular from an estate devolving by law on the widow without the consent of the family, and while the family may be at liberty to resume their free gift, it cannot be inferred from this rule that they have power to take from her the estate which vested in her by law; and it is the more remarkable that, if they had such power, the author of Smriti Chandrika should not have adverted to it equally with the rule from which the argument is derived. Again, on re-marriage the woman becomes a member of the family into which she re-marries, but unchastity does not deprive her of membership in the family into which she married.

The argument that a widow inherits for the purpose of conferring benefits on her husband by the employment of his wealth for pious purposes, and that she consequently forfeits the estate when she is no longer able to perform the ceremonies which are incumbent on a widow, proceeds on an imcomplete statement of the grounds for the widow's succession. This point was considered and determined by the Privy Council in *Katama Nachiar* v. *The Raja of Shivagunga* (1), and it was ruled that "it is on the

(1) 9 M.I.A. 539.

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principle of survivorship that the qualification of the widow's right established by the Mitakshara......must be taken to depend (1)," and the text is cited: "Of him whose wife is not deceased half the body survives, how should another take the property while half the body of the owner lives?"

The principle that the degree of benefit which may be conferred on the deceased by the employment of his wealth regulates the succession may be invoked in aid of the widow's right to succeed, but it is not the sole principle on which the right is founded, and as is [155] shown in the succession to a co-parcener's interest in an undivided estate it is subordinate to the principle of survivorship.

This being so, it appears to me the text of the Mitakshara, ch. ii, s. 10, v. 6, and the Viramitrodaya cited in Mr. Justice West's work (2) are pertinent. In these texts it is declared that disqualification arising before partition deprives the disqualified of their shares, but that one already separated from his co-heirs is not by disqualification deprived of his allotment.

The same principle applies to the succession of the widow. Adultery, unrepented of and unatoned, prevents the estate from vesting in her. Should it have vested she does not lose it by subsequent immorality.

OLDFIELD, J.—The question referred has already been fully discussed by the High Court of Bengal in *Kery Kolitany* v. *Moneeram Kolita* (3). The contention that a Hindu widow who has once succeeded to her husband's estate forfeits it by reason of unchastity appears to rest on the ground that chastity is the absolute condition on which she holds the estate, and forfeiture the penalty, or that she holds the estate for certain purposes, the due fulfilment of which is dependent on her remaining chaste, and forfeiture follows as a penalty on the failure to perform them by reason of unchastity.

It is asserted that this rule of law is to be gathered from the texts which indicate the importance of chastity, the dependence of women, the limited nature of the interest held by them in the husband's estate, and on the fact that their right to the succession depends on their capacity to confer benefits on the soul of the husband; that the texts of the Hindu Law make the chastity of the widow the condition for taking and for retaining the estate, as well as for taking and retaining allowances for maintenance and *stridhan*, or a woman's particular property, all of which are alike forfeited by reason of unchastity. We have to consider this question with reference to the law prevailing in the Benares school.

It may be admitted that the widow succeeds her husband with reference to her capacity to perform certain religious rites, as in [156] the Mitakshara, ch. ii, s. i, v. 5,—" In the first place the wife shares the estate. 'Wife' (patni) signifies a woman espoused in lawful wedlock; conformably with the etymology of the term as implying a connexion with religious rites,"—and other authorities to the same effect; but under the Mitakshara law she cannot be said to take the estate with the sole view to perform such rites or services for the benefit of the deceased: this may be gathered from Mitakshara, ch. ii, s. i, v. 14, and the following verses, where the author is pressing the argument in favour of a wife's succession, and cites the contention made by his opponents, that the wealth of a regenerate man is designed for religious uses, and that a woman's succession to such property is unfit because she is not competent to the performance of religious rites, which he proceeds to refute by showing, first,

(1) 9 M. I. A. 611. (2) See p. 300. (3) 13 B.L.R. 1=19 W.R. 367.

that she is competent to perform many religious duties and then by showing that wealth is intended for other purposes besides religious uses, citing Menu and Yajnavalkya, and implying that a widow may make other and proper uses of the wealth, and does not hold it merely and entirely as a trustee for the soul of her husband, as some would contend. The argument is thus weakened which would infer that she forfeits the estate when no longer able to perform these religious services, but it may be also met by the fact that other heirs whose succession is also dependent on their capacity to perform certain services, do not admittedly forfeit the estate on failure to perform them, and that the same texts inculcate other duties, on the widow's failure to perform which do not operate as forfeiture.

It is asserted, however, that there are texts of law which absolutely make it a condition for retaining the estate that the widow remain chaste; among these texts is that from Menu: "The widow of a childless man keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain his entire share (1)." This is the only text in the Mitakshara from which it can be inferred that the obligation of chastity is a continuing one after succession; there are other passages, but they refer to chastity as a condition prior to succession and for a claim to maintenance. Then there is the following text from Catyayana: "Let the childess widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property [157] until her death: after her let the heirs take it (2)," the purport of these passages has been very fully discussed by the learned Judges of the High Court of Bengal in *Kery Kolitany* v. *Moneeram Kolita* (3).

It is noticeable and significant that these passages do not in express terms attach the penalty of forfeiture for unchastity; the first passage may, I think, refer to the succession of the widow in the first instance, and the second be in the nature of a precept inculcating chastity: and it has been urged, and I cannot but think with some force, that inasmch as this passage contains two conditions, the last of which does not admittedly carry forfeiture for failure, there is no reason why the first should do so.

If, then, the forfeiture of the estate for subsequent unchastity is to rest on direct passages inculcating it, I think it fails to be established.

But it is admitted that an unchaste wife cannot succeed to the estate, and it is asserted that maintenance and *stridhan*, or her peculiar property, can be resumed by reason of unchastity, and there is some force in the argument that, if this be so, there may be an inference in favour of the resumption for the same cause of the separate estate inherited from the deceased husband; but I think it would be unsafe to deduce the law as to one state of circumstances, merely from its enactment in respect of another state. Silence on a particular point may very well have been intentional, and there are obvious reasons why this may be the case in respect of the question before us, where the estate taken is a separate estate, and the certain result of such a law as is contended for would be to give openings so constant and harassing inquiries, in the interest of persons with merely reversionary interests.

When we find also that even the disqualifications which operate as bar to succession to property, among which is the being outcaste, will not operate to divest property once it has vested (see Viramitrodaya), it is a fair question to ask why unchastity should so operate.

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(1) See Mitakshara, ch. ii, s. i, v. 6. (2) See Dayabhaga, ch. xi, s. i, v. 56.
(3) 13 B.L.R. 1=19 W.R. 367.

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There are texts to show that maintenance and *stridhan* are resumable by reason of unchastity, and it is hence inferred that the [158] separate estate taken by a widow must be resumable. In the Mitakshara the following passage from Narada is quoted: "Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord: but if they behave otherwise the brethren may resume that allowance (1)," and there is another passage from Yajnavalkya: "And their childless wives, conducting themselves aright, must be supported, but such as are unchaste should be expelled, and so, indeed, should those who are perverse (2)." These are the only passages in Mitakshara from which resumption of maintenance may be inferred, and that authority is silent as to the resumption of *sridhan*; but it should be observed that these passages are not cited in the Mitaskhara expressly in support of resumption but are brought forward as the arguments sometimes used by the author's opponents against the widow's right of succession, and in favour of her right to maintenance only, a proposition which the author then proceeds to refute; and the last cited passage is stated to refer to wives of disqualified persons. There is, however, authority for asserting that maintenance may be resumed, but be this as it may, there is no analogy between the case of a widow succeeding to the separate estate of her deceased husband and that of one taking maintenance as a charge on property in an undivided family. It is easy to understand why the allowance may be resumable in the last case, while the separate estate may remain not liable to be resumed.

As to the power to resume *stridhan*, there are some passages in the Viramitrodaya as follows: "If a husband have a second wife and do not show honor to his first wife he shall be compelled by force to restore her property though it may have been given to him out of kindness. If suitable food, raiment, and dwelling be withheld from a woman, she may exact her own property and take a share of the estate with the co-heirs;" and further on comes the text: "A wife who acts unkindly towards her husband, who is shameless, who destroys his effects, and who takes delight in being faithless to his bed, is unworthy of separate property: the separate property she may have received shall be taken from her;" [159] and if all the passages be read together the separate property referred to seems to be that which the husband was obliged by the previous texts to give to the wife if he neglected her, and may not refer to *stridhan* generally, and the passages clearly refer to a resumption by the husband and not by other persons subsequently to his death.

It has not been urged before us that property inherited from a husband classes as *stridhan* under the law of the Benares school and is necessarily to be forfeited under these texts.

Then we have the opinion of Mr. Colebrooke adopted by Sir T. Strange: "An unchaste woman is excluded from the inheritance of her husband, but no misconduct other than incontinency operates disinherison, nor after the property has vested by inheritance does she forfeit it, unless for loss of caste unexpiated by penance or unredeemed by atonement" (3); and the opinion of Mr. Ellis, given at vol. 2, p. 273, that "the wife does not succeed unless she be chaste, this is a necessary condition," may refer to her succession in the first instance. The only authority distinctly opposed is Elberling, to the effect that the widow enjoys the property on two conditions —that she may remain chaste and that she does not make waste.

(1) See Mitakshara, ch. ii, s. i, v. 7. (2) See Mitakshara, ch. ii, s. i, v. 16.
(3) Strange, 4th ed., by Mayne, 136.

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The decided cases have been very fully discussed by the learned Judges of the High Court of Bengal. The first two (1) may possibly be construed to rule forfeiture, but it is open to doubt. The third (2) has reference to the forfeiture of allowance on account of maintenance, and goes on the ground that unchastity involves degradation, which prevents the widow having a right to the heritage. The case reported in the seventh volume of Selwyn's Reports (3) is one in respect of a widow's maintenance. The case of *Radamoney Raur* (4) is, however, expressly, in favour of the forfeiture, but against this there is the case of *Saummoney Dossee* (5) which rules that "though, by Hindu Law, incontinence excludes a widow from succession to her husband's estate, yet if **[160]** the inheritance were once vested it is not liable to be divested unless her subsequent incontinence were accompanied by degradation, but that by Act XXI of 1850 deprivation of caste could no longer be recognised as working a forfeiture of any right or property or affecting any right of inheritance."

In the case reported in the fourth volume of the Bombay High Court Reports, p. 25 (6), it was ruled that incontinence excludes a widow from succession to her husband's estate, but nothing short of actual infidelity; if, however, the inheritance becomes vested in the widow it is not by Hindu law liable to be divested, unless her subsequent incontinence be accompanied by loss of caste unexpiated by penance and unredeemed by atonement. Of cases decided by this Court, the only ones which have been pointed out are those noted (7).

The first was a case in which a Hindu widow held a share of ancestral property in an undivided estate for her maintenance. She deserted her husband's family and lived with a paramour. The Pandit consulted by the Judge was of opinion that she forfeited the share by reason of unchastity, but was still entitled to maintenance. The Sudder Court decided that the share was forfeited, on the authority of the Pandit of the Court, that "if a wife be unfaithful to her husband whilst she lives with him, or forsakes his home, she is in no way entitled to any part of his property or to maintenance; nay, her *stridhan* and her jewels should be taken from her, and she should be banished from her husband's house." This exposition of the law refers clearly to the case of unchastity during the husband's lifetime, though the Court held it applicable to a subsequent state, but the case is not precisely in point, as it refers to a share given for maintenance in an undivided family, and not to the estate a widow takes in a separated family. The other case was where a widow had been put in possession, on partition, after her husband's decease, of a share of the joint ancestral property, and had subsequently become unchaste, and the question decided was in respect of her power to make a valid devise of the property; it was held she could not do so, the Court remarking **[161]** "it is not contested that, admitting the fact of misconduct, the deed of gift was altogether illegal." The decision therefore does not directly decide the point before us, and both cases have reference to shares taken by widows for maintenance in estates held by co-proprietors, and will afford no certain rule for the case under discussion.

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(1) See Macnaghten's Hindu Law, 3rd ed., vol. ii, pp. 19, 20, 21, Cases iii and iv.
(2) See Macnaghten's Hindu Law, 3rd ed., vol. ii, p. 112, Case v.
(3) *Bussunt Koomaree* v. *Kummul Koomaree*.
(4) 4 Montriou's H.L.Ca. 314.
(5) 2 T. & B. 300.
(6) *Parvatikom Dhondiram* v. *Bhikukom Dhondiram*.
(7) *Doorgee* v. *Kashee Pershad*, S.D.A. N.W.P. (1862), vol. i, p. 506; *Bulloo* v. *Ramdut*, same volume, p. 206.

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It appears to me therefore that the rule of law which is now asserted is not one which is deducible from the Hindu law books, and that no custom to support the rule can be said to have come down to us in practice, supported by a course of decisions of the Courts, and therefore deserving consideration. On the contrary, the Hindu authorities speak with uncertainty; the highest English authorities are opposed to any such rule of law; and the few decisions of the Courts, in which the question can be said to have been unmistakably decided, give conflicting rulings, while the later decisions are opposed to the existence of such a rule of law.

My reply to the reference is that, under the Hindu law governed by the Mitakshara, a widow who has once succeeded to the separate estate of her deceased husband is not liable to forfeit that estate by reason of unchastity.

BRODHURST, J.—In this case the pleaders for Nehalo (the defendant) appellant, have relied entirely upon the judgments of the Chief Justice of the Calcutta High Court and of those his honorable and learned colleagues who concurred with him in *Kery Kolitany* v. *Moneeram Kolita* (1). On the other side nothing of any importance has, I think, been urged that has not been noticed at even greater length in the printed judgments of the case above alluded to.

From the Hindu texts referred to it is evident that it is only the chaste widow who is entitled to succeed to the estate of her childless husband, but I have not seen any passage of Hindu law pointed out which declares positively that a widow, after having duly obtained possession of the estate, can, simply on account of her subsequent incontinence, be deprived of it. I concur generally in the opinions expressed by the majority of the learned Judges in the case above alluded to, and I consider that the Full Bench ruling of the Calcutta High Court is also applicable to cases of a similar description in these Provinces.

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2 A. 162.

[162] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

ABADI BEGAM (*Plaintiff*) v. ASA RAM (*Defendant*).*
[10th February, 1879.]

Agreement affecting Land—Transfer of the Land—Covenant running with the Land.

S, by an instrument in writing, duly registered, agreed, for valuable consideration, for himself, his heirs and successors, to pay his wife, *A*, a certain sum monthly out of the income of certain land, and not to alienate such land without stipulating for the payment of such allowance out of its income. He subsequently gave *L* a usufructuary mortgage of the land subject to the payment of the allowance. *L* gave *R* a sub-mortgage of the land, agreeing orally with *R* to continue the payment of the allowance himself. *Held*, in a suit by *A* against *L* and *R* for arrears of the allowance, that *A* was not affected by any agreement between *L* and *R* as to the payment of the allowance, and *R*, being in possession of the land, was bound to pay the allowance.

[R., 9 A. 591 (599) = 7 A.W.N. (1887), 121.]

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* Second Appeal, No. 974 of 1878, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 29th July 1878, reversing a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 8th May, 1878.

(1) 13 B.L.R. 1 = 19 W.R. 367.

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THE facts of this case were as follows: On the 26th February 1866, Maujad Ali Shah, who was indebted at the time to his wife, Abadi Begam, in a sum of Rs. 14,000, being her dower, by an instrument in writing, duly registered, convenanted for himself, his heirs and successors, to pay his wife Rs. 12 per mensem out of the income of certain land in lieu of dower. He further covenanted not to alienate the land without stipulating for the payment of this allowance. On the 1st December 1870, Maujad Ali Shah gave Lachman Singh a usufructuary mortgage of the land for seven years, stipulating in the deed of mortgage that the mortgagee should pay Abadi Begam Rs. 12 per mensem out of the income of the mortgaged property. On the 24th August 1874 Lachman Singh sub-mortgaged the land to Asa Ram, and gave him possession of it. At the time of this mortgage Lachman Singh agreed orally with Asa Ram to continue to pay Abadi Begam her allowance himself. The present suit was brought by Abadi Begam against Lachman Singh and Asa Ram for the arrears of the allowance. The Court of first instance gave the plaintiff a decree against Asa Ram alone. On appeal by Asa Ram the lower appellate Court reversed the decree against him, and gave the plaintiff a decree against Lachman Singh.

The plaintiff preferred an appeal to the High Court, contending that she was entitled to a decree against Asa Ram.

[163] Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Harkishen Das*, for the respondent.

JUDGMENT.

The judgment of the High Court was delivered by

SPANKIE, J.—The plaintiff's husband, by a deed registered on the 29th April 1866, settled upon her a sum of Rs. 12, in lieu of dower, to be paid monthly from the income of the rent-free land of Nagla Asadnagar, in mauzas Nurpura, Jasmai, Asmatpur, and Dhalawal, by himself, and his heirs and successors after him. If either he or any of his heirs or successors failed to make the payment monthly, the lady was at liberty to sue for the sum due in the Civil Court. The deed further provides that no transfer of the property shall be made unaccompanied by a condition providing for and securing the required monthly payment of Rs.12 from the profits. When the plaintiff's husband, Maujad Ali Shah had subsequently mortgaged the property to Lachman Singh, one of the defendants, and to Madho Singh, on the 1st December 1870, it was recorded in the deed of mortgage that a monthly allowance of Rs. 12 was to be paid to the plaintiff. The first mortgagee acknowledged this fact. The first mortgagee subsequently, on the 24th August 1874, sub-mortgaged the property to Asa Ram, the other defendant. The plaintiff therefore sued him along with Lachman Singh, the first mortgagee, as being in possession of the lands from which the allowance was to be paid. The Munsif decreed against Asa Ram in favour of the plaintiff, exempting Lachman Singh. The Judge, however, held that there was no clause in the second mortgage-deed binding him to continue the payment of Rs. 12 monthly to the plaintiff, as had been the case in the first mortgage-deed with regard to the first mortgagee, and further he found that it was clearly shown by Asa Ram's witnesses that, at the time of entoring into the sub-mortgage, Lachman Singh had bound himself to continue the payment, whereas the second mortgagee had never undertaken to pay it. Moreover, Lachman Singh's sons and others had purchased the proprietary rights in the property, and Lachman Singh's interest in it had never ceased. The Judge

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decreed Asa Ram's appeal, and gave the plaintiff a decree against Lachman Singh alone.

[164] It is contended that Asa Ram, sub-mortgagee, being in possession of the property charged with the payment of the monthly allowance of Rs. 12, is bound to pay it.

We are of opinion that the contention is right. The plaintiff is not affected by any arrangement made between Lachman Singh and Asa Ram. She looks to payment of her allowance from the income of the land charged with the burden of paying it, and therefore she has a claim upon the party who is in possession of the lands. In this case the sub-mortgagee, in accepting the mortgage from Lachman Singh, must have been aware of the conditions under which the latter had accepted the original mortgage, and therefore also must have been aware of the lien created by Maujad Ali Shah in favour of his wife, and which lien, with or without notice, extends to all persons claiming to hold the lands, to the extent of the amount of the profits set apart for the benefit of the plaintiff. With this view of the case we decree the appeal, reverse the decree of the lower appellate Court, and restore the decision of the first Court, with costs.

Appeal allowed.

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2 A. 164 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

HANUMAN TIWARI (*Plaintiff*) *v.* CHIRAI AND ANOTHER (*Defendants*).*
[24th February, 1879.]

Hindu Law—Adoption of an only son.

Held (TURNER, J., *dissenting*) that the adoption of an only son cannot, according to Hindu Law, be invalidated after it has once taken place.

[N.F., 14 B. 249 (256); (F.B.); F., 14 A. 67 (73) (F.B.) = A.W.N. (1892), 6; R., 9 A. 253 (293); 19 B. 428 (431); 18 M. 53 (61); 1 Bom.L.R. 144; Cons., 12 A. 328 (337).]

THE facts of this case were as follows: One Mata Bakhsh, claiming to be the adopted son of Durga Prasad, deceased, sold a certain dwelling-house, of which Durga Prasad had died possessed, to Chirai, on the 25th February 1874. The plaintiff in this suit, Durga Prasad's brother, claiming to be his heir, sued Mata Bakhsh and Chirai for a declaration of his right to, and possession of, the house, and the [165] cancellation of the deed of sale, alleging, amongst other things, that Mata Bakhsh was not the adopted son of Durga Prasad, and that, admitting the adoption, the adoption was not valid, according to Hindu law, as Mata Bakhsh was the only son of his father. As to the fact of Mata Bakhsh's adoption by Durga Prasad, the Court of first instance held that such fact was fully established. As to the validity of the adoption, the Court held that, assuming that Mata Bakhsh was the only son of his father, and that the adoption of an only son was not valid according to Hindu law, yet the adoption in this case could not be deemed invalid, inasmuch as it had been

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* Special Appeal, No. 5 of 1876, from a decree of J.W. Sherer, Esq., C.S.I., Judge of Mirzapur, dated the 27th September 1875, affirming a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Mirzapur, dated the 29th May, 1875.

recognised and acknowledged for a long period of time. On appeal by the plaintiff the lower appellate Court concurred in the views of the Court of first instance.

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2 A. 164 (F.B.).

The plaintiff preferred a special appeal to the High Court, in which he contended that the adoption of an only son was not valid according to Hindu law.

The Court (SPANKIE, J., and OLDFIELD, J.) referred to the Full Bench the question whether the adoption of an only son is altogether void, or whether, once having been made, such an adoption is valid.

Munshi *Sukh Ram*, for the appellant.

The Senior Government Pleader (Lala *Juala Prasad*), Munshi *Hanuman Prasad*, and Lala *Lalta Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench :

STUART, C. J.—I remain of the opinion which I formed at the hearing that the answer to this reference must be that the adoption of an only son is not altogether void, but that having once been made, the adoption is valid. Such is my conclusion on the authorities, which are, however, very conflicting, but the weight of them is clearly in favour of the validity of the adoption in question. In a Calcutta case (1) that was cited to us, the Judges being L. S. Jackson and Dwarka Nath Mitter, JJ., it was laid down (Mitter, J., being the Judge who delivered the judgment in his own name and that of his colleague), on the authority of certain passages from Dattaka Chandrika, that the adoption of an only son is forbidden by Hindu law. The judgment then proceeds: "It has been said that the prohibition contained in these passages amounts to nothing more than [166] a mere religious injunction, and that the violation of such an injunction cannot invalidate the adoption after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and its temporal aspects are wholly inseparable." But Mr. Justice Mitter goes on to observe: "It is true that the doctrine of *factm valet* is to a certain extent recognised by the lawyers of the Bengal school ; but if we were to extend the application, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindu Shastras might have been violated by the parties concerned in it. The case of *Chinna Gaundan* v. *Kumara Gaundan* (2) is no doubt in favour of the appellant, but for the reasons stated above, we are unable to concur with the learned Judges who decided that case. On the other hand we find two cases in our presidency which are directly in favour of the view we have taken, and what is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself." The cases thus referred to will be found in Macnaghten's Hindu Law, 3rd ed., vol. ii, p. 178. They appear to have been decisions in 1806 by the late Calcutta Sudder Dewanny Adawlut, but they are not of much weight, their reasoning against the validity of such an adoption being unsatisfactory and superficial. There was also quoted to us a dictum in

(1) *Upendra Lal Roy* v. *Srimati Rani Prasannamayi*, 1 B.L.R. A.C. 221.
(2) 1 M.H. C. R. 54.

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a judgment of the Privy Council, which will be found in p. 50 of the appendix to Munshi Hanuman Prasad's useful collection of precedents in these terms: "Again if there is, on the one hand, a presumption that Guru Prasad would perform the religious duty of adopting a son, there is, on the other hand, at least as strong a presumption that Parmanand would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwayamushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family." This view will, among other things, be found very fairly answered and disposed of [167] by Sir Thomas Strange in his well known work on Hindu law (1). He states the general principle relating to adoption to be that "one with whose mother the adopter could not legally have married must not be adopted." He then remarks: "Subject to this general principle, the nearest male relation of the adopter is the proper object of adoption. This of course is the nephew, or son of a brother of the whole blood, whose pretensions were, by the old law, such, that if, among several brothers, one had a son, he was so far considered to be common to all, as to preclude in every one of them the power of adoption. But the injunction of Menu has, in more modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable." Further on he observes: "But the result of all the authorities upon the point is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who, upon spiritual considerations, ought to have been preferred." Then on page 86 he says: "It is true that a brother's son, as such, inherits and performs obsequies to his uncle, dying without preferable heirs; but then it is as his nephew, not as his son; and the spiritual efficacy in the one and in the other case is considered to be different. To render him a substitute for a son, he must have been filiated. When, therefore, a Hindu has but one son, and it is agreed that his brother, having none, shall adopt him, the adopted in this case has vested in him accumulated rights and duties. Son by adoption to his adoptive parent, he remains so, to all intents and purposes, to his natural one, becoming *dwayamushyayana*, or son to both:" and he points out other restrictions which, however, he observes are inculcated, "but not always enforced; since, as in other instances, so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only, and an adoption of either, however blameable in the giver, would, nevertheless to every legal purpose, be good; according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet quod fieri non debuit*." The High Courts of Calcutta, Madras and Bombay have all ruled in favour of the doctrine of *factum valet*. In the Calcutta Court Sir Edward Ryan, C. J., in [168] delivering judgment in *Sreemutty Jaymoney Dossee* v. *Sreemutty Sibosoondry Dossee* (2), said: "The adoption of an only son is no doubt blameable by Hindu law, but when done it is valid." In Bombay the question was distinctly raised in the case of *Raje Vyyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (3), before Warden and Gibbs, JJ., who were both of opinion that the adoption of an only son having once taken place, and the requisite ceremonies having been duly performed, cannot be set

(1) See 4th ed. by Mayne, pp. 83-86. (2) 1 Fulton 75.
(3) 4 B. H. C. R. A. C. J. 191.

aside. Gibbs, J., in delivering his judgment, said: "The rulings of this Court, as shown from 2 Borr. p. 83, downwards as also of the Calcutta Court, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone, but the adoption must stand. In the High Court of Madras the same doctrine was approved and applied in the case of *Chinna Gaundan* v. *Kumara Gaundan* (1), before Scotland, C. J., and Frere, J. In delivering judgment, Scotland, C.J., went carefully through all the authorities, concluding thus: "On the whole the case (*i.e.*, the validity of such an adoption) is concluded by authority; but I must say, with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way." This appears to be the Madras case alluded to in the judgment of Mr. Justice Mitter in the Calcutta case I have referred to. In a subsequent Madras case, *Śingamma* v. *Vinjamuri Venkatacharlu* (2), before Bittlestone and Ellis, JJ., the law laid down by Scotland, C.J., was carefully considered and distinctly approved, and it appears to me to be sound and worthy of acceptance by us.

PEARSON, J.—The adoption of an only son is declared to be improper and is disapproved or prohibited by the Hindu law, but no text is shown to us declaring such an adoption to be void or voidable. The objections to such an adoption are its injurious consequences to the person who gives his son to another, and these consequences would not follow were the adoption a nullity. The view taken by Sir Thomas Strange that "the prohibitions respecting an eldest and an only son, where they most strictly apply, are directory only, and an adoption of either, however blameable in the **[169]** giver, would, nevertheless, for every legal purpose, be good, according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet quod fieri non debuit*" appears to have been generally accepted, and is supported by a great weight of authority; and I am disposed to adopt it.

SPANKIE, J.—I accept this view of the case. It does not appear that more can be said.

TURNER, J.—The rulings as to the validity of the adoption of an only son are cited at length in Mr. Mayne's admirable work on Hindu Law, ss. 126-133, and I need not further refer to them. It is sufficient to say that the rulings of the Courts are conflicting. I therefore feel myself at liberty to consider the question as unsettled, and in the absence of any evidence that the law enunciated by the commentators has been varied by custom, to rest my decision on the texts and principles which are to be gathered from their works. The object of adoption is the perpetuation of lineage and the spiritual benefits which accrue to the parent of a son, and in virtue of the benefits which he can render, the adopted son succeeds not only to the estate of the person who has adopted him, but to collaterals of that person, and to constitute a valid adoption, there must be a competent giver. The Mitakshara, ch. xi, s. xi, v. 11, expressly declares "an only son must not be given (nor accepted). For Vasishtha ordains: Let no man give or accept an only son." The Dattaka Mimansa, a work of high authority in these provinces, declares (s. iv, vv. 5 and 6) that a father is incompetent to give an only son, and (v. 4) that the offence of extinction of lineage is incurred both by the giver and the adopter; and again (s. ii, v. 38) the author recognising the force of prohibition declares it does not

(1) 1 M. H. C. R. 54. (2) 4 M. H. C. R. 165.

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apply to the case in which the son of one brother is made common to another brother also. In the Vyavahara Mayukha, ch. iv, s. v, vv. 9, 11, the same prohibition is declared, and in the Dattaka Chandrika, s. i, vv. 27 and 29, the rule is distinctly based and supported by the text of Caanaka,—" By no man having an only son is the gift of a son to be ever made."

It is to be noticed that, although the Mitakshara, ch. i, s. xi, v. 12, goes on to declare that "nor though numerous progeny exists should an eldest son be given, for chiefly he fulfils the office of [170] a son," neither in that work nor in any of the works to which I have referred is there any declaration that extinction of issue would follow the gift (as it obviously would not), nor is the limitation of the paternal power to make a gift extended to an eldest son. The Mitakshara also gives the reason for what appears to me a dissuasive rather than peremptory injunction: "By the eldest son as soon as born a man becomes the father of male issue."

On these grounds then that a father is incompetent to give an only son and that the object of adoption wholly fails if such a gift be attempted, I am of opinion that the adoption of an only son is invalid, and that the principle *fieri non debet factum valet* cannot be applied. The consequence of the contrary ruling would be according to Hindu law, to inflict a penalty not only on the giver and receiver, but on the collaterals of the receiver, whose property might descend to a person solely entitled to claim it on account of benefits he is presumed to confer, but which he could not possibly confer.

OLDFIELD, J.—There appears to be no sufficient reason for considering that the prohibitions in the text-books in respect of the adoption of an only son are more than of the nature of moral injunctions, rendering the gift and acceptance of an only son blameable, as interfering with the perpetuation of the lineage of the giver—Dattaka Mimansa, s. iv, vv. 3,4—but not invalidating the adoption when made. Balam Bhatta appears to consider the gift and acceptance as blameable, but no more. His annotation to v. 11, s. xi, ch. i of Mitakshara is, " So an only son should not be given, nor should such a son be accepted; the blame attaches both to the giver and to the taker *if they do so*." The act is declared blameable but not absolutely void, and the adoption would not appear to fail civilly in effecting in favour of the adopter the material object for which adoption is made, the perpetuation of lineage. This view has been taken by the chief authorities on Hindu law,—Strange, 4th ed. by Mayne, 87; Macnaghten, 3rd ed., vol. i, 67 (I do not find that the cases in pages 178-179 of vol. ii go so far as to decide that the adoption once made must be set aside),—and it has been enforced by the early decisions of the superior Courts, and, so far as I am aware, been maintained until now, with few exceptions, by the superior Courts, of the three Presidencies.

2 A. 171.

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APPELLATE CIVIL.

2 A. 171.

[171] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

BHAWANI AND ANOTHER (*Defendants*) v. MAHTAB KUAR AND OTHERS (*Plaintiffs*).* [3rd March, 1879.]

Hindu Law—Widow's Estate, Forfeiture of—Unchastity during Widowhood.

It is sufficient for the protection of a Hindu widow's right to her husband's estate from forfeiture by reason of unchastity that such right has vested in her before her misconduct. It is not necessary for such protection that she should have acquired possession of the estate before her misconduct.

[R., 17 Ind. Cas. 133=8 N.L.R. 128.]

THE facts of this case, so far as they are material for the purposes of this report, were as follows: One Dariao Singh died in 1860 leaving him surviving two widows, Ganesh Kuar and Bhawani, three daughters, his mother and a sister. On his death Ganesh Kuar's name alone was recorded as the proprietor of his landed estate. Ganesh Kuar died in 1870, and on her death a dispute arose between one Maharaj Singh, styling himself the legitimate son of Dariao Singh, on the one side, and Dariao Singh's mother and Bhawani on the other, as to the mutations to be made in the revenue registers consequent on Ganesh Kuar's death. In November 1871, the settlement officer directed that Maharaj Singh, Dariao Singh's mother, and Bhawani should each be recorded as the proprietor of one-third of the landed estate of Ganesh Kuar. Subsequently Maharaj Singh sued for the shares recorded in the names of Dariao Singh's mother and Bhawani, on the ground that he was the legitimate son of Dariao Singh. This suit was dismissed. In 1873 Dariao Singh's mother died, and on her death Maharaj Singh's name was recorded as the proprietor of her share. The present suit was brought by Dariao Singh's sister against Maharaj Singh and Bhawani for the possession of the entire landed estate of her brother. The defendants set up as a defence to the suit, amongst other things, that the suit was not maintainable by the plaintiff in the presence of Dariao Singh's daughters. Subsequently the Court of first instance made Dariao Singh's daughters plaintiffs in the suit, and, with their consent, [172] allowed Dariao Singh's sister to remain in the suit as a plaintiff. The Court gave the plaintiffs a decree, Dariao Singh's sister taking one moiety of his estate, with the consent of his daughters, who took the remaining moiety. The Court held that Bhawani, who had given birth to an illegitimate child in 1869, had forfeited her husband's estate by reason of her unchastity. It was of opinion that, assuming that, under Hindu law, a Hindu widow who has once inherited the estate of her husband does not forfeit that estate by reason of subsequent unchastity, that law did not apply, inasmuch as Bhawani did not acquire possession of her husband's estate until Ganesh Kuar's death in 1870, or after her misconduct. The Court further held that Maharaj Singh had no title to the property in his possession, not being the legitimate son of Dariao Singh.

The defendants preferred an appeal to the High Court, contending, among other things, that the fact that her husband's estate had vested in Bhawani before her misconduct was quite sufficient to protect her right from forfeiture, and possession was not necessary for such protection.

* Regular Appeal, No. 153 of 1874, from a decree of Maulvi Muhammad Abdul Majib Khan, Subordinate Judge of Shahjahanpur, dated the 25th September 1874.

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2 A. 171.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellants.
Lala *Lalta Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—There are no grounds for holding that Musammat Bhawani, defendant, appellant, became unchaste during the life of her husband Dariao Singh. He died in 1860, and her illegitimate child would seem to have been born in or about 1869. It may be concluded therefore that the right of inheritance to her husband's estate jointly with his other wife, Musammat Ganesh, had vested in her by law long before she was guilty of misconduct. The lower appellate Court considers that nevertheless she has forfeited that right by her misconduct because she had not acquired possession of her husband's estate before the death of his elder wife in 1870. His reason for thinking that she did not acquire possession of her husband's estate until after Musammat Ganesh's death is merely that the latter's name only was recorded after Dariao Singh's death. But the reason does not seem to be a good one. Musammat Ganesh, when her name was recorded as her husband's heir, [173] acknowledged the joint heirship of Musammat Bhawani, and there is no reason to doubt that the latter continued to live in her husband's house, and to be supported out of his estate, with the other widow. Musammat Ganesh was probably the head of the house and the manager of the estate, but Musammat Bhawani cannot be regarded as having been out of possession. But, however this may be, we conceive it to be sufficient for the protection of her right that it had vested in her by law before her misconduct. In her presence none of the plaintiffs have any right to succeed to the estate of Dariao Singh aforesaid. It is unnecessary to discuss the question of the legitimacy of the defendant, appellant, Maharaj Singh. We decree the appeal with costs, and dismiss the suit by reversal of the lower Court's decree.

Appeal allowed.

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2 A. 173.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

KHETA MAL (*Defendant*) *v.* CHUNI LAL (*Plaintiff*).*
[8th March, 1879].

Arbitration—Insolvency—Contract—Act IX of 1872 (*Contract Act*), *s.* 65.

K, on the one part, and his creditors including *C*, on the other part, agreed in writing to refer to arbitration the differences between them regarding the payment of his debts by *K*. The award compounded *K*'s debts, and assigned his property to his creditors, and directed that *K* should dispose of such property for their benefit, and that, if he misappropriated any of the property he should be personally liable for the loss sustained by the creditors on account of such misappropriation. *C* signed the award amongst other creditors, but the award was not signed by all the creditors. *C* received a dividend under the award.

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* Second Appeal, No. 670 of 1878, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 1st March 1878, affirming a decree of Babu Abinash Chandar Banarji, Munsif of Agra, dated the 19th September 1877.

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2 A. 173.

Held, in a suit by *C* against *K*, to recover a debt which had been compounded under the award, in which suit *C* alleged that several creditors had not signed the award; that some of them had sued *K* and recovered debts in spite of the award; that *K* has misappropriated some of the property; and that, if the plaintiff did not sue, there would be no assets left to satisfy his debt, that such suit was not maintainable.

[F., 2 A. 474 (479,480); R., 19 B. 12 (18).]

THE facts of the case were as follows: By an instrument in writing dated the 9th May, 1877, the firm of Kheta Mal and Kashi Nath on the one part, and the creditors of that firm, amongst whom was one Chuni Lal, on the other part, agreed to refer the differences between them to arbitration. The arbitrators appointed [174] by the parties delivered an award, dated the 10th May, 1877, in the following terms: "Whereas Kheta Mal and Kashi Nath on the one part, and Hazari Lal and the other persons hereinafter mentioned, have appointed us arbitrators to settle the disputes between them regarding *hundis*, purchase and sale of goods, debts, &c., appertaining to the firm of Kheta Mal and Kashi Nath and have signed a duly stamped agreement to that effect, after examining the account books and taking evidence, it appears that Kheta Mal and Kashi Nath had transactions with all the said creditors by way of *hundis*, &c.: and it appears that Rs. 21,502 is due to the creditors on account of *hundis*, &c., by Kheta Mal, and at present Kheta Mal has no cash, nor can he get any from which the debts could be liquidated and the creditors are pressing Kheta Mal for payment, but Kheta Mal has stores, &c., to the value of about Rs. 16,569-13-6 including cash Rs. 104, and outstandings, Rs. 2,892-13-6, which are now in his possession, and these stores are kept, in different shops, *i. e.*, three shops, and a "*mukkan*" of Musammat Janki, also in a shop of Ganga Prasad and other places, and besides these stores Kheta Mal has no cash, immoveable property, nor jewels from which these debts could be realised: there is a difference of Rs. 4,632-2-6 between Kheta Mal's assets and liabilities and this deficiency can in no way be made up: the firm of Kheta Mal and Kashi Nath has failed, and there is no hope of the Rs. 4,632-2-6 being hereafter liquidated: we have, therefore, awarded that in payment of the said sum of Rs. 21,502 the stores, &c., now in Kheta Mal's possession, amounting to Rs. 16,569-13-6, be made over to the creditors: and the creditors have released Kheta Mal from the payment of the said balance of Rs. 4,632-2-6: now there is no claim for these debts by the creditors against Kheta Mal and Kashi Nath, nor, will there be any such claim hereafter: and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have such claim hereafter, but Kheta Mal and Kashi Nath shall sell these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of the one and brother of the other, and shall act as "*gomashtas*," these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per month: the proceeds of cash-sales and realised debts shall be made over every evening and accounts rendered to Gobind Ram, [175] Her Sahai Mal, Chuni Lal or to any one appointed by them: the keys of the shops shall be made over to the person appointed to be in charge: if the stores, &c., are not all sold within four months Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal only to sell the balance on a salary of Rs. 10 per month: Kheta Mal may draw his salary daily or monthly if his salary is not paid, Kheta Mal need not serve: if Kheta Mal realises any sums on account of stores sold from the shop, or if he has previously so realised any sums, or

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if he misappropriates any of the property, or if he acknowledges the claims of any other parties, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence of such claims : if Kheta Mal or Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree, the property made over by this award shall not be liable for the payment of such decree, nor will the decree-holder be entitled to recover from this property, because up-to-day's date, except those persons on account of whose claims this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us, nor are their names entered in Kheta Mal's account-books: the rents of the shops and houses shall be paid by the creditors and not by Kheta Mal and Kashi Nath : no further claims remain between the parties and both parties are agreeable to be bound by this our award and have signed this award."

This award was signed by Chuni Lal, amongst other creditors, but it was not signed by all the creditors who had signed the agreement to refer to arbitration, some of them refusing to sign it. On the 11th May, 1877, by an instrument in writing which recited that Kheta Mal, Kashi Nath, and Bankey Lal had entered into the service of the creditors, the former bound themselves to perform faithfully the duty of selling the property assigned under the award, and to render accounts, and empowered the creditors in case of any misappropriation of the property, to sue to recover the value of the property misappropriated. On the 13th September, 1877 the present suit was instituted by Chuni Lal against Kheta Mal to recover Rs. 878-14-0 on two *hundis*, being a debt which had been compounded under the award. The defendant set up as a [176] defence to the suit that the plaintiff could not maintain the suit in the face of the award. The plaintiff contended that the award was not binding on him on the ground that all the creditors had not signed it; that several of the creditors who had not signed it had sued and had recovered their debts from the property assigned under the award, and that the defendant had fraudulently disposed of some of such property. The Court of first instance held that the suit was maintainable and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court also held that the suit was maintainable for the reasons set forth in its judgment, the material portion of which was in the following terms: "Did the respondent (plaintiff) make with the appellant (defendant) a complete and valid contract by virtue of which his original right under the bills was foregone, and another right substituted for it to which he is now confined; or is he at liberty to treat that contract as incomplete and void and to fall back upon his original right under the bills? I have no hesitation in concluding that the contract or compromise between the parties was never carried out. The respondent has admitted that he received a sum of money under its provisions, but he has made restitution by suing for the balance due to him after crediting the amount. In so doing he has made the restitution required by s. 65 of the Contract Act, if the agreement is void. That it is so seems plain to me. It arose out of a proposed composition between the appellant and the whole of his creditors, by virtue of which they were to sign a deed releasing him from immediate liability and appointing their agent to carry on the business for their benefit. The respondent signed the deed, and the arbitrators handed him his dividend under the proposed composition. But about one-third of the creditors afterwards refused to sign; and the appellant, instead of conducting his business as the common agent of all and for their common benefit as he had engaged to do, made separate

arrangements with some of the others. On this the respondent was perfectly justified in regarding the contract as a lapsed and void agreement, and in suing on his original right, restoring the amount received as dividend. I annex an English abstract (for which I am indebted to the pleader for the respondent) from which it will be seen that the signature of all the creditors and the [177] *bona fide* management of the business for the joint benefit of all were essential conditions, the non-fulfilment of which affected the whole consideration of the agreement, and rendered it void and of no effect. With reference to the fourth plea, I may observe that no specific point was stated as to which the account-books would give satisfaction to the Court's doubts. There was proof on the record, and in the corroborative papers called for from the Court of Small Causes, to show that the business had not been carried on in good faith for the common benefit of all the creditors, as it ought to have been under the terms of the agreement in virtue of which the composition was allowed. I therefore uphold the award of the lower Court and dismiss the appeal with costs."

The defendant appealed to the High Court, contending that the suit was not maintainable.

Mr. *Conlan* and the *Junior Government Pleader* (Babu *Dwaraka Nath Banarji*), for the appellant.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

SPANKIE, J.—Respondent admitted in his plaint that he agreed to the arbitration and the award made by the arbitrators, in which a composition was made between the creditors of defendant, appellant, and defendant himself. He admits that he signed the award, and it is certain that he accepted payments towards the satisfaction of his debt, due by defendant on his failing to meet two *hundis* when they fell due. But plaintiff avers that several of the creditors did not accept the award, and some had sued and recovered debts due to them in spite of the award: also the defendant had acted dishonestly, and had made away with some of the goods over which he was placed in charge by the award and the creditors who signed it: plaintiff was therefore compelled to sue, as there were not sufficient assets left to satisfy his debt and the debts of the others who were also suing defendant.

But it appears to me that the plaintiff and all persons who signed the award and were parties to and signed the agreement to refer to arbitration are bound by their acts. The arbitrators decided that there were not sufficient assets to discharge all the debts [178] due to that of the creditors, but the latter should surrender their claims to a sum Rs. 4,632-2-6, which is mentioned in the award as irrecoverable, and that the stores, &c., now in the defendant's possession should be made over to the creditors for their benefit. The award goes on to say that the creditors "have released Kheta Mal from the payment of the said (irrecoverable) balance of Rupees 4,632-2-6: now there is no claim for these debts by the creditors against Kheta Mal and Kashi Nath, nor will there be any claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores, &c., now in their shops, nor will they have any claim to them hereafter. But Kheta Mal and Kashi Nath shall sell these stores, &c., on the part of the creditors, and shall engage Bankey Lal, son of Kheta Mal and brother of Kashi

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Nath, and shall act as *gomashtas* : these three men shall manage the affairs for four months, getting a consolidated salary of Rs. 30 per mensem." Then come some other less important conditions and the award proceeds : "If these stores are not all sold in four months, Bankey Lal and Kashi Nath shall leave the shop and carry on their own work, leaving Kheta Mal alone to sell the balance on a salary of Rs. 10 per mensem."

There are certainly the following conditions : "If Kheta Mal realizes any sums on account of stores sold from the shop, or if he has previously sold any, or realized any sums, or if he misappropriates any of the property, or if he acknowledges the claim of any other party, Kheta Mal and Kashi Nath will be responsible for the payment of such sums and for the defence to such claims : if Kheta Mal and Kashi Nath collusively allow a suit to be instituted against them, they shall be liable to pay the amount of the decree : the property made over by this award shall not be liable for the payment of such decrees, nor will such decree-holders be entitled to recover from this property because up to-day's date, except those creditors to whom this property has been made over, there are no other creditors, inasmuch as their claims have not been admitted before us nor are their names entered in Kheta Mal's account books : no further claims remain between the parties and both parties agree to be bound by our award."

Now, from these extracts it is quite apparent that there are no conditions such as those referred to by the lower appellate Court [179] which rendered the agreement void or voidable. The defendant is made responsible under the award. No right is given to the plaintiff to rescind the agreement and repudiate the award and fall back upon his dishonoured *hundis*. The Judge's application of s. 65 of the Contract Act to this case altogether fails. The very fact that the plaintiff received on two occasions moneys in satisfaction of his claim under the award shows incontestibly that the award was carried out, and was in full operation when the suit was brought. The argeement entered into for the satisfaction of the claims of creditors was a new contract substituted for former contracts between creditors and defendant. This agreement was never discovered to be void, nor had it become void by any circumstances making it so. The defendant was the paid servant of the creditors as manager of the stores, and if he misappropriated them or behaved fraudulently, they could proceed against him and hold him responsible for losses, but only under the award. If creditors who had not signed the award obtained decrees, the creditors who had signed it could only protect themselves under the terms of the award. They could not rescind the award and fall back on their old debts in satisfaction of which the defendant had assigned all his property for the benefit of his creditors. As the award declares : "Now, there is no claim for these debts by the creditors of Kheta Mal and Kashi Nath, neither will there be any such claim hereafter, and Kheta Mal and Kashi Nath have no claim to the stores now in the shops."

I am clearly of opinion that the suit was not one that could be maintained, and that it should have been dismissed. I would decree the appeal and reverse the decrees of both the lower Courts with costs.

STUART, C. J.—I agree in the conclusion arrived at by Mr. Justice Spankie. Both the lower Courts have utterly mistaken the law applicable to this case. There is no bankruptcy law in these provinces, nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the

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position of the present defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can [180] only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and his creditors, the law, at least in these provinces, places no compulsory machinery in this hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements or conveyances without fraud, that is honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person.

Now, applying these legal principles to the present case, there can be no doubt that the agreement between Kheta Mal and those creditors of his who joined with him in the arrangement was in effect such a transfer or conveyance as I have referred to, and the plaintiff, being one of the creditors who accepted that mode of settlement, is bound by it, and cannot recover any balance that may remain over after the event of the award in the arbitration proceedings; and the fact that he had on foot of the award accepted [181] payments from the sale of the defendant's goods only still further weakens his contention that he has a surviving right of action against his debtor.

I must here observe that a more extraordinary misreading of a plain law than that afforded by the recorded opinion of the Judge as to the application of s. 65 of the Contract Act to the facts of the present case I never met with. That section of the Contract Act is in the following terms: "When an agreement is discovered to be void, or where a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it." So that, according to the Judge, the payments made to the plaintiff in the present case is merely an advantage for which compensation may be made by being credited to the debtor as against his *hundis*. Now, there was here no void contract, no contract void in any sense, but the arbitration proceedings between Kheta Mal and his other creditors who are parties thereto, including Chuni Lal, the plaintiff, constituted, together with the award made by the arbitrators, a good

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and sufficient contract, valid and effectual, against the plaintiff and those other creditors in the same position, and all these persons are thereby concluded against any further remedy *ultra* the arbitrators' award.

The present appeal must therefore be allowed, the decrees of both the lower Courts reversed, and the suit dismissed with costs in all the Courts.

Appeal allowed.

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2 A. 181 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

NANAK CHAND AND ANOTHER (*Defendants*) *v.* RAM NARAYAN (*Plaintiff*).*
[11th March, 1879.]

Act VIII of 1859, (*Civil Procedure Code*), *ss.* 323, 324—*Arbitration.*

The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage, which alleged the defendants had received and appropriated to their own use. The defendants denied that they had [182] received such moneys, but admitted that such moneys had been credited by the plaintiff's father to the firm in which they, the plaintiff, and the plaintiff's father, were jointly interested, against a larger amount of moneys belonging to the firm which had been expended on the plaintiff's marriage. The parties agreed to refer the matter in dispute between them to arbitration, and to abide by the decision of the arbitrator. The arbitrator decided that the plaintiff could not recover the moneys he sued for, and which had been credited to the firm of which he was a partner, as a larger sum had been expended on his marriage out of the funds of the firm. The plaintiff obtained the opinions of certain *pandits* to the effect that, under Hindu law, gifts on marriage are regarded as separate acquisitions, and prayed that the Munsif would remit the award with these opinions to the arbitrator. The Munsif remitted the award with the opinions, requesting the arbitrator to consider them, and to return his opinion in writing within a certain period. The arbitrator having refused to act further, the Munsif proceeded to determine the suit, and gave the plaintiff a decree on the ground that, in a joint Hindu family, presents received on marriage do not fall into the common fund. *Held* (PEARSON, J., dissenting) that, there being no illegality apparent on the face of the award the Munsif was not justified in remitting the award or in setting the award aside and proceeding to determine the suit himself, but that he should have passed judgment in accordance with the award.

[R., 3 A. 636 (640); 30 A. 505=5 A.L.J. 658=28 A.W.N. 228; 22 M. 202 (204); 15 Ind. Cas. 928=236 P.L.R. 1912=4 P.W.R. (N.W.F.P.) C. Rul. 1913; L.B.R. (1893—1900) 548 (549); 66 P.R. 1907=159 P.L.R. 1908=148 P.W.R. 1907.]

THIS was a suit instituted in the Court of the Munsif, in which the plaintiff claimed to recover Rs. 520, being the amount of the presents received at his marriage, which he alleged had been taken and appropriated by the defendants, his uncles. The defendants set up as a defence to the suit that a sum of Rs. 1,132-2-0 had been expended on the plaintiff's marriage out of the funds of a firm in which the plaintiff, his father, and they were partners, that they had not received the sum claimed, but that the plaintiff's father had received and expended a sum of Rs. 549 which had been presented to the plaintiff on his marriage, and that the plaintiff's father had entered the sum claimed in the books of the partnership to the credit of the firm, but that no sum on account of marriage presents had

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* Appeal under cl. 10, Letters Patent, No. 5 of 1877.

ever come into their hands. On the 17th June 1875 the parties to the suit presented a petition to the Munsif appointing a certain person arbitrator, and agreeing to accept whatever such person should decide. The Munsif referred the suit to the arbitrator for the determination of the matters in dispute. On the 12th July 1875 the arbitrator delivered his award in the following terms: "It is admitted by both parties that up to this time the plaintiff, his father, and the defendants, carry on business in partnership, and that they are the joint owners of the firm known as Ganga Bai Chain Sukh: it is admitted by the plaintiff that nearly Rs. 1,000 was expended [183] on his marriage from the joint firm; therefore the plaintiff cannot get back Rs. 520 which he received at his marriage, and which were credited in the joint firm opposite the debit side, no matter if he paid that amount to the defendants or to his father: this point is out of question, because the amount is credited in the account books of the joint firm." The pleaders of the plaintiff subsequently obtained the opinions of certain *pandits* who averred that under Hindu law gifts at marriage are regarded as separate acquisitions, and applied to the Munsif to remit the award with these opinions to the arbitrator. The Munsif, without declaring that an objection to its legality was apparent on the face of the award remitted the award with the opinions, and requested the arbitrator to consider them, and to return his opinion in writing within a week. The arbitrator declined to act any further in the matter, stating, amongst other things that his award had not proceeded merely on the facts of the case, but that he had referred to certain texts of the Hindu law which the parties had produced. The Munsif then proceeded to determine the suit, and gave the plaintiff a decree, which the lower appellate Court affirmed, on appeal by the defendants.

The defendants preferred an appeal to the High Court, contending that the Munsif was not competent to set aside the award. The Judges composing the Division Bench (PEARSON, J., and SPANKIE, J.) before which the appeal came for hearing differed in opinion, as to whether or not the Munsif was justified by law in remitting the award, or in setting the award aside and determining the suit himself.

The judgments of the Judges of the Division Bench were as follows:

PEARSON, J.—I concur with the lower appellate Court in the opinion that the Munsif was warranted, under the terms of s. 323 of Act VIII of 1859, in remitting the award, which was apparently illegal, for reconsideration on the point of law; and that, inasmuch as the arbitrator declined to determine the point, the award became incomplete and null; and I hold that, under the circumstances, the provisions of s. 324 are inapplicable, and that the Munsif was competent to set aside the award, so incomplete and null, and to proceed to try and decide the case himself. I further [184] hold that the Hindu law, if not by law expressly applicable to the case, was the law which equity, justice, and good conscience required to be applied to it. I would therefore dismiss the appeal with costs.

SPANKIE, J.—The parties to the suit of their own free will appointed Lala Sham Lal, a pleader of the Court, their arbitrator, and agreed to accept whatever might be his decision in the case. An order dated the 17th June was sent to the arbitrator to decide the case and send in his award and the papers embodying the result of his inquiries, and that copies of the papers in the case be sent to him. On the 12th July the arbitrator submitted his award. He states that he had investigated the case, and had taken down the depositions of the witnesses and the statements of the parties. He

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had also taken into consideration the *custom of the brotherhood*, and perused the *passages in the Hindu law referred to by the parties and their pleaders*. It is admitted, he adds, by both parties that up to date the plaintiff, his father, and defendants carry on business in partnersbip, and that they are the joint owners of the firm known as Ganga Bai Chain Sukh: it is admitted by the plaintiff that nearly Rs. 1,000 were expended on his marrige from the joint firm: therefore the plaintiff cannot get back Rs. 520 which he got on marriage, and which were credited in the joint firm opposite to the debit side, no matter if he paid that amount to the defendant or to his father: this point was out of question, because the sum was credited in the account books of the joint firm: with reference to the circumstances of the case, it did not appear proper to award costs to defendants. The result of this award was to dismiss the claim, both parties bearing their own costs. No exception was taken to this award, which, indeed, the referring Court pronounced to be "admirable and excellent." But on the 22nd July the plaintiff objected to the arbitrator's law, and on the 9th August he presented to the Munsif an exposition of the law by some Hindu *pandits*, at Benares. The Court, stating that the exposition of the law differed from the view of the Hindu law relied upon by the arbitrator, ordered that the award should be returned to the arbitrator in order that he might consider the law as expounded by the *pandits*, and submit his opinion in writing about it. The arbitrator stated his inability to determine the case, and declined to act any further in it. [185] The Munsif took up the case and decreed the plaintiff's claim, and the lower appellate Court affirmed the decree. It is contended by defendant that the Munsif had misapprehended s. 323 of Act VIII of 1859, and should not have referred the award back to the arbitrator: no award can be set aside except as provided by s. 324 of Act VIII of 1859.

I would accept the pleas in appeal. The award had not left undetermined any of the matters referred to arbitration, nor had it determined matters not referred to arbitration. It was not so indefinite as to be incapable of execution. Looking at the terms of s. 323, the only other ground on which an award could be remitted is that an objection to its legality was apparent on the face of the award. No exception to the award was taken under s. 324. But on the 22nd July the plaintiff objected that the *Shastras* were in his favour, and it was brought to the Court's notice, and nearly a month after the delivery of the award, that a *pandit* at Benares expounded the law differently from the arbitrator. Now the parties had agreed to abide by the decision of the arbitrator. His view of the law might be right or wrong, but there is no illegality apparent on the face of the award which justified the remission of the award to the arbitrator. It was as if the plaintiff had asked for a review of judgment, and produced fresh evidence in his own favour. Where parties agree to abide by the decision of an arbitrator, both are supposed to concede something, and they are, I think, bound to abide by the decision, though, perhaps, a Court might have determined the point differently. I would decree the appeal and reverse the decision of both Courts and enforce the award.

The defendants appealed to the Full Court under cl. 10 of the Letters Patent against the judgment of Pearson, J., again contending that the award could not be set aside.

Mir *Akbar Husain*, for the appellants.

The respondent did not appear.

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JUDGMENTS.

The following judgments were delivered by the Full Bench:

STUART, C. J.—The procedure before the Munsif in this case appears to me to have been most irregular. Under s. 323 of Act VIII of 1859 the Munsif could only remit the award for reconsideration [186] if an objection to its legality is apparent *on the face of it*. But instead of considering the matter in this simple light the Munsif, on the 9th August 1875, made the following extraordinary and anomalous order: "Apparently it appears that the principles of Hindu law relied upon were decided against the petitioner in the arbitration award: therefore it is ordered that the award may be sent to the arbitrator to consider the *bywasthás* attached to this petition, and submit his opinion in writing to the Court." Or as if he said in other words, "It appears that the principles of Hindu law *were* applied by the arbitrator, but something more is wanted, and 'therefore' the award must go back to him for reconsideration." If such is not the meaning of the order, the *therefore* should have led to the very different conclusion of the award being accepted and applied by the Munsif, especially as he had admitted in his judgment not only that "the inquiry and award made by the arbitrator are admirable and excellent," but that the award was "in conformity with the evidence on the record."

It will be seen that, instead of showing that the award is illegal "on the face of it," the Munsif expresses his order in terms that ought to have led him to the opposite conclusion, but nevertheless he at the same time, and ss. 323 and 324 of Act VIII of 1859 notwithstanding, entertains the complaint that the findings in the award were opposed to the authorities in Hindu law relied upon by the plaintiff, and for this reason, and for this reason alone, he orders that the award may be sent back to the arbitrator for reconsideration, but admitting notwithstanding, so far as the language of his order is concerned, that the principles of the Hindu law had evidently been considered in making the award, in other words, that the arbitrator had done his duty. Such procedure not only cannot be allowed to stand for one moment, but in my opinion is deserving of the severest censure. Nor does the arbitrator, finding himself placed in the position assigned him by this foolish order, appear to have been a whit more intelligent in the matter than the Munsif, for he submitted himself uncomplainingly to it, and only noticed it by a petition, dated the 28th of August, in which he referred to the bad state of his health and the difficulties of the case, among others, certain Sanskrit texts which he had been unable [187] to understand or to get satisfactorily translated for him. In this petition, however, the arbitrator goes chiefly upon his bad health and his consequent inability to proceed with the case. He therefore declines to act any further, and he begs the Court either to decide the case itself or to appoint another arbitrator in his stead. The Munsif adopted the former course, proceeded with the case, and decreed the plaintiff's claim, which decree was affirmed by the lower appellate Court.

All this procedure was utterly mistaken. I have carefully perused the award, and in my judgment it shows no illegality on the face of it. It recites the reference to the arbitrator for his decision, and then it states as follows: "I have investigated the case to my satisfaction, and have taken down the depositions of witnesses and the statements of the parties. I have also taken into consideration the custom of the brotherhood to which the parties belong, *and perused the passages in the Hindu law referred to*

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by the parties and their pleaders." Now in the face of such a statement the Munsif had no right to assume that the arbitrator had not correctly applied the Hindu law. Any error of the kind must appear on the face of the award itself, which, however, on the contrary states "he had perused the passages of the Hindu law referred to by the parties and their pleaders." This I consider was a sufficient compliance with his duty as an arbitrator under the Code of Procedure, Act VIII of 1859, and if the Munsif differed from him, and believed that he had not correctly applied the principles of the Hindu law, the award was not thereby rendered invalid, and ought not to have been remitted for reconsideration, for on the face of it it was right, and it is distinctly provided by s. 324 of Act VIII of 1859 that "no award shall be liable to be set aside except on the grounds of corruption or misconduct of the arbitrator or umpire. In fact, in accepting him as their arbitrator, the parties accepted his judgment and opinion, and his understanding of the Hindu law applicable to the case, and were bound by his judgment and opinion and his law, no matter how mistaken he may have been in these respects. And the Munsif who, as I have shown, admits in his judgment that the award was excellent and admirable and unimpeachable on the evidence, was bound by it too, and he ought to have given judgment [188] according to it, his judgment being final and not open to appeal to the Judge or Subordinate Judge.

Holding this opinion, and I must add holding it very clearly, I would, concurring with Mr. Justice Spankie, allow this appeal, and reverse the judgment of the Division Bench, and I would set aside the whole procedure before the Munsif subsequent to the filing of the arbitrator's award, and order a decree by this Court according to the award, and dismiss the suit, with costs, in all the Courts.

PEARSON, J.—The question to be determined by the Full Bench is, I presume, whether the judgment which is the subject of the present appeal rightly or wrongly disposed of the special appeal heard by the Division Bench. If reference be made to the grounds of the special appeal, it will appear that two substantial questions are raised by it, first, was the Munsif justified in remitting the award for consideration ; second, was he justified in setting it aside when the arbitrator refused to reconsider it. The first of these questions will include the applicability of the Hindu law to the matter in dispute. The plaintiff claimed to recover from his uncles a sum which he had received from his father-in-law as a marriage present, and which, he alleged, they had appropriated to their own use. Their defence was that they had not taken it but that it had been expended on this marriage by his father. The matter being referred to arbitration, the arbitrator disallowed the claim, because the sum claimed had been entered in the accounts of the family firm, as a set-off against the plaintiff's marriage expenses. The award is obviously unsatisfactory, but on the plaintiff objecting that it was opposed to Hindu law, and filing *bywasthas* in support of the objection, it appeared to the Munsif that it was bad in law. This being so, I conceive that he was not only justified in remitting it for reconsideration, but was bound to remit it. Both the lower Courts have now decided that the plaintiff's claim is valid under the Hindu law. It was not pleaded in the special appeal, and it is not pleaded in the present appeal, that the lower Court's exposition of Hindu law is erroneous. What was pleaded in the special appeal was that the Courts were not bound to apply the Hindu law to the case. I ruled that the Hindu law, if not by statute law expressly [189] applicable was the law which equity, justice, and good conscience required to be applied to the case. It is now pleaded

that my ruling is incorrect. I entertain no doubt of its correctness myself, and I shall be surprised if the plea should find its acceptance.

On the other question whether, on the refusal of the arbitrator to reconsider his award, the Munsif was justified in setting it aside and proceeding to try the case himself, I do not perceive that my honorable colleague on the Division Bench in the judgment delivered by him on the 28th June 1877, expressed an opinion different from that expressed by me. It is obvious to remark that, if the Munsif was precluded from setting aside the award in this case by the provisions of s. 324 of Act VIII of 1859, he would be precluded from so doing in a case in which an arbitrator refused to reconsider an award which left undetermined some of the matters referred to arbitration, and was so indefinite as to be incapable of execution ; and such a contention could not probably be maintained.

In my judgment the pleas in appeal are without weight, and the appeal should be dismissed with costs.

TURNER, J.—(After stating the facts leading up to the arbitration and award, continued) : The plaintiff's pleader obtained the opinions of some *pandits* who averred as is not disputed that gifts at marriage are regarded as separate acquisitions, and petitioned the Munsif to remit the award, with these opinions, to the arbitrator. The Munsif without declaring that an objection to the legality was apparent on the face of the award remitted the award with the opinions, and requested the arbitrator to consider them, and to return his opinion in writing in a week.

In special appeal the honorable Judges of the Division Bench differed as to whether or not an objection to the legality of the award was apparent on the face of it. The Senior Judge held such an objection was apparent and that the Munsif was therefore justified in remitting the award for the consideration of the point of law. It is to be observed that the plaintiff did not come into Court alleging that he and the defendants were members of a family. Nor did he allege that the defendants claimed to retain the money as falling into and forming part of the common stock. They were charged with having appropriated the money to their own use, and they denied [190] that they had received it, but admitted it had been credited in the books of the firm in which they, the plaintiff, and his father, were jointly interested against a larger sum expended on his marriage. It is to be noticed that, if there had been a question as to whether the moneys received on the plaintiff's marriage formed part of a common stock, or even of the partnership funds, the plaintiff's father should have been made a party to the suit. On the proceedings I do not see that there was an objection to the legality of the award apparent on the face of it. If one partner sues another for moneys recoverable on his account, it would surely be an answer that the moneys so received had been credited against a debt due by him to the firm.

I therefore am of opinion that the Munsif was not justified in remitting the award to the arbitrator. At the same time having perused the evidence it is apparent to me that the questions really in issue were not properly raised by the pleadings ; and, moreover, that they are not disposed of by the judgment of the Court below. The parties are members of a family who, while retaining undivided the firm which has descended to them from their common ancestor, have also separate dealings, and I have no doubt that the dispute arises out of the question as to whether or not expenses relating to the plaintiff's marriage ought to be met by the separate property of his father or out of the joint firm. The questions which called for determination in this suit appear to me to be the following :

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Did the sums received on the occasion of the plaintiff's marriage come to the hands of the defendants : If they did, have they been appropriated by the defendants to their own use : for if they have been so appropriated, the defendants are liable, and it is unnecessary to go further : but if the moneys have not been appropriated by the defendants to their own use, but have been carried into the firm, then the question airses whether the defendants were at liberty to set them off against expenses incurred by the firm on the plaintiff's marriage, and before determining this issue, the plaintiff's father should have been made a party to the suit. All proper parties being before the Court, it should then have been inquired whether the joint fund or the separate estate of each of the partners should have been charged with the marriage expenses of the members of the family. Had the parties been members of a Hindu family living altogether [191] in commensality, I admit that the plaintiff would have been entitled to claim his marriage presents as a separate acquisition, and that the Courts would be justified in applying Hindu law, and I hold further that, in determining whether the joint or separate estate should bear the expenses of the plaintiff's marriage, the Courts are justified in applying Hindu law controlled as it may be by the agreement binding on the members as to the purposes to which the property remaining undivided should be applied. In my judgment the appeal should prevail and be decreed, the claim being dismissed on the ground that the award was a good award, and that a decree should have passed in accordance with it, but if it be held that the award was open to the objection urged, and that the plaintiff was justified in trying the suit on the merits, it is in my judgment necessary for the purposes of justice that such of the issues suggested by me as are undisposed of by the judgment of the Subordinate Judge should be tried, and I would remit them for that purpose.

SPANKIE, J.—I adhere to my opinion. With regard to the nature of the claim, the statements of the parties, the reference to arbitration, and the award itself, I see no illegality apparent on the face of the award, and therefore it was not one with which the Munsif could interfere under s. 323 of Act VIII of 1859. It may be erroneous in law, but, if so, that error is not apparent on the face of the award, and therefore it cannot be set aside merely because it is erroneous in law.

OLDFIELD, J.—I am of the same opinion in this case as Mr. Justice Spankie. The award was improperly remitted to the reconsideration of the arbitrator, as there was no ground under s. 323 which justified the Munsif to remit it. There was no objection to the legality of the award apparent on the face of the award ; the decision was made upon facts in connection with the partnership relations of the parties, and the Munsif in remitting the award does not point out the particular illegality apparent upon the face of the award, nor does he appear to have come to any conclusion that there was an apparent legal defect ; he merely remitted it that the arbitrator should consider some objections which the plaintiff alleged against a supposed view of the Hindu law taken by the arbitrator.

[192] There were no objections taken under s. 324, and under the circumstances the Court should have given judgment according to the award.

Appeal allowed.

2 A. 192 (F.B.).

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2 A. 192 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

FAZAL MUHAMMAD (*Plaintiff*) *v.* PHUL KUAL (*Defendant*).*
[11th March, 1879.]

Appeal under cl. 10 *of the Letters Patent—Computation of Limitation.*

In computing the period of limitation prescribed for an appeal under cl. 10 of the Letters Patent, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required, under the rules of the Court, to be presented with the memorandum of appeal.

[App., 20 M. 476 (479); R., 9 A. 115 (118) = A.W.N. 1886, 306; 32 B. 14 (F.B) = 9 Bom. L.R. 1138 = 2 M.L.T. 410.]

THIS was an appeal to the Full Court, under cl. 10 of the Letters Patent, which had been preferred two days after the period of limitation (1) had expired.

On behalf of the appellant it was contended that the time requisite for obtaining a copy of the judgment appealed from should be deducted, in computing the period of limitation. On behalf of the respondent it was contended that, inasmuch as under the Rules of Practice adopted by the High Court on the 21st May 1873, regarding the admission of appeals under cl. 10 of the Letters Patent, a copy of the judgment appealed from was not required to be presented with the memorandum of appeal (2), the time for obtaining a copy could not be deducted.

The Senior Government Pleader (Lala *Juala Prasad*), Munshi *Hanuman Prasad*, and Maulvi *Mehndi Hasan*, for the appellant.

Mr. *Colvin*, for the respondent.

The Full Bench delivered the following

JUDGMENT.

The Full Bench is of opinion that the appeal is beyond time and not entitled to be admitted. It is therefore dismissed with costs.

* Appeal under cl. 10, Letters Patent, No. 4 of 1878.

(1) Under the Rules of Practice adopted by the High Court on the 21st May 1873, regarding the admission of appeals under cl. 10 of the Letters Patent, such appeals must be preferred within ninety days, "unless the Court, in its discretion, on good cause shown, shall grant further time."

(2) Rule iii.—The appellant shall not be required, as in ordinary appeals, to file, with such petition of appeal, a copy of the judgment appealed from.

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2 A. 193.

2 A. 193.

[193] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

NIKKA MAL AND OTHERS (*Plaintiffs*) *v.* SULAIMAN SHEIKH GARDNER (*Defendant*).* [18th March, 1879.]

Usufructuary Mortgage.

By the terms of a deed of usufructuary mortgage the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. During the currency of the mortgage-tenure the mortgagees, averring that they had had to pay a certain sum in excess of the amount of Government revenue entered in the deed of mortgage from 1279 to 1281 Fasli, sued the mortgagor to recover such excess. *Held* that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage-tenure should be brought to an end, the suit was not premature and could be entertained.

[R., 13 A. 195 (197) = A.W.N. 1890, 228.]

THE facts of this case were as follows: The defendant in this suit, on the 28th May 1869, gave the plaintiffs in this suit a usufructuary mortgage of one moiety of a certain village, and put the plaintiffs into possession. Under the terms of the deed of mortgage the mortgagees agreed to collect rents, to pay the Government revenue, and to take the profits in lieu of interest on the mortgage-money, and the mortgagors were at liberty on the expiry of five years to repay the mortgage-money, and to enter on the property. The deed also contained this condition, *viz.*, "If the Government demand be enhanced or reduced at the time of settlement, I, the mortgagor, am liable for it, and the mortgagees shall have nothing to do with the increase or decrease of the Government demand." The deed also empowered the mortgagees to enhance the rents at any time. The revenue which was payable in respect of the mortgaged property at the time of the execution of the deed of mortgage having been enhanced, and the plaintiffs having paid the enhanced revenue for three years, the plaintiffs brought the present suit to recover from the mortgagor the sum paid by them in excess of the revenue which was payable at the time of the [194] execution of the deed of mortgage, basing their suit on the condition in the deed of mortgage stated above. The defendant set up as a defence to the suit that on a proper construction of the deed of mortgage the claim of the plaintiffs could not be preferred during the currency of the mortgage, but only when accounts were settled on redemption of the mortgage. The Court of first intance allowed this contention and dismissed the suit, and on appeal by the plaintiffs the lower appellate Court also allowed it.

The plaintiffs appealed to the High Court contending that the lower Courts had improperly construed the deed of mortgage, and they were entitled, under the condition in the deed of mortgage upon which the suit was based, to prefer the present claim.

Pandit *Bishambar Nath* and Babu *Jogendro Nath Chaudhri*, for the appellants.

Babu *Oprokash Chandar*, for the respondent.

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* Second Appeal, No. 992 of 1878, from a decree of G. L. Lang, Esq., Judge of Aligarh, dated the 10th June 1878, affirming a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 19th January, 1878.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—By the terms of the deed of mortgage, dated 28th May, 1869, the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. The mortgagees, averring that they have had to pay Rs 1,907-13-3 in excess of the amount of the Government demand entered in the mortgage-deed from 1279 to 1281 fasli, sue to recover that amount with interest. The lower Courts have disallowed the suit on the ground that the mortgagees are not competent to prefer a claim of this sort in a suit during the currency of the mortgage-tenure. Such a claim, in the opinion of the lower Courts, can only be properly advanced and adjusted when a settlement of accounts between the parties takes place at the termination of the mortgage tenure. An obvious objection to the opinion of the lower Courts on this subject is that no settlement of accounts is contemplated by or is necessary under the provisions of the deed of mortgage, which allows the mortgagees to appropriate the profits realized by them during the terms of mortgage in lieu of interest, and the mortgagor to recover his estate at the end of that term by payment of the principal or the [195] amount of the loan. Another not less obvious objection is the unreasonableness of expecting the mortgagees to make large payment year after year for the mortgagor to be treated as mere supplements to the original loan. But apart from the objections aforesaid, the view of the lower Courts that a suit of the nature of the present cannot be brought year by year by the mortgagees for the recovery of any sums paid by them in excess of the amount of the Government demand at the time of execution of the deed of mortgage, merely because there is no express provision made for such suit being brought in the deed of mortgage, is quite untenable. The law authorises a man to sue for a debt whenever it becomes due to him. The mortgagees could only have been precluded from so suing, had there been an express provision in the deed reserving the adjustment of such claims to the moment when the mortgage-tenure should be brought to an end. It is admitted that a similar suit has been already once before brought by the mortgagees. It was not then pleaded that the suit was premature and could not be entertained. On the contrary it was entertained and the claim was decreed. The lower appellate Court has remarked that the deed of mortgage has been carelessly drawn up, inasmuch as the mortgagees are authorised to raise the rents, yet no provision is made for the disposal of the increased profits due to their enhancement; although it can hardly be supposed that it was the intention of the mortgagor that she should pay any increase of revenue to Government, and that the mortgagees should enjoy all the corresponding increase of profits consequent on the enhancement of the rents. We observe, however, that in the present case it is no part of the defence that the increased demand of the Government has been met by a corresponding enhancement of rent. On the contrary the plea is that although empowered to enhance the rent, the mortgagees have neglected to do so. There is nothing in the deed of mortgage binding the mortgagees to enhance the rents in the event of the *jama* being enhanced. All that is said is that "if the mortgagees wish to enhance the rent of any tenant, they may enhance it, &c." On the other hann, the liability undertaken by the mortgagor to pay any additional demand made by the Government is not limited by any condition that such increased demand cannot [196] be

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met by a corresponding enhancement of rents. In the former suit to which reference has been made it was held that enhancement of rents by the mortgagees would not debar them from recovering enhanced *jama*; and the ruling was not impugned by appeal. The ground on which the suit has been disallowed by the lower Courts failing, it does not appear that there is any substantial defence to the suit, or that in reference to the foregoing remarks it is necessary to remand the case for the trial of the other issues laid down for trial by the Court of first instance.

We decree the appeal and claim with costs in all the Courts, and interest at 6 per cent. per annum from the date of this decree to the date of realisation.

Appeal allowed.

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2 A. 196.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

THE COLLECTOR OF MORADABAD (*Defendant*) v. MUHAMMAD DAIM KHAN (*Plaintiff*).* [20th March, 1879.]

Act VIII of 1859 (*Civil Procedure Code*), s 309—*Pauper Suit—Sale in Execution of Decree—Distribution of Sale-Proceeds—Court-Fees—Prerogative of the Crown.*

With a view to recover the amount of Court-fees which *J* would have had to pay had he not been permitted to bring a suit as a pauper, the Government caused certain property belonging to *B*, the defendant in such suit, who had been ordered by the decree in suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against *B* which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees *J* would have had to pay had he not been allowed to sue as a pauper, the principle that the Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in *Ganpat Putaya* v *The Collector of Kanara* (1) applied in this case.

[**Overr.**, 29 A. 537 (540) (**F.B.**) = 4 A.L.J. 720 = A.W.N. (1907) 157; **N.F.**, 7 M. 434 (436); **F.**, 33 C. 1040 (1046) = 10 C.W.N. 857; **Appr.**, 25 M. 457 (493); **R.**, 18 B. 237 (240).]

THE facts of this case were as follows: One Jagan Nath brought a suit as a pauper against Bulaki Das in the Moradabad district, in which suit a decree was made against Bulaki Das directing that he should pay the costs of such suit. The Collector [197] of Moradabad subsequently applied for the attachment of a house belonging to Bulaki Das, with a view to recover by its sale the amount of Court-fees which Jagan Nath would have had to pay had he not been permitted to sue as a pauper. The house was accordingly attached on the 8th January, 1875. The house was again attached on the 30th June 1876 in the execution of a decree obtained by Muhammad Daim Khan against Bulaki Das on a bond for the payment of money, in which the house was charged with such payment, such decree directing that the house should be sold in satisfaction of the decree. The house was sold in the execution of this decree, and the Collector was first

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* Second Appeal, No. 1060 of 1878, from a decree of Maulvi Muhammad Sami ul-la Khan, Subordinate Judge of Moradabad, dated the 4th June, 1878, reversing a decree of Maulvi Ain-ud-din, Munsif of Moradabad, dated the 19th November, 1877.

(1) 1 B. 7.

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paid out of the sale proceeds, and the surplus remaining was paid to Muhammad Diam Khan who now sued the Collector to recover the amount paid to him. The Court of first instance held that the Government was entitled to be paid first out of the sale-proceeds, and dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree, distinguishing the present case from *Ganpat Putaya* v. *The Collector of Kanara* (1), on the ground that in the present case the plaintiff had a lien on the property.

The defendant appealed to the High Court, contending that the Government took precedence of creditors of every description.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Shah *Asa Ali*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—In our opinion the ground of appeal is valid and must be allowed. The Bombay High Court's decision in the case of *Ganpat Putaya* v. *The Collector of Kanara* (1) appears to be applicable in the present case. The principle that the Government takes precedence of all other creditors is not liable to an exception in the case of lien-holders. We decree the appeal with costs, and, reversing the lower appellate Court's decree, restore that of the Court of first instance.

Appeal allowed.

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2 A. 198 = 3 Ind. Jur. 568.

APPELLATE CIVIL.

[198] *Before Mr. Justice Spankie and Mr. Justice Oldfield.*

BHOLA NATH AND ANOTHER (*Plaintiffs*) v. BALDEO (*Defendant*).*
[24th March, 1879.]

Act VIII of 1871 (*Registration Act*, ss. 18, 50—*Act III of* 1877, *Registration Act*, ss. 17, 18, 50—*Registered and unregistered documents.*

A document creating an interest in immoveable property the registration of which under Act VIII of 1871 was compulsory and which was registered under that Act, does not, under s. 50 of that Act, take effect as regards such property against an unregistered document relating to such land, the registration of which under Act VIII of 1871 was optional (2).

Held that the provisions of s. 50 of Act III of 1871 did not apply to documents executed after the first day of July, 1877 and before Act III of 187 came into operation (3).

[F., 7 C. 570 ; R., 13 B. 229]

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* Second Appeal, No. 1050 of 1878, from a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 28th May, 1878, affirming a decree of Babu Brij Pal Das, Munsif of Bisauli, dated the 25th March, 1878.

(1) 1 B. 7.

(2) So held in *Hamed Bux* v. *Bindra Bun*, H.C.R., N.W.P. 1870, p. 37 and *Shaikh Ryasutulla* v. *Durga Churn Pal*, 15 B.L.R., 294 = 24 W.R, 121 with reference to s. 50 of Act XX of 1866, the provisions of which section and s. 50 of Act VIII of 1871 are similar. See, however, *Shamacharan Neogi* v. *Nabinchandra Dhoba*, 6 B.L.R. Ap. 1; and *Gayaram Mazumdar* v *Madhusudan Mazumdar*, 4 B.L. R. Ap. 73 and the cases cited in that case, which refer to s. 68 of Act XVI of 1864.

(3) See, however, *Soodharam Bhuttacharjee* v. *Obhoy Chunder Bundopadhya*, 10 B. L.R. 380, where retrospective effect appears to have been given to s. 50 of Act XX of 1866,

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THE facts of this case were as follows: Certain persons mortgaged their share in a certain village to one Baldewa by a deed dated the 5th August, 1872. The registration of this deed under Act VIII of 1871 was not compulsory, and it was not registered. The same persons subsequently again mortgaged such share to one Bhola Nath and a certain other person, by two separate deeds, both dated the 3rd October, 1872. The registration of these deeds under Act VIII of 1871 was compulsory, and they were registered. Bhola Nath and his co-mortgagee obtained a decree on these deeds in execution of which the share was sold on the 23rd October, 1876, the mortgagees purchasing the property. Baldewa having obtained a decree on his deed sought to bring the share to sale in execution thereof. On the day fixed for the sale Bhola Nath and his co-mortgagee satisfied Baldewa's decree, and then instituted the present suit against Baldewa and the mortgagors to recover the amount which they had paid on account of Baldewa's decree. The plaintiffs contended, amongst other things, that their deeds of mortgage being registered took effect against the defendant's [199] unregistered deed, notwithstanding that the registration of the defendant's deed was optional, in virtue of the provisions of s. 50 of Act III of 1877. The defendant contended that the provisions of that section of Act III of 1877 did not apply to documents executed before the passing of that Act; and that the registration of the plaintiffs' deeds being compulsory, while that of the defendant's deed was optional, there was nothing in Act VIII of 1871 which gave the plaintiffs' deeds preference over the defendant's deed by reason that the plaintiffs' deeds were registered, while the defendant's deed was not registered. The Court of first instance allowed the defendant's contention, and dismissed the plaintiffs' suit. On appeal by the plaintiffs the lower appellate Court affirmed the decree of the Court of first instance.

The plaintiffs appealed to the High Court contending that s. 50 of Act III of 1877 applied to documents executed before the passing of that Act, and that under that Act their deeds, being registered, took effect against the defendant's unregistered deed.

Pandit *Ajudhia Nath* and Lala *Harkishen Das*, for the appellants.

Pandit *Bishambar Nath*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—Both the bonds were executed in 1872, and as far as the deed of plaintiff, appellant, is affected, the registration law in force at the time of its execution was Act VIII of 1871. By s. 50 every document of the kind mentioned in clauses (*a*) and (*b*) of s. 18 shall, if duly registered, take effect as regards the property comprised therein against every other unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. But s. 18 applies to documents of which the registration is optional. The registration of the deed of plaintiffs was compulsory. We need not interfere. Act III of 1877 does not, we think, apply. The unregistered document in that Act (s. 50) means one not registered under Act VIII of 1871 or that Act, although executed after the 1st July, 1871. But still the Act introduces for the first time clauses both of s. 17 and s. 18, by which introduction all [200] registered documents take effect henceforth as against unregistered documents of which under the Act the registration is optional, subject of

course to the explanation in the section. Whereas s. 50 of Act VIII of 1871 gives a preference to registered documents of the kind mentioned in clauses (*a*) and (*b*) of s. 18 over the unregistered document, subject again to the explanation added to the section, so that by Act VIII of 1871 it is only the duly registered documents (though their registration is only optional) which take effect against the unregistered documents. As the documents referred to in this suit were both executed after the 1st July, 1871 and before Act III of 1877 came into force, the former Act would seem to apply. We agree with the lower appellate Court that no collusion or fraud between the defendants having been established, and the decree having been passed in favour of the first mortgagee, there was nothing to prevent the sale of the property in execution of that decree. If plaintiffs chose to satisfy the decree for their own purposes, they do not thereby seem to have any legal claim upon defendant, the decree-holder, for a refund of the money so paid by them. We affirm the decree of the lower appellate Court, and dismiss the appeal with costs.

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Appeal dismissed.

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2 A. 200 (F.B.).

FULL BENCH.

Before Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie and Mr. Justice Oldfield.

SHIMBHU NARAIN SINGH (*Plaintiff*) *v.* BACHCHA AND ANOTHER (*Defendants*).* [25th March, 1879.]

Act XVIII of 1873 *(N.W.P. Rent Act)*, s. 95—*Determination under cl. (n) of Title*—Res judicata.

S applied to the Revenue Court, under cl. (*n*) of s. 95 of Act XVIII of 1873, for the recovery of the occupancy of certain land, alleging that the occupancy of such land had devolved upon her by inheritance, and that the landholder had wrongfully dispossessed her. The landholder set up as a defence to this application that *S* was not entitled to the occupancy of the land by inheritance, but that she was a trespasser. The Revenue Court determined that *S* was entitled to the occupancy of the land by inheritance, and granted her application. The landholder then sued *S* in the Civil Court for the possession of the land.

[201] *Held, per* PEARSON, J., and TURNER, J., that the question of *S*'s title to the occupancy of the land was, with reference to the decision of the Revenue Court, *res judicata* and could not again be raised in the Civil Court.

Per SPANKIE J., and OLDFIELD, J., *contra.*

[F., 3 A 81 (84); Appr.; 15 A. 387 (389, 390); R., 7 A. 148 (151); 18 A. 270 (272) (F.B.).]

THE facts of this case were follows: One Bakes Kuari, the recorded occupancy-tenant of certain land, his daughter Sukhia, his grandson Manraj, and his son-in-law Khedu, lived as a joint Hindu family. On the death of Bakes Kuari Manraj's name was recorded as the tenant of the land, and on the death of Manraj Khedu's name was so recorded. On the death of Khedu the landholder disputed Sukhia's right to the holding, and dispossessed her. She applied to the Revenue Court, under cl. (*n*), s. 95 of Act XVIII of 1873, to be restored to possession, on the ground that the holding had devolved upon her by inheritance from Khedu, her husband, and that she had been wrongfully dispossessed. The Revenue Court

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* Appeal under cl. 10, Letters Patent, No. 4 of 1877.

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of first instance allowed the application on the ground on which it was made, and its order was affirmed on appeal. The present suit was brought in the Civil Court by the landholder against Sukhia for the possession of the holding, on the ground that the defendant was not entitled to succeed to the same by inheritance, not being the wife of Khedu. The Court of first instance held that the defendant was entitled to succeed to the holding as Khedu's widow, and dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court refused to enter into the merits of the case, holding that the question of the defendant's title to the holding was, with reference to the decision of the Revenue Court, *res judicata.*

The plaintiff preferred an appeal to the High Court, contending that the Revenue Court had not determined the question of the defendant's title, and that, if it had determined that question, the question was not *res judicata.* The Judges composing the Division Court (TURNER, J., and SPANKIE, J.), before which the appeal came for hearing, differed in opinion on the point whether the question of the defendant's title to the land was *res judicata.* The judgments of the Division Court were as follows:

TURNER, J.—The respondent, complaining that she had been illegally ousted from an occupancy holding that had devolved on [202] her by inheritance, applied to the Revenue Court, under s. 95 of Act XVIII of 1873, to be restored to possession. Her application was granted. It was competent to the zemindar on the hearing of the application to contend that the respondent was a trespasser and had no title. The question was raised and decided rightly or wrongly. The zemindar now sues to be maintained in possession of the holding. The respondent pleaded the order she has obtained from the Revenue Court; that order in my judgment is a conclusive answer to the suit. The Legislature having been pleased to declare that no Civil Court shall take cognizance of any dispute or matter on which an application might be made of the nature mentioned in s. 95, we are unable to review the order passed on such an application in a civil suit; as between the landlord and tenant it is final.

The appeal therefore fails, and the decree of the lower appellate Court must be affirmed with costs.

SPANKIE, J.—Assuming that the original defendant, now represented by Bachcha and Jhingari Kuari, made an application to the Revenue Court, under cl. (*n*), s. 95 of Act XVIII of 1873, for the recovery of the occupancy of the land from which she had been wrongfully dispossessed, I cannot hold that the order of the Revenue Court on that application would be a bar to the determination of the plaintiffs' claim in this suit. I apprehend that "wrongfully dispossessed" means "wrongfully dispossessed" because the landholder had not proceeded in accordance with the provisions of the Rent Act. If that were the case, the Collector could restore her to possession. But he was not at liberty on that application to determine finally whether or not the plaintiff here, as the landholder, had the right to recover the cultivatory possession of the land, on the ground that the occupancy right had lapsed on failure of heirs to the late occupier. The landholder, who denies that defendant was his tenant, was unable to obtain relief from the Revenue Court either under s. 93 or s. 95. In my opinion, therefore this was a suit of which the Civil Court not only could take cognizance (and this the lower Courts admit), but that the determination of the issues involved in the case was not barred by the order of the Revenue Court on the application of the

original [203] defendant. The lower appellate Court should have tried the appeal on the merits. 1879 MARCH 25

The plaintiff appealed to the Full Bench, under cl. 10 of the Letters Patent, from the judgment of Turner, J. FULL BENCH.

The Senior Government Pleader (Lala *Juala Prasad* and Munshi *Hanuman Prasad*), for the appellant. 2 A. 200 (F.B.).

Lala *Lalta Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

PEARSON, J.—I am not very well able to reconcile the first and last grounds of the appeal. In the first it is contended that no question of title by right of succession was directly at issue. In the last it is admitted that the point for determination was whether the last tenant had left an heir who could legally claim a right of possession of the land. The real question raised, tried and decided in the application made by Mussammat Sukhia in the Revenue Court, under cl. (*n*), s. 95 of Act XVIII of 1873, was whether she was Khedu Kuari's widow and heir. Such she claimed to be, and because as such she was entitled to retain his holding, she alleged her dispossession by Raja Shimbhu Narain Singh to have been wrongful. Her claim rested on no other ground, and if the Revenue Court was not competent to determine the question whether she had or had not a right to the holding by inheritance from her husband, it could not have disposed of her application. But an application such as she made can only, under the provisions of s. 95 of Act XVIII of 1873, be entertained by Courts of Revenue, and no other Courts can take cognizance of any dispute or matter on which such an application might be made. The decision is *res judicata* and is not open to re-adjudication in the present suit. The provisions of s. 95 seem to be opposed to and to preclude the view that, when questions of right are determined on applications made thereunder, the decisions of the Revenue Courts are not final and may be challenged in the Civil Courts.

I would therefore affirm the decision of the Division Bench, and dismiss the appeal with costs.

SPANKIE, J.—Since the hearing of this case, I desire to add that I retain the opinion which I expressed when the case was [204] before the Division Bench. It appears to me that the Full Bench decision of the Presidency High Court in *Guru Das Roy* v. *Ram Narain Mitter* (1), is very much in point. The same principle must apply to this case.

OLDFIELD, J.—The plaintiff sues in the suit before us to eject the defendant from the land in suit as a trespasser. The defendant alleges she is the widow of a former tenant, and has a right to succeed to the tenancy as his heir, and it appears she has already made an application in the Revenue Court to recover possession of the holding. She then alleged that the plaintiff had permitted her to take possession and recognised her tenancy and had subsequently dispossessed her. In that matter her right of succession as heir, and the fact that she had been recognised as a tenant and so succeeded to the holding, were disputed. The Assistant Collector before whom the case came inquired into and decided that she had a right of succession, and that she had taken possession of the holding on the death of her husband, and that plaintiff had given a lease of the

(1) 7 W. R. 189.

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holding to others, but he did not decide whether plaintiff had ever recognised her tenancy, and on this finding he allowed her application for recovery of possession. The question before us is whether the suit now brought is cognizable by a Civil Court, and whether the decision of the Revenue Court is final.

I cannot see how the matter in dispute in this suit can be otherwise than cognizable by the Civil Court, for it is certainly not a matter on which an application could be made by the plaintiff in the Revenue Court under s. 95 of Act XVIII of 1873. This is no recognised tenancy, but the question at issue is whether defendant is a tenant or trespasser, whether she has a right or not to succeed as heir to the former tenant. This is a question peculiarly within the province of a Civil Court to determine. Nor can I consider that a decision of a Revenue Court which may have been passed on such a point in the course of deciding an application preferred under s. 95, clause (*n*), Act XVIII of 1873, will be binding as a final decision of a competent Court. I concur with Mr. Justice Spankie in the view he takes. The jurisdiction of the Revenue Court in the matter of an application [205] under clause (*n*), s. 95 of Act XVIII of 1873, is I think confined to the determination of the immediate matter of the application, the dispossession otherwise than by law of the tenant,—see *Khugowlee Singh* v. *Hossein Bux Khan* (1). It seems to me that it was not intended to give the Revenue Court when disposing of such applications a jurisdiction to decide finally questions of title or succession under Hindu law. The Act seems to recognise a distinction between suits and applications, for the former are alone provided by the Act with a regular procedure under chapter vi. In the former also the decisions on questions of title would come before the Civil Court by way of appeal, whereas there is no appeal to a Civil Court in the latter. These are considerations which may make one hesitate in holding that it was intended that decisions should be final on matters outside the immediate object of the application and otherwise peculiarly cognizable by Civil Courts.

The appeal should be tried by the lower appellate Court on the merits.

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2 A. 205 (F.B.) = 4 Ind. Jur. 35.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

IN THE MATTER OF THE PETITION OF GUR DAYAL.
[27th March, 1879.]

Act X of 1872 (*Code of Criminal Procedure*), s. 468—*Sanction to prosecute—Relative positions of a Magistrate of the First Class, the Magistrate of the District, and the Court of Session.*

Held (OLDFIELD, J., *dissenting*) that, for the purposes of s. 468 of Act X of 1872, a Magistrate of the First Class is subordinate to the Magistrate of the District, and consequently application for sanction to prosecute a person for intentionally giving false evidence before the former may, where such sanction is refused by the former, be made to the latter, and not to the Court of Session, which has not power to give such sanction.

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(1) 7 B.L.R. 679.

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FULL BENCH.

2 A. 205 (F.B.) = 4 Ind. Jur. 35.

THIS was an application to the High Court for the exercise of its power of revision under s. 297 of Act X of 1872. One Gur Dayal was tried at Allahabad by Mr. E. White, a Magistrate of the First Class, on a charge of dishonestly receiving stolen property, an offence punishable under s. 411 of the Indian Penal Code, and on the 8th August 1878 was acquitted by the Magistrate. Gur Dayal [206] subsequently applied to the Magistrate, under s. 468 of Act X of 1872 for sanction to prosecute one Hira Lal and certain other persons, who had given evidence against him in the Magistrate's Court, for making a false charge against him, and giving false evidence, offences punishable under ss. 193 and 211 of the Indian Penal Code. The Magistrate refused to grant such sanction. Gur Dayal then applied to Mr. H. A. Harrison, Sessions Judge of Allahabad, for sanction, and on the 15th August 1878 the Sessions Judge granted the required sanction. On the 24th August 1878 the Sessions Judge, having noticed the case of *Imperatrix* v. *Padmanabh Pai* (1), cancelled the permission to prosecute previously granted on the ground that Mr. White was subordinate to the Magistrate of the District and not to the Court of Session within the meaning of s. 468 of Act X of 1872, and the application for sanction to prosecute must be made to the Magistrate of the District.

Gur Dayal now applied to the High Court to revise the order of the Sessions Judge dated the 24th August 1878. The Court (Oldfield, J.) referred to the Full Bench the question whether the Sessions Judge had power, under s. 468 of Act X of 1872, to sanction the prosecution demanded by the petitioner.

Mr. *L. Dillon*, for the petitioner, contended that the Court of a Magistrate of the First Class is "subordinate" to the Court of Session, for the purposes of s. 468 of the Criminal Procedure Code. Section 468 should be read by itself and not with s. 37. These sections provide for different matters. Section 468 contains provisions of a judicial nature, while the nature of the provisions in s. 37 is executive. Section 37 cannot govern s. 468.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown, contended that s. 37 of the Criminal Code governed s. 468, and the Court of Session in this case had no power to sanction the prosecution demanded.

STUART, C.J.—In the present case Gur Dayal, the applicant to us in revision, had been charged and tried before the Joint Magistrate of the First Class under s. 411 of the Indian Penal Code and s. 505 of the Criminal Procedure Code as an alleged receiver of stolen [207] property. The evidence against him consisted chiefly of statements made by four *dallals*, residents of Allahabad, but these were considered so suspicious and untrustworthy that the Magistrate dismissed the case. Gur Dayal then applied to the Session Judge under s. 468 of the Criminal Procedure Code for permission to prosecute the *dallals* for giving false evidence under ss. 193 and 211 of the Indian Penal Code, and such sanction the Judge gave by an order dated the 15th August 1878. Subsequently, on a decision by a Division Bench of the High Court of Bombay, Melvill and Pinhey, JJ., being brought to his notice, by which it was ruled that the Magistrate of the District, and not the Sessions Judge, had the power to give the sanction contemplated by s. 468 of the Criminal Procedure Code, he recalled his order and cancelled the sanction he had given; and, in my opinion, he clearly had power to do this.

(1) 2 B. 384.

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2 A. 205 (F.B.) = 4 Ind. Jur. 35.

The same question arises in this Court in a revision case before Mr. Justice Oldfield, who has referred the matter to a Full Bench, and we are now, after argument at the Bar, to decide the question.

I generally concur in the ruling of the High Court of Bombay. To my mind it is unnecessary to make a nice examination of the Criminal Procedure Code for the purpose of ascertaining the relative position and powers of the different judicial officers in particular cases and in particular circumstances, for it is clear to me that the present case must be disposed of by the construction to be put upon s. 468 read with s. 37 of the Criminal Procedure Code; and with reference to the latter section I do not appreciate the distinction which was taken at the hearing between the Magistrate as an executive and the Magistrate as a judicial officer. No doubt s. 468 contemplates a purely judicial proceeding, but that view of the matter is, in my opinion, not only not inconsistent with s. 37, but that section helps us to interpret s. 468, by providing as it does that all Magistrates shall be subordinate to the Magistrate of the District. The word "subordinate" it will be observed is not in any way limited or qualified, but applies to the jurisdiction of the Magistrate of the District in all its plenitude, and with reference to all that officer's duties and powers, judicial as well as executive. Indeed s. 37 would have been of little value if it had [208] to be read as only applying to the executive functions of Magistrates. This view of the section is made still more clear by the express provision that neither the Magistrate of the District nor the Subordinate Magistrates shall be subordinate to the Judge except to the extent and in the manner provided by the Act, and the power to sanction a prosecution for perjury committed before a Magistrate of any of the three classes is clearly not within such an exception. In fact it appears to me that for the purpose of applying s. 468 to such a case as that now before us, the term "Magistrate" in s. 37 and that of "Court" in s. 468 are convertible and have the same meaning; and—although I do not attach so much importance and force to interpretation clauses in Acts of the Legislature as is sometimes claimed for them, holding that they should not be read merely by themselves, but that they may be controlled and limited by other express provisions of the same law, and as a consequence, that if inconsistent with and repugnant to such other provisions they may be disregarded—yet they frequently are very useful, and in the present case we ought not to ignore the definition of "Criminal Court" in s. 4 of the Criminal Procedure Code, which considered in connection with the two other sections of the same Code I have remarked on, *viz.*, ss. 468 and 37, places the true view of the question now to be decided beyond any reasonable doubt.

My answer therefore to the question referred to us is that the Sessions Judge had no power to sanction the prosecution of Hira Lal and others, but that such sanction should have been sought at the hands of the Magistrate of the District.

PEARSON, J.—Magistrate and Sessions Judges are included in the term "Criminal Courts" defined in s. 4 of the Procedure Code. It is impossible to suppose that the Sessions Judge mentioned in s. 37 does not mean the Sessions Court, or that what is said about the subordinate Magistrates refers to them not as Criminal Courts, but only when engaged otherwise than in judicial proceedings. The Procedure Code regulates the procedure of Courts of Criminal Judicature. Section 468 must, in my, opinion, be read and interpreted with reference to s. 37; and thus it appears that the Court of a subordinate Magistrate is subordinate to the Court of the Magistrate of the District in the matter to which s. 468 relates, unless

[209] the Procedure Code has provided that in that matter subordinate Magistrates shall be subordinate to the Sessions Judge. No such provision has been made. My answer to the question referred to the Full Bench is therefore in the negative.

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SPANKIE, J.—We are asked by the Judge making the reference whether the Sessions Judge has power, under s. 468 of Act X of 1872, to sanction a prosecution, under ss. 211 and 193 of the Indian Penal Code, in the particular case giving rise to the reference.

An Assistant Magistrate of the First Class refused permission to an acquitted person to prosecute the complainant against him under the sections cited above. The party desirous to proceed criminally against the original complainant applied to the Sessions Judge for sanction to do so. The Sessions Judge gave permission, but subsequently recalled it, holding that "when sanction to prosecute has been refused by a Magistrate subordinate to a Magistrate of the First Class, an application to prosecute may be made to the Magistrate of the District, but cannot be made to the Sessions Judge."

Under the terms of s. 468 of the Criminal Procedure Code, the sanction of the Court, Civil or Criminal, before or against which the offence was committed or "of some other Court to which such Court is subordinate," is necessary. A "Criminal Court" means and includes every Judge or Magistrate, or body of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding—s. 4 of Act X of 1872;—and there are four grades of Criminal Courts in British India, *viz.*, (i) The Court of the Magistrate of the Third Class; (ii) The Court of the Magistrate of the Second Class; (iii) The Court of the Magistrate of the First Class; (iv) The Court of Session;—s. 5 of Act X of 1872. In every District, however, there must be a Magistrate of the First Class appointed by the Local Government who is called the Magistrate of the District, and he is to exercise throughout his district all the powers of a Magistrate,—s. 35 of Act X of 1872. Besides the Magistrate of the District, the Local Government may appoint as many other persons as it thinks fit to be Magistrate of the First, Second, or Third Class in the District,—s. 37 of Act X of 1872. Thus all these Magistrates so appointed, when inquiring into or trying any criminal case or engaged in any judicial [210] proceeding, are presiding over a Criminal Court. But all these Magistrates are made subordinate to the Magistrate of the District, but neither the Magistrate of the District nor the Subordinate Magistrates are made subordinate to the Sessions Judge, except to the extent and in the manner provided by the Act,—s. 37 of Act X of 1872. It is contended that s. 37 of the Act refers only to the subordination of Magistrates to the District Magistrate in their executive capacity, that such subordination is not of a judicial character, and that a Magistrate of the First Class is not subordinate to the Court of the Magistrate of the District, but to the Court to which appeals from the decisions of the Magistrates of the First Class ordinarily lie, namely, the Court of Session. But s. 37 makes no provision subordinating Magistrates to the District Magistrates solely in their executive capacity, though it does limit the subordination both of the District Magistrate and Subordinate Magistrates to the Sessions Judge to the extent and in the manner provided by the Act. When we consider what is the extent of the subordination to the Sessions Judge provided by the Act, it appears chiefly to be limited to cases committed for trial to the Sessions Court, to cases coming regularly before the Sessions Judge in appeal, and to those instances in which,

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under s. 295 of Act X of 1872, he may at all times call for and examine the record of any Court subordinate to himself as a Court for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court. In some other respects, however, hereafter to be mentioned, the Magistrates are subordinate to the Sessions Judge. It is, however, worthy of notice that a Magistrate of the District has the same power by s. 295 as the Court of Session has over the Courts of the Subordinate Magistrates. "Any Court of Session or Magistrate of the District may call for and examine the record of any Court subordinate to such Court or Magistrate for the purpose, &c., &c., &c." Here there is a distinct recognition of the subordination of *Courts* of Magistrates to the Magistrate of the District for a judicial purpose that of ascertaining whether there are any grounds for revision, and for the purposes of this particular section every Magistrate in a Sessions Division is to be deemed subordinate to the Sessions Judge of the Division. This is an illustration of the subordination of the Magistrate [211] of the District and of Subordinate Magistrates to the Sessions Judge as provided by the Act. I have used the words "judicial purpose," that of ascertaining whether there are any grounds for revision, because under s. 296 both Sessions Judge and District Magistrate, are called upon to exercise their judgment, and if they think that the judgment sent for under s. 295 is contrary to law, or that the punishment is too severe, or is inadequate, such Court or Magistrate may report the proceedings for the orders of the High Court. By the second clause, in Sessions cases, if a Court of Session or Magistrate of the District considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial. This illustrates the manner in which the Sessions Court or District Magistrate is to deal with the Subordinate Magistrate. So again by s. 298 as amended by s. 31 of Act XI of 1874, the Court of Sessions may direct the Magistrate of the District by himself, or any Magistrate subordinate to him, or the Magistrate of the District may direct any subordinate to make further inquiry into any complaint which has been dismissed under s. 147. Here the extent of subordination is clearly laid down, and it will be observed that, when the Magistrate of the District acts under this section, his authority extends to a Magistrate of the First Class. Those parts of the Code which deal with commitments to a Court of Session and to appeals sufficiently show to what extent the Courts of the Magistrates are subordinate to the Sessions Judge in respect of the cases which come before him as a Court of Session or Judge of appeals, and do not require further consideration. But the Act provides for the subordination of the Magistrates to the Sessions Judge in some other cases, as for instance the Sessions Judge can in any case, whether there be an appeal on conviction or not, direct that an accused person may be admitted to bail, or that the bail required by a Magistrate be reduced—s. 390 of Act X of 1872. He can also order or refuse a commission for the examination of a witness in cases under trial by a Magistrate—s. 330 of Act X of 1872. On the other hand s. 328 appears to give the Magistrate of the District considerable power over all Magistrates subordinate to him, even to the extent of ordering a new trial where a conviction has passed upon evidence [212] not wholly recorded by the Magistrate before whom the conviction was had, if he is of opinion that the accused person had been materially prejudiced thereby—s. 328 of

Act X of 1872. Under this section a Court of Appeal, and the District Magistrate, both are superior Courts to those of the Magistrate. The District Magistrate may also hear an appeal against the order of a Magistrate of the First Class requiring security for good behaviour—s. 267 of Act X of 1872.

It will be thus seen that the Magistrates of the First Class are to some extent judicially subordinate to the Magistrate of the District, as also to the Sessions Judge. But it is nowhere laid down that the Magistrate of the First Class is to be subordinate to the Magistrate of the District only so far as is provided by the Act, whereas neither the Magistrate of the district, nor the Subordinate Magistrate, are subordinate to the Sessions Judge "except to the extent and manner provided by the Act,"—s. 37. It would seem therefore that the words "all such Magistrates shall be subordinate to the Magistrate of the District" do not point exclusively to Magistrates in their executive, but also apply to them in their judicial character, except so far as the Act makes them subordinate to the Sessions Judge. It has been contended that the test as to the nature of the subordination of a Magistrate of the First Class to the Sessions Judge or Magistrate of the District lies in the answer to the following question,—To whom does an appeal lie from the Magistrate's decision? But this is, as we have seen, not the conclusive test. The true test is to be found in the words "except to the extent and manner provided by the Act." It is not provided in s. 468 that application is to be made to the Court of Session or to the High Court, but the words used are "except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate." Nor has the Act provided in this section, or anywhere else, that in respect of an application of the nature contemplated by s. 468 the Magistrate's Court is subordinate to that of the Sessions Judge, and therefore his interference would appear to be barred under the provision in s. 37 of the Act. The Magistrate of the First Class, it is urged, has the same powers as the Magistrate of the District has, and therefore the [213] latter acting as a Criminal Court within the terms of s. 4 is not a Criminal Court superior to that of the former, who therefore cannot be said to be subordinate to it in the sense required by s. 468. But the Magistrate of the District is specially appointed as such by the Government, and he exercises throughout his District all the powers of a Magistrate—s. 35 of Act X of 1872—and he does so although the District may have been divided into divisions—s. 40 of Act X of 1872. A Magistrate of the First or Second Class may be placed in charge of a Division of a District, and the officer so appointed exercises the powers conferred upon him under the Act, or under any law for the time being in force, "subject to the control of the Magistrate of the District"—s. 46 of Act X of 1872. The Government may also delegate its own powers of placing these Magistrates in Divisions of a District to the Magistrate of the District, Again, every Magistrate in a Division of a District is subordinate to the Magistrate of the Division of the District, subject, however, to the general control of the Magistrate of the District—s. 41 of Act X of 1872—so that throughout his District the subordination of all Magistrates to the Magistrate of the District is clearly provided for both in his executive and judicial character, except when the Magistrates are made by the Act subordinate to the Sessions Court. Whenever then the Magistrate of the District is engaged in any judicial proceeding, although he may not have larger powers in respect to the trial of offences and to passing sentences on persons convicted of them than a

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Magistrate of the First Class has, his Court is a Criminal Court to which the Courts of the Magistrates, except where they are made subordinate to the Sessions Judge, under the proviso of s. 37, are subordinate. Some doubt was expressed whether the entertainment of an application under s. 468 could be regarded as part of a judicial proceeding. But a judicial proceeding as defined in s. 4 includes any proceeding in the course of which evidence is or may be taken, and it cannot be denied that any Court to whom "a complaint" (in the words of s. 468) of an offence against public justice is made, would be at liberty, if it pleased, to examine the complainant, and even take evidence if it thought that there was any necessity to do so, in order to enable the Court to determine whether or not sanction should be given. There can therefore be no doubt that any Magistrate or Sessions Judge engaged **[214]** in determining whether the complaint under the section should be entertained would be acting as a Criminal Court. Again, the application made for sanction is "the complaint." The sanction may be expressed in general terms, and, authority once given, the complaint may be entertained. That that is so seems certain from the explanation attached to s. 470, that in cases under this chapter the report or application of the public servant or Court shall be deemed sufficient complaint. If so, then the application by a private individual for sanction is a sufficient complaint under s. 468 and s. 469 of the Code, for he appears in Court personally or by pleader, and subjects himself to examination.

In conclusion, I would say, in reply to the question, that the Sessions Judge had not power, under s. 468, to sanction the prosecution of Hira Lal and others, demanded by Gur Dayal for offences punishable under ss. 211 and 193 of the Indian Penal Code.

OLDFIELD, J.—The question is whether the Court of a Magistrate of the First Class is a Criminal Court subordinate to the Court of Session, within the meaning of s. 468 of the Criminal Procedure Code, so as to enable the Sessions Court to give sanction to entertain a complaint of an offence against public justice committed before or against the Magistrate's Court. By s. 37 of the Code Magistrates are not subordinate to the Sessions Judge except to the extent and in the manner provided by the Criminal Procedure Code, and it is argued that, with reference to this section, the Magistrate's Court cannot be held to be subordinate to the Sessions Court for the purposes of s. 468, there being no provision making the Magistrate subordinate for the purposes of that section.

But it is to be noticed that the word used in s. 468 is not Magistrate but Criminal Court, the sanction is required of the Court to which the Criminal Court is subordinate before which the offence is committed, not of the Sessions Judge to whom the Magistrate is subordinate. The argument proceeds on the supposition that the term, Magistrate in s. 37 and Criminal Court in s. 468 are used indiscriminately, but s. 4 of the Code contains a special definition of the term Criminal Court. It is something more than Magistrate. "Criminal Court" means and includes every Judge or Magistrate, or body **[215]** of Judges or Magistrates, inquiring into or trying any criminal case or engaged in any judicial proceeding. When we find a special definition of the term Criminal Court, I think it is putting a strained meaning on the term Magistrate in s. 37 to say that it extends so as to include Criminal Courts. A Criminal Court may mean and include a Magistrate; but the term Magistrate will not necessarily mean and include a Criminal Court. If s. 37 had been dealing with the subordination of Criminal Courts, it is reasonable to suppose that the words Criminal

Courts would have been used instead of Magistrate. The distinction is one which the Code itself draws, and is important, for while s. 37 limits the subordination of Magistrates to Sessions Judges, there is nothing in the Code to the effect that the Court of the Magistrate of the First Class is not subordinate to the Court of the Sessions Judge, but on the contrary its subordination as a Criminal Court, that is, where a Magistrate is acting judicially, seems contemplated and enforced by the provisions of the Code, for instance, by the appellate jurisdiction of the Sessions Court over Magistrates' Courts, and more particularly by the powers conferred on the Court of Session over the Courts of Magistrates by ss. 295 and 296. This establishment of a power of supervision and revision seems to me in itself to constitute a subordination, within the meaning of s. 468. Section 37 may be dealing with the subordination of Magistrates personally and executively, and not with Criminal Courts. I do not think we need consider it in interpreting s. 468, which deals with the subordination of Criminal Courts, but be this as it may, as I have already remarked, it seems to me that the intention and effect of ss. 295 and 296 are to constitute the subordination to the Sessions Court of the Magistrates' Courts; which thereby become subordinate Criminal Courts within the meaning of that term in s. 468. I think we have in s. 419 an indication of what is intended to constitute subordination of Criminal Courts. That section is dealing with orders passed by Criminal Courts for disposal of property and runs: "Any Court of Appeal, Reference, or Revision, may direct any such order passed by a Court subordinate thereto to be stayed, and may modify, alter or annul it." The use here of the words subordinate Court seems to show that Courts over which Courts of Appeal, Reference, and Revision are appointed are subordinate to the latter in the meaning of the term as used in [216] the Code. This subordination will not of course enable the Sessions Court to exercise any powers over the Magistrate's Court other than those allowed by the Code. The learned Judges who decided *Imperatrix* v. *Padmanabh Pai* (1), and who have taken a contrary view to the one I have expressed, seem to consider that the Legislature intended that the sanction contemplated should be given by the Court before which the offence was committed or by the appellate Court or the High Court, in fact that the Legislature intended to recognise a subordination of the Magistrates' Courts to the Sessions Court, within the meaning of s. 468, but they consider that, in face of the express provisions in s. 37 applied to s. 468, they cannot give effect to a possible intention of the Legislature. For my part, I think that the law as it stands and the intention of the Legislature are not irreconcilable.

My answer to the reference is that the Sessions Court has power under s. 468 to sanction the prosecution.

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(1) 2 B. 384.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

AHMAD BAKHSH (*Defendant*) *v.* GOBINDI (*Plaintiff*).*
[27th March, 1879.]

Act VIII of 1871 (*Registration Act*), s. 17—*Mortgage—Registration.*

The obligors of a bond for the payment of money charging land agreed to pay the principal amount, Rs. 99, within six months after the execution of the bond, and to pay interest every month on the principal amount at the rate of two per cent., and that, in the event of default of payment of the interest in any month, the whole amount mentioned in the bond should become due at once. There was no stipulation preventing the obligors from repaying the loan at any time within the six months after which it was reclaimable. *Held* that the only amount certainly secured by the bond was the principal, and the bond did not therefore need to be registered (1).

[F., 12 A. 688 (689).]

THE facts of this case were as follows: In 1871 certain persons gave the plaintiff in this suit a bond for the payment of Rs. 75 by [217] instalments, without interest, within five years, which bond charged certain land with such payment. This bond did not need to be and was not registered. On the 11th January 1874 the same persons gave Ahmad Bakhsh, the defendant in this suit, a bond for the payment of Rs. 99. In this bond, which was registered, the obligors agreed to pay the principal amount within six months from the date of the execution of the bond. They also agreed therein to pay interest on the principal amount every month at the rate of two per cent., and that if they failed to pay such interest in any month, the obligee should be at liberty to sue to recover "the entire amount mentioned in the bond," and they charged the same land with the payment of "the amount mentioned in the bond." On the 7th August 1874 Ahmad Bakhsh obtained a decree on his bond which declared his lien on the land; and on the 24th November 1876 the plaintiff in this suit obtained a decree on his bond declaring his lien on the land. On the 26th December 1876 the land was attached in the execution of Ahmad Bakhsh's decree, and on the 15th April 1877 it was attached in the execution of the decree of the plaintiff in this suit. On the 20th April 1877 the land was sold by auction in the execution of these decrees, and was purchased by the plaintiff in this suit. The Court executing the decrees directed that the sale-proceeds should be paid to Ahmad Bakhsh as the creditor who had first attached the land. The present suit was brought by the plaintiff against Ahmad Bakhsh to recover the money so paid to him. The Court of first instance gave the plaintiff a decree, which the lower appellate Court, on appeal by the defendant, affirmed, holding, *inter alia*, that the registration of the defendant's bond was compulsory, and that consequently the fact that it was registered did not give it preference over the plaintiff's bond the registration of which was optional.

The defendant appealed to the High Court.

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* Second Appeal, No. 1078, of 1879 from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Agra, dated the 26th July 1878, affirming a decree of Rai Bansi Dhar, Munsif of Agra, dated the 8th June 1878.

(1) See also *Karan Singh* v. *Ram Lal*, 2 A. 96, where it was held that a bond for Rs. 83-8-0 payable on demand with interest did not certainly secure Rs. 100, and its registration was therefore optional.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the appellant. 1879 MARCH 27.

Munshi *Hanuman Parshad* and Mir *Zahur Husain*, for the respondent.

APPELLATE CIVIL.

JUDGMENT.

The judgment of the Court was delivered by

[218] PEARSON, J.—In the bond executed in favour of the defendant, appellant, there was no stipulation preventing the debtor from repaying the loan advanced to him at any time within the six months after which it was reclaimable. This being so, it cannot be said that any portion of the interest accruing on the principal was secured for certain, in the sense that it could be definitively calculated and taken into account at the date of the execution of the deed. The only amount certainly secured was the principal which was below Rs. 100. The bond did not therefore need to be registered; but having been registered is entitled to take effect against the unregistered bond executed in the plaintiff's favour. The property was moreover first attached by the defendant, appellant, who, for that reason as well as because his bond is registered, is entitled to preference over the plaintiff, respondent. We accordingly decree the appeal with costs of all Courts, reversing the decree of the lower Courts, and dismiss the suit. 2 A. 216 = 4 Ind. Jur. 40.

Appeal allowed.

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2 A. 218 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* SARMUKH SINGH. [28th March, 1879.]

Act XI of 1872 (*The Foreign Jurisdiction and Extradition Act*), *ss.* 3, 9—*Liability of Native Indian British Subject for offence committed in Cyprus*—"*Native State*"—*Act V of* 1869 (*Indian Articles of War*), *arts.* 170, 171—*Reference—Confirmation of Sentence of Death—Act X of* 1872 (*Criminal Procedure Code*), *ss.* 288, 297—*Division Court—Full Court.*

Held (STUART, C.J., dissenting) that a Native Indian subject of Her Majesty, being a soldier in Her Majesty's Indian army, who committed a murder in Cyprus while on service in such army, and who was accused of such offence at Agra, might, under s. 9 of Act XI of 1872, be dealt with in respect of such offence by the Criminal Courts at Agra, Cyprus being a "Native State," in reference to Native Indian subjects of Her Majesty, within meaning of that Act (1).

Per STUART, C.J.—The power of the Governor-General of India in Council to make laws for the trial and punishment in British India of offences committed by British Indian subjects in British territories other than British India discussed.

[219] A Division Court of the High Court ordered the Magistrate who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into such charge, considering that the Magistrate had jurisdiction to make such inquiry. The Magistrate inquired into the charge and committed the accused person for trial. The Court of Session convicted the accused person on the charge and sentenced him to death. The proceedings of the Court of Session having been referred to the High Court for confirmation of the sentence, the case came before the Full Court.

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(1) As to the power of the Governor-General in Council to legislate for Native Indian subjects of Her Majesty, see 32 and 33 Vic., c. 98, ss. 1 and 2.

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Held per STUART, C.J., SPANKIE, J., and OLDFIELD, J., that, in determining whether such sentence should be confirmed, the Full Court was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a Court of competent jurisdiction.

[R., 24 B. 287=1 Bom. L.R. 678.]

SARMUKH SINGH was a soldier in Her Majesty's Indian Army, and on the 21st August 1878 was serving with his regiment in the Island of Cyprus. In December 1878 his regiment having returned to India and being then stationed at Agra, Sarmukh Singh was charged before the Cantonment Magistrate of Agra with having, on the 21st August 1878 at Baffo, Cyprus, murdered one Dewa Singh, another soldier. The Cantonment Magistrate refused to inquire into this charge, on the ground that be could not take cognizance of an offence committed in Cyprus. An application was then made to the High Court on behalf of the Local Government, under s. 297 of Act X of 1872, praying that the Cantonment Magistrate might be ordered to inquire into the charge. The High Court (Pearson, J., and Turner, J.), on the 24th January 1879, made an order directing the Cantonment Magistrate to inquire into the charge on the following terms:

"The ninth section of Act XI of 1872, the Foreign Jurisdiction and Extradition Act, declares that all British subjects, European and Native, in British India, may be dealt with in respect of offences committed by them in any Native State as if such offences had been committed in any place within British India in which any such subject may be or may he found, and in s. 3 of the Act the term 'Native State' is defined as meaning, in reference to Native Indian Subjects of Her Majesty, all places without and beyond the Indian territories under the dominion of Her Majesty. Cyprus is a place without and beyond the Indian territories under Her Majesty's dominion, and is therefore a Native State as defined in that Act. Consequently the prisoner being in the Agra Cantonment [220] may be dealt with in respect of the offence it is alleged he has committed in Cyprus as if such offence had been committed in the Agra Cantonment. The Indian Articles of War are not inconsistent with the provisions of the Foreign Jurisdiction Act to which we have referred. Although the titles of arts. 170 and 171 are inaccurate, the former declares that any person subject to the articles who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by her Majesty, or by the Government of India, &c., is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, shall be delivered over to the nearest Magistrate to be proceeded against according to law; and art. 171 declares that such offences, when committed by any person amenable to the Articles, shall in any place out of British India be cognizable by a General Court Martial. The prisoner is accused in British India within the jurisdiction of Courts of Criminal Justice established by the Local Government; he must be delivered to those for trial, the offence of which he is accused not being included in the Articles which precede art. 170. The Magistrate is directed to hold an inquiry and to proceed according to law. The prisoner, a sepoy in the 13th Native Infantry, was accused of having committed murder in the Island of Cyprus, and was in custody under that charge in the Cantonment of Agra. The military authorities desired that an inquiry into the charge should be made by the Cantonment Magistrate, and for that purpose the prisoner was sent to the Cantonment Magistrate's Court and a charge preferred. The Cantonment Magistrate has declined to hold an inquiry on the ground that he

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has no jurisdiction. We may observe in passing that no record of the proceedings was framed by the Cantonment Magistrate. This should have been done and the grounds stated on which the Magistrate arrived at the conclusion that the charge was not cognizable by him. The Government has applied to this Court to order the Magistrate to inquire into the charge, and in our judgment it is entitled to the order."

In pursuance of this order the Cantonment Magistrate inquired into the charge and committed Sarmukh Singh to the Court of Session for trial on it. He was tried by Mr. H. G. Keene, Sessions Judge of Agra, and was found guilty, the assessors concurring, and was sentenced to death.

[221] Sarmukh Singh appealed to the High Court on the ground that the Sessions Judge had no jurisdiction to try him for an offence committed in Cyprus. The appeal came on for hearing before the Full Court.

Pandit *Ajudhia Nath*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

The *Junior Government Pleader.*—The order dated the 24th January last, made under s. 297 of Act X of 1872, decides that the Criminal Courts at Agra had jurisdiction. That order, though actually the order of a Division Court, is virtually the order of the High Court, and is final, and cannot be reviewed by the High Court, there being no provision in the Code for the review of an order made by the High Court under s. 297. Neither is there any appeal to the Full Court from an order made under s. 297 by a Division Court. To re-open the question whether the Agra Courts had jurisdiction is to allow such an appeal to the Full Court.

Pandit *Ajudhia Nath.*—The question now is whether the appellant has been convicted by a Court of competent jurisdiction. That question was not decided by the order of the 24th January. With reference to the question of jurisdiction, the preamble to Act XI of 1872 shows that the term "Native State" as used in the Act can only mean, with reference to Native Indian subjects, places beyond the limits of British India in which the Governor General of India in Council has power and jurisdiction. The definition of the term in s. 3 of the Act must be read in connection with the preamble. Cyprus is not a place beyond the limits of British India in which the Governor-General in Council has power and jurisdiction, and it does not therefore fall within the definition of a "Native State." Under art. 171 of the Indian Articles of War the appellant should have been tried by Court Martial.

The *Junior Government Pleader.*—Act XI of 1872 is an Act for, amongst other things, amending the law relating to offences committed by British subjects beyond the limits of British India, and to the extradition of criminals. By s. 1 of the Act the Act [222] extends to all Native Indian subjects of Her Majesty without and beyond the Indian territories of Her Majesty. The term "Native State" as used in the Act expresses shortly what it took several sections of Act I of 1849, the law amended by Act IX of 1872, to express. Cyprus is a place beyond Her Majesty's Indian territories, and therefore falls within the definition of the term "Native State" contained in s. 3 of Act IX of 1872. The appellant could have been tried in this country under Act I of 1849, and Act XI of 1872 only amends that law. Section 3 of the Indian Penal Code contemplates that offences committed beyond British India are triable within British India. The power of a State to try and punish within such State offences committed by its subjects beyond its limits is allowed by authorities on international law, see Wheaton on International Law, 8th ed., pp. 179, 180. That power has

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been recognised and given effect to by English Acts of Parliament, see 26 Geo. III, c. 57, s. 29, and 33 Geo. III, c. 52, s. 67.

JUDGMENTS.

The following judgments were delivered by the Full Court:

STUART, C.J.—This is a reference for confirmation of a capital sentence passed on the accused Sarmukh Singh by the Sessions Judge of Agra under these circumstances: On the recent occupation by the British of the Island of Cyprus, situated in the Mediterranean, and within the Empire of European Turkey, one of the regiments forming part of the military forces on the occasion was an Indian regiment, the 13th Native Infantry, and in the regiment was a man named Sarmukh Singh. On the night or early in the morning of the 21st of August 1878, while the regiment was still at Cyprus, another sepoy named Dewa Singh came to his death by a shot from a rifle fired, it was believed, by Sarmukh Singh. He was at once placed in custody by the military authorities, and on the return of the regiment shortly after to Agra, in the North-Western Provinces of India, he was handed over to the Civil Court of that district for trial, and the case came before the Cantonment Magistrate of Agra for the purpose of commitment. But the Cantonment Magistrate believing that he had no jurisdiction to entertain the case ordered the prisoner to be at once sent back to the Commanding Officer of the regiment, with an intimation to that effect; [223] whereupon an application for revision under s. 297 of the Criminal Procedure Code was made by the Government to this Court complaining of the Magistrate's proceeding, and praying that he be ordered to inquire into the charge against the accused, with a view to his commitment for trial to the Court of Session at Agra. On that application coming before a Bench of the Court, Pearson and Turner, JJ., the accused was not represented, while the Government Pleader appeared for the Crown. The case was therefore heard *ex parte*, and in the result the application for revision was granted, the Bench being of opinion, from their reading of Act XI of 1872, that notwithstanding that the facts had occurred at Cyprus, the civil authorities of Agra had jurisdiction to entertain the case, and the Cantonment Magistrate was ordered to inquire into the charge. The inquiry was accordingly made, and the accused committed for trial on the charge of murder before the Sessions Judge of Agra, who, after hearing evidence, convicted the accused, Sarmukh Singh, and sentenced him to death.

On the case coming up to this Court again for confirmation of sentence, and feeling serious doubts of the soundness of the decision in favour of the jurisdiction at Agra, I directed the case to be brought before the Full Bench by the following order: "In the ordinary course this case should go before a Bench of the Court for confirmation of the capital sentence, but the peculiarity of the procedure that has taken place is such that I consider it ought to be heard by myself and the Judges of the Court in Full Bench. The reference to us for confirmation of the sentence assumes that the Magistrate and Judge of Agra had jurisdiction to entertain the case, and it has been so decided by a Division Bench of this Court. But the proceeding was entirely *ex parte*, and the question may be reconsidered. I therefore direct that this case be brought before a Full Bench of the Court."

The case came before a Full Bench accordingly, when Pandit Ajudhia Nath, a pleader of this Court, appeared for the accused against the confirmation of the sentence, on two grounds, the first of which was that, whereas the murder is said to have been committed by the appellant in

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Cyprus, the Sessions Judge of Agra had no jurisdiction to try the appellant on that charge; the second ground [224] was on the merits and for the purpose of this judgment need not be further referred to.

On the reference for confirmation of the sentence coming on for consideration, the Junior Government Pleader took preliminary objection that the judgment of the Division Bench could not be called in question in such a proceeding, but that contention we had no difficulty in disallowing. My colleagues Mr. Justice Spankie and Mr. Justice Oldfield have given cogent reasons against such an objection, and in all they say on this subject I concur. But I may add it appears to me that such an objection is sufficiently disposed of by s. 297 of the Criminal Procedure Code. By s. 288 it is provided that "in any case so referred, whether tried with assessors or by jury, the High Court may either confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction, and order a new trial on the same or an amended charge, or may acquit the accused person;" and any sentence warranted by law includes of course any judgment, sentence, or order authorised by s. 297.

The argument was then addressed to the principal question raised by the reference, *viz.*, whether the Court at Agra had jurisdiction to try the accused for the murder alleged to have been committed by him in Cyprus, and on that question the doubt I originally entertained when I read the judgment of the Division Bench has on reflection been fully confirmed. The question is one purely of law, and depends for its solution on the true intent and meaning of Act XI of 1872 entitled "an Act to provide for the trial of offences committed in places beyond British India and for the Extradition of Criminals." Other Acts of the Indian Legislature and of the British Parliament were referred to, but at best they appear to me to serve merely as illustrative of what had been done in regard to the commission of and trial for offences under different, although analogous, circumstances, while they did not appear to me to give any support to the argument for the Crown. These Acts and authorities were Act I of 1849, the Indian Articles of War, being Act V of 1869, and provisions in two Acts of the British Parliament, 26 Geo. III, c. 57, s. 29, and 33 Geo. III, c. 52, s. 67. I shall afterwards refer more particularly to these authorities, but meanwhile I desire to direct attention to Act XI of 1872 upon the true [225] construction of which the question now before us more especially depends, and it contains within itself matter quite sufficient for that purpose. The judgment of the Bench now under our consideration begins by referring to s. 9, and for the meaning of the words "Native State" there, the interpretation of the expression as given in s. 3 of the Act is referred to, it being assumed that that definition is wide enough to include not only Indian Native States, but all other places in any part of the world without and beyond British India, and that therefore the Island of Cyprus is a "Native State" within the meaning of the definition. And no doubt if this definition could be read by itself without reference to or connection with any other part of the Act, it is comprehensive enough to include not only Cyprus but any "place" in the habitable globe. Can that really have been the meaning and intention of the Legislature when it passed this Act? It seems impossible to believe it. The Act itself shows the limits within which the definition in question is to be applied, and we have only to look to the preamble to see what these limits are. It is remarkable that the judgment now under our consideration make no allusion whatever to the preamble, but reads the term "Native State" simply by itself and without the least regard

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to such a guide and light in the interpretation of Acts of the Legislature as the preamble. The preamble is as follows: "Whereas by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means the *Governor-General of India in Council has power and jurisdiction within divers place beyond the limits of British India:* and whereas *such* power and jurisdiction have from time to time been delegated to Political Agents and others *acting under the authority of the Governor-General in Council;* and whereas doubts have arisen how far the exercise of such power and jurisdiction and the delegation thereof are controlled by and dependent on the laws of British India; and whereas it is expedient to remove *such* doubts, and to consolidate and amend the law relating to the exercise and delegation of *such* power and jurisdiction, and to offences committed by British subjects beyond the limits of British India, and to the extradition of criminals: It is enacted, &c." The purpose, intent, and limits of everything in Act are thus plainly seen, and "Native State" means and means only a place so defined, that is, a place where by treaty, &c., the Governor-General [226] of India in Council has jurisdiction, and Cyprus certainly is not such a place. The Government of India have no power and jurisdiction there, no more than that Government has power and jurisdiction in all the capital towns and countries not only of Europe but in the four quarters of the globe. This is what the ruling of the Division Bench not only leads to, but necessarily involves. In support of that ruling the two forms of the definition as given in the Act were referred to as showing that places such as Cyprus were clearly within the meaning of the first part of the definition, and which states that "Native State" means, "in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominions of Her Majesty," and this *arguendo* was contrasted with the other part of the definition, which says that "Native State" means, "in reference to European British subjects, the dominions of Princes and States in India in alliance with Her Majesty." But so far from affording any contrast to the first part of the definition, it is simply to my mind, as regards the expression "Native State," another way of saying the same thing, unless it be supposed that the Legislature of India were anxious to provide against the possibility of their being understood to have contemplated the application of the Indian Penal Code to Englishmen on account of offences committed in England, or any part of Europe where there is established law and properly constituted tribunals. Both parts of the definition read by the light of the preamble mean one and the same thing, *viz.*, a "Native State," where by treaty, capitulation, &c., the Governor-General has power and jurisdiction.

Allusion was made at the hearing to the third and fourth sections of the Indian Penal Code, Act XLV of 1860. Section 3 provides that any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories." This raises, in a somewhat loose way, the same argument we have had to consider under Act XI of 1872. It is to be observed that the Indian Penal Code was passed in [227] 1860, and came into operation on the 1st January 1862, and therefore long before the passing of Act XI of 1872, and it affords therefore no assistance in interpreting the words "Native State" as used in the Act, although I think it can only mean "Native State" within the purview of its preamble.

And by s. 4 of the Penal Code the words "the dominions of any Prince or State in alliance with the Queen" are to my mind plainly synonymous with "Native State" as used in Act XI of 1872. But is it really the case that Cyprus is a "Native State" in the sense of being a foreign country, *i. e.*, a country not subject to but foreign to the Queen's Government? I think it may be gravely doubted whether Cyprus is such a "Native State" or a "Native State" in any sense whatever. It has for the present been ceded by the Turkish Government to the Crown of England. This is shown by the treaty between the two powers called "Convention of defensive alliance between Great Britain and Turkey," signed the 4th June 1878, and by the first articles of which it is, among other things provided as follows: "In order to enable England to make necessary provision for executing her engagements, His Imperial Majesty the Sultan further consents to *assign the Island of Cyprus to be occupied and administered by England*," and the Island is accordingly occupied by military forces directly under the control and command of the Queen's Government, and it is governed, and in all respects fully administered, by English officials, and it would be hopeless to discover this state of things as in any way contemplated by Act XI of 1872, or to maintain that Cyprus under such conditions was within the meaning and intent of that Act a "Native State," for so far from being a place in the sense of a "Native State" without and beyond the dominion of Her Majesty, it is directly administered by Her officers, and is under Her Majesty's dominion and control.

I shall now briefly notice the other Acts and authorities to which I have already alluded as bearing on the construction to be put on Act XI of 1872. The first of these is Act I of 1849, which is entitled "an Act to provide more effectually for the punishment of offences committed in Foreign States," and which, to say the least, affords no support whatever to the argument for the prosecution. It recites the various old Indian Regulations which it states it is [228] expedient to make more effectual and uniform, and also to extend their application, and then by s. 2 it provides that "all subjects of the British Government, and also all persons in the civil or military service of the said Government, while actually in such service and for six months afterwards, and also all persons who shall have dwelt for six months within the *British territories* under the Government of the East India Company, subject to the laws of the said territories, who shall be apprehended *within the said territories or delivered into the custody of a Magistrate within the said territories, wherever apprehended*, shall be amenable to the law for all offences committed by them *within the territory of any Foreign Prince State*, and may be bailed or committed for trial as hereafter provided, on the like evidence as would warrant their being held to bail or committed for the same offence, if it had been committed within the British territories." This speaks for itself, the expression Foreign Prince or State plainly meaning not such a place as Cyprus, but any Foreign Prince or State in India, or in other words, "Native State," while by the words "the British territories" can only be intended territories or possessions in India as distinguished from those of a "Native State" there. The expression "*the* British territories" occurs in other section of the Act while the word "Government" is defined to mean the *Governor or Governor in Council or other person or persons having supreme executive authority in the Presidency or place to which the committing Magistrate belongs.* The whole Act is only intelligible as a law to be carried out in India, having reference on the one hand to the British territories and on the other to those of Native Princes or States. Section 9, the

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last section of this Act, is not undeserving of notice: it provides that the authority given to the Government may also be exercised by any Commissioner or other person acting in the civil service, a provision which is consistent with the other portions of the Act, and which it would surely be absurd to apply to Cyprus.

With regard to the Indian Articles of War, art. 171 has been referred to. It is there provided that "in any place out of British India offences against the Indian Penal Code, and not included in the foregoing Articles, shall, when committed by any person amenable to these Articles, be cognizable by a General Court Martial [229] to be convened by any officer who is empowered by warrant, or Order in Council, or by art. 77, to appoint General Courts Martial." Now it appears to me that the fair inference from such an express provision is that, in contemplation of the Legislature which passed it, there was no other law on the subject, and the trial by Court Martial was the only and sole proceeding intended for offences against the Indian Penal Code committed in places out of British India by persons subject to the Articles of War. Such offences are distinctly and expressly so specified, and we are not left to surmise or suggestion such as is necessary in order to favour the reading of the term "Native State" as maintained by the prosecution in this case.

The next authority referred to in support of the conviction was the 29th section of the Act of Parliament, 26 Geo. III, c. 57, as showing that the jurisdiction of the Courts in British India over any of the King's subjects could be extended so as to include cognizance of offences committed beyond British territory, and not only in India, *i.e.*, in States governed by Native Princes, but in other parts of the world. But in my judgment the 29th section has exactly the opposite effect, for it plainly appears to me to limit the extension of the authority of the Courts in question to the countries or parts of the world specially selected and named, and that not only no other places but that no general or indefinite extension of jurisdiction was intended. The 29th section of 26 Geo. III, c. 57, is in these terms: "That as well the servants of the said United Company, as all other of His Majesty's subjects resident or to be resident in India, shall be and are hereby declared to be amenable to the Courts of oyer and terminer and goal delivery, and Courts of general or quarter sessions of the peace, in any of the British settlements in India, for all murders, felonies, homicides, manslaughters, burglaries, rapes of women, perjuries, confideracies, riots, routs, retainings, oppressions, trespasses, wrongs, and other misdemeanours, offences, and injuries whatsoever, by them done, committed, or perpetrated, in any of the countries or parts of *Asia, Africa or America, beyond the Cape of Good Hope, to the Straits of Magellan, within the limits of the exclusive trade of the said United Company*, whether the [230] same shall have been done, committed, or perpetrated, or shall hereafter be done, committed, or perpetrated, against any of His Majesty's subjects, or against any other person or persons whatever." It will be observed that the countries or parts of the world to which this section was to apply were "Asia, Africa, or America, beyond the Cape of Good Hope, to the Straits of Magellan," a definition and description which by no contrived meaning or ingenuity could be made to apply to Cyprus or any other place in the same position or relation to the British Government or the Government of India.

The only other authority in support of the conviction I need refer to was another Act of the British Parliament, the 33 Geo. III, c. 52, and s. 67 of that Act. I was I confess not a little surprised that this s. 67 should have

been referred to on behalf of the Government, for it is not only plainly inconsistent with the conviction of the accused by the Agra Court, but it supplies an express definition of the lands or territories to which its application was to be limited altogether at variance with the meaning attempted to be put upon the term "Native State" as that is used in Act XI of 1872. Section 67 of the 33 Geo. III, c. 52, is in the following terms: "That all His Majesty's subjects, as well servants of the said United Company as others, shall be and are hereby declared to be amenable to all Courts of Justice, both in India and Great Britain, of competent jurisdiction to try offences committed in India, for all acts, injuries, wrongs, oppressions trespasses, misdemeanours, offences, and crimes whatever, by them, or any of them, done, or to be done, or committed in any of the lands or territories of any Native Prince or State, or against their persons or properties, or the persons or properties of any of their subjects or people, in the same manner as if the same had been done or committed within the territories directly subject to and under the British Government in India." The words here used are thus made distinctly to apply to "the lands or territories of any Native Prince or State," and the offences described being offences "committed *in India*," and the expression "Native State" must be similarly limited. This provision therefore of the 33 Geo. III, c. 52, is an authority directly and expressly against the jurisdiction of the Agra Court in the present case.

[231] I have now, I think, adverted to all the principal authorities referred to in support of the conviction and of the application for confirmation of sentence, and, I think, I have shown that not only do they fail to afford that support, but that their weight, if not their distinct and express bearing, is entirely in the opposite direction. The conclusion therefore at which I arrive is that Cyprus is not a "Native State" within the meaning of Act XI of 1872, that in fact it is not a "Native State" in any sense. It never was and is not now a "Native State" in relation to Turkey, for it was and in some sense still in part of the Turkish dominions. It cannot I consider be otherwise in its relation to the English Crown and Government, nor can we make it so by any interpretation of our laws.

But there is another and most serious consideration which I feel bound to notice, *viz.*, whether it is within the powers of the Indian Legislature not to pass such a law as Act XI of 1872, but a law capable of such a construction as is necessary in order to sustain this conviction of Sarmukh Singh. In other words can the Government of India in its legislative capacity pass a law for trial and punishment in respect of offences committed in other territories and jurisdictions governed and administered by and equally representing the Crown and Government of England? I think the answer to these questions in the affirmative might be successfully disputed. On this subject our attention was directed to certain opinions expressed by Wheaton in his International Law, 8th edition, pp. 179, 180, ss. 111-113. Wheaton there lays down that every sovereign State is independent of every other, in the exercise of its judicial power. But this general position must of course be qualified by the exceptions to its application arising out of express compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with other States, for some common purpose. "Subject to these exceptions, the judicial power of every State is co-extensive with its legislative power." Wheaton goes on to state that: "The judicial power of every independent State, then, extends, with the qualifications mentioned,—(1) to the

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punishment of all offences against the municipal laws of the State, by whomsoever committed within the territory; (2) [232] to the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports; (3) *to the punishment of all such offences by its subjects, wheresoever committed.*" This last sentence would require more precise definition even if Cyprus was truly a "Native State" within the meaning of Act XI of 1872, without the tribunal and procedure afforded by the Articles of War. Wheaton further lays down as follows: "By the common law of England, which has been adopted in this respect in the United States, criminal offences are considered as altogether local and are justiceable only by the Courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States, and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the Courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favour of the jurisdiction of the Courts of the offender's country." The legal doctrine which it is here admitted is paramount in the British and American Courts, *viz.*, that criminal offences are local and triable only where committed, appears to be qualified in a rather doubtful manner, on the authority too of certain jurists among whom there is a difference of opinion, although the weight of authority favours the jurisdiction of the offender's country, and the views so stated assume their application to a distinctly foreign State. But it is unnecessary to pursue the subject further, as, I think, I have shown that Cyprus is clearly not a foreign or "Native State" according to the true intent and meaning of Act XI of 1872.

For all these reasons I am of opinion that the conviction in the present case cannot stand, seeing that it rests on the authority of a Court which was without jurisdiction to try the accused.

PEARSON, J.—The question of jurisdiction raised by the first plea in appeal, and decided by Mr. Justice Turner and myself on [233] the 24th January last, and now brought before the whole Court for reconsideration, is in so far as it relates to s. 3 of Act XI of 1872 simply whether Cyprus is or is not without and beyond the Indian territories under the dominion of Her Majesty; upon this point there is no room for discussion. The provisions of s. 9 of the Act appear to be quite within the competency of the Legislature, and to be not less consistent with sound reason and good policy than conducive to the interests and ends of justice.

Apart from the question whether Cyprus is a Native State as defined in s. 3 of Act XI of 1872 is the question of the construction to be put on the 170th and 171st Articles of War. I entertain no doubt that the construction placed by Mr. Justice Turner and myself in our proceeding of the 24th January last is correct.

The evidence on the record fully convicts the prisoner of the offence of murder, and there are no circumstances which would warrant a modification of the sentence passed upon him by the Agra Sessions Court. I would dismiss his appeal and confirm the sentence.

SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader, that this Court had no power to review under s. 297

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of the Criminal Procedure Code the ruling that the Cantonment Magistrate of Agra had jurisdiction to inquire into the charge of murder preferred against Sarmukh Singh. The Criminal Procedure Code provides that no judgment or final order, once signed, shall be altered or reviewed by the Court which gives such judgment or order we are not now asked to review the order of the Division Bench which directed the Magistrate to commence the inquiry. That order was not a final order or judgment in the case. It was a preliminary order. At the stage at which the case has now arrived, we are called upon to consider whether we can confirm the sentence of death passed upon the prisoner who has been convicted of murder. An appeal has been preferred from the sentence passed by the Sessions Judge, and the question of jurisdiction has again arisen. The case has been laid before all the Judges of this Court, and I do not understand how we are precluded from determining this question of jurisdiction because, for the purpose of determining whether or not the Magistrate should make an inquiry, a Division [234] Bench of the Court had ruled that he was competent to do so. If we come to a decision that there was no jurisdiction, then the commitment was bad, we could not confirm the sentence of death, and would be competent to annul the proceedings. Again, if there was no jurisdiction, it would be monstrous if we were to hold that we were bound to accept as conclusive the order of this Court sitting as a Division Bench, directing the Magistrate to commence his preliminary inquiry.

On the point of jurisdiction I see no possibility of differing from the learned Judges who directed that the inquiry should proceed. Act XI of 1872 is one to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals. It is called the Foreign Jurisdiction and Extradition Act. The definition of Native State may be arbitrary, but it must be accepted. There is no doubt whatever of the power of legislation to pass such an Act in regard to the native subjects of the Empress, and if this be so, the object of the Act being to provide for the punishment of offences committed by them beyond British India as if they had been committed in British India, Cyprus or any other foreign country, would be a "Native State," in reference to the prisoner in this case, within the meaning of the Act. I also accept the view taken by the learned Judges as to Articles 170 and 171 of the Articles of War. There are no grounds whatever for not accepting the decision of the Sessions Judge on the merits. I would therefore confirm the sentence of death passed upon the prisoner.

OLDFIELD, J.—The material point raised by the counsel for the prisoner is that the Agra Sessions Court had no jurisdiction to try the prisoner, a soldier in the 13th Native Infantry, for the offence of murder committed in Cyprus. A preliminary objection was taken on the part of the prosecution that the Court cannot now go into the questions of jurisdiction, since it has been determined by the order of two Judges of this Court on the 24th January 1879. That order was made under s. 297 of the Criminal Procedure Code, and it directed the Cantonment Magistrate of Agra to inquire into the charge against the prisoner, and in passing the order the learned Judges held that the Agra Court had jurisdiction to entertain the charge.

[235] The case is now before this Court for confirmation of the sentence of death passed by the Sessions Judge on the prisoner, convicted for murder under s. 302 of the Indian Penal Code, and in dealing with it, it is incumbent on us and our absolute duty before we can affirm the

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sentence to satisfy ourselves that the sentence is one which could legally be passed by the Sessions Judge, and we cannot be restricted by any order which may have been passed in the course of the proceeding. I may add that I can find no prohibition in the Code of Criminal Procedure against a review of an order of the nature of the one which has been made in this case. The only express prohibition contained in the Criminal Procedure Code against altering or revising orders is in s. 464, and that section refers to judgments and final orders given under Ch. XXXIV on conclusion of a trial in any Criminal Court.

On the question of jurisdiction I concur in the view taken by Mr. Justice Pearson and Mr. Justice Turner in their order of the 24th January last. Act XI of 1872 is an "Act to provide for the trial of offences committed in places beyond British India, and for the extradition of criminals." Section 1 makes it apply to "all Native Indian subjects of Her Majesty without and beyond the Indian territories under the dominion of Her Majesty," and by s. 9 "all British subjects, European or Native, in British India, may be dealt with in respect of offences committed by them in any Native States as if such offences had been committed in any place within British India in which any such subject may be or may be found," and "Native State" is defined in s. 3 to mean, "in reference to Native Indian subjects of Her Majesty, all places without and beyond the Indian territories under the dominion of Her Majesty; in reference to European British subjects, the dominions of Princes and States in India in alliance with Her Majesty." It has been urged that it could not have been intended that the term "Native State" should include a remote country like Cyprus, that the term Native State is not a fitting term to apply to States beyond the Peninsula of India, but such a consideration as this cannot be allowed to override the plain language of the Act, which admits of but one interpretation, namely, that all places without and beyond the Indian territories under the dominion of Her Majesty are "Native States" in the [236] sense in which the term is used in the Act. And the objection deserves little weight when we find that the term is used in different senses in the Act, when referred to Native Indian subjects and European British subjects. The term took the place of that of "territories of any foreign Prince or State" used in Act I of 1849, and that it was intended to have a very extended application is shown by some alterations in the language of the Act as passed, and as it was first introduced. The Governor-General in Council was given under a previous draft of the Act power to establish Courts for trial of offences committed in "the territories of Native States and Princes in and adjacent to British India," and for the appointment of Justices of the Peace in such State or territory, whereas in the Act as it was passed these powers can be exercised "within any country or place beyond the limits of British India."

I should have scarcely thought it necessary to enter so fully into this point, but for the stress which was placed on it by the prisoner's pleader. Cyprus is therefore clearly a Native State within the meaning of the Act. It was also pointed out that by a proviso in s. 9 no charge as to any offence shall be inquired into in British India unless the Political Agent, if there be such for the territory in which the offence is said to have been committed, certifies that in his opinion the charge is one which ought to be inquired into in British India, but this proviso only applies "if there be such" a Political Agent in the territory, and it has not been shown that any such Political Agent, that is, as defined in s. 3, any

officer representing the British Indian Government, was established at Cyprus. The prisoner can therefore be dealt with in respect of the offence alleged to have been committed in Cyprus as if such offence had been committed in the Agra Cantonment.

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Referring to Article 170 of the Indian Articles of War, "Any person subject to these Articles, who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by Her Majesty, or by the Government of India, or by the Local Government, is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, shall be delivered over to the nearest Magistrate to be proceeded against according to law."

[237] The Penal Code applies to British India, *i. e.*, the territories defined in the 1st section of the Code, and had the prisoner been accused at Agra of an offence against the Indian Penal Code he would have been delivered over to the nearest Magistrate to be proceeded with according to law, and the effect of s. 9 of Act XI of 1872 will be to permit his being dealt with for the offence committed in Cyprus as if it had been committed within British India and the proceedings which have been taken are therefore quite according to law. There is nothing in Article 171 inconsistent with effect being given to Article 170.

The crime of murder is clearly proved against the prisoner, and in my opinion the sentence of death must be confirmed.

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2 A. 237.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

GULAB SINGH (*Plaintiff*) *v.* AMAR SINGH AND ANOTHER (*Defendants*).* [31st March, 1879.]

Pre-emption—Limitation—Act XV of 1877 *(Limitation Act), sch. ii, art.* 10.

On the 19th December, 1876, *A* gave *T* a mortgage of his share in a certain village. The terms of the mortgage were that A should remain in possession of his share, and pay the interest on the mortgage money annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. On the 19th May 1877 *T*'s name was substituted for that of *A* in the proprietary registers in respect of the share. On the 8th February, 1878, *G* sued *T* and *A* to enforce his right of pre-emption in respect of the share, alleging that his cause of action arose on the 19th May, 1877, and that *A*, notwithstanding the mutation of names, was still in possession. *T* alleged that he had been in possession since the execution and registration of the deed of mortgage. *Held*, that whether *T* had been in plenary possession of the share since the date of the deed, or whether he had only such constructive or partial possession of it as was involved in the receipt of interest on the mortgage-money, the plaintiff was equally bound to have sued within a year from the date of the deed, and was not entitled to reckon the year from the date on which the possession by the mortgagee of the share was recognised by the revenue department, and the suit was therefore barred by art. 10, sch. ii, of Act XV of 1877.

THE facts of this case are sufficiently stated, for the purposes of this report, in the judgment of the High Court, to which the **[238]** plaintiff

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* Second Appeal, No. 1076 of 1878, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 8th August, 1878, affirming a decree of Munshi Mahabir Prasad, Munsif of Etah, dated the 8th March, 1878.

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appealed from the decree of the lower appellate Court. That decree affirmed the decree of the Court of first instance which dismissed the plaintiff's suit as barred by limitation.

The plaintiff contended in second appeal that limitation ran from the date that mutation of names took place, and the suit was consequently brought within time.

Babu *Oprokash Chandar*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the High Court was delivered by

PEARSON, J.—On the 19th December 1876 Amar Singh borrowed money from Tota Ram, and mortgaged his zamindari share as security for the re-payment of the amount. The agreement was that the mortgagor should remain in possession of his share and pay the interest on the loan annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. By the terms of the *wajib-ul-arz* the plaintiff contends that he was entitled to have had an offer of the share made to him before it was mortgaged to Tota Ram, and he now claims proprietary possession of it. The suit was instituted on the 8th February 1878 and the cause of action is said to have arisen on the 19th of May 1877, when Tota Ram's name was substituted for that of Amar Singh in the proprietary registers in pursuance of the transaction. The plaint, however, alleges that Amar Singh, notwithstanding the mutation of registry, is still in possession of the share. On the other hand Tota Ram alleges that he has been in possession of it since the execution and registration of the deed of mortgage. Whether the mutation of registry was merely a precaution to secure the mortgagee's interests, whether he has been only hitherto receiving the interest due to him, annually for the mortgagor still in possession of the share, or, whether in consequence of default in payment of the interest the share has passed into the actual possession of the mortgagee, these are questions which find no answer in the judgments of the lower Courts. But it seems to us that whether, as Tota Ram avers, he has been in plenary possession since the date of the deed, or [239] whether, in accordance with the tenor of the deed he has only had such constructive or partial possession of it as is involved in the receipt of interest on the loan secured by the mortgage, the plaintiff was equally bound to have brought his suit within a year from the date of the deed, and is not entitled to reckon the year from the date on which the possession of the mortgagee of the share was rightly or wrongly recognised by the revenue department. Concurring therefore in the opinion of the lower Courts that the suit is barred by art. 10, sch. ii, of Act XV of 1877, we disallow the pleas in appeal, and dismiss the appeal with costs.

Appeal dismissed.

2 A. 239.

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APPEL-LATE CIVIL.

2 A. 239.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MANGAL KHAN (*Defendant*) v. MUMTAZ ALI AND OTHERS (*Plaintiffs*).*
[31st March, 1879.]

Land in a mahal held by the lambardar as "khud-kasht" at a nominal rental—Liability of lambardar to co-sharer for profits—Act XVIII of 1873 (*N.W.P. Rent Act*), ss. 3, 31, 209.

The land in a certain mahal was recorded as held by *M*, the lambardar, as "*khud-kasht*" at a certain nominal rental. For two years in succession *M* sublet such land in part or in whole for a less amount than such nominal rental; the third year such land lay fallow. Certain persons sued as co-sharers in the mahal to recover from *M* their share of the profits on account of such years. *M* set up as a defence to the suit that there were no profits, on the contrary, a small loss. The lower Courts held *M* answerable for the rental recorded.

Held that it was doubtful whether the provisions of s. 209 of Act XVIII of 1873 were applicable in the present case, and that, even if such provisions were applicable, the lower Courts having neither found that more was realized from the land than had been accounted for by *M* nor that the failure to realize more was owing to gross negligence or misconduct on his part, the decree of the lower Courts could not be sustained.

THIS was a suit by three co-sharers for their share of the profits of a mahal for the years 1282, 1283, and 1284 Fasli. The defendant in the suit was the lambardar of the mahal, and held all the land in the mahal at a certain rent. He set up as a defence to the suit that he had not cultivated the land. The Court of first instance held that the defendant was liable for the recorded rent of the land [240] irrespective of the question whether or not he had cultivated the land, or how much rent he had realized from his sub-tenants, and it gave the plaintiffs a decree. On appeal by the defendant the lower appellate Court also held that the defendant was liable for the recorded rent, but disallowed the interest claimed by the plaintiffs.

The defendant appealed to the High Court, contending, amongst other things, that he was not liable for uncollected profits unless he had omitted to collect them through gross negligence or misconduct, which was not found.

Munshi *Kashi Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The land in this mahal appers to have been recorded as the *khud-kasht* (1) of the lambardar Mangal Khan, and to have borne a nominal rental of Rs. 79-6-0. In 1282 and 1283 Fasli it is stated to have been underlet by him in part or in whole for Rs. 28-6-0 and in 1284 Fasli to have lain fallow.

This is a suit brought by the plaintiffs as co-sharers in the mahal for Rs. 115-6-0 as their share of the profits on account of the three years

* Second Appeal, No. 1068 of 1878, from a decree of R.F Saunders, Esq., Judge of Farukhabad, dated the 30th July 1878, modifying a decree of J. L. Denniston, Esq., Assistant Collector, dated the 8th June 1878.

(1) "*Khud-kasht*" is the term applied in the N.-W. Provinces to lands which the proprietor cultivates himself.

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above mentioned. The answer is that, in reference to the facts above stated, there were no profits; on the contrary, a small loss. The lower Courts have, however, held him answerable for the rental borne on the rent-roll; and the question for our consideration is whether the view taken by them of his responsibility is correct. It appears that in April 1876 he attempted to get rid of his responsibility by resigning the holding. The Assistant Collector calls it his sir-land, whether rightly or not, in reference to the definition in s. 3 of the Rent Act, we have no means of ascertaining. The attempt was disallowed by the Collector. It may be a question whether s. 31 of that Act is applicable to such a holding. The lambardar's position as cultivator of the joint land was not that of an ordinary tenant. His co-sharers in the estate could scarcely have sued him as a tenant for the amount entered in the rent-roll **[241]** as the rent of the land, or even for a share of it proportionate to their shares in the mahal; although he may have been bound to distribute to them according to their shares the profits realized from it after defraying the expenses of cultivation and paying the Government revenue and village expenses. Section 209 of the Rent Act provides that, in any suit brought by a co-sharer against a lambardar for a share of the profits, the Court may award to the plaintiff not only a share of the profits actually collected, but also a sum equal to the plaintiff's share in the profits which, through gross misconduct or negligence, the lambardar has omitted to collect. But for this special provision, such an award could not be made in a suit for profits, and it seems very doubtful whether that provision is applicable in the present case. The position of a lambardar who fails to collect rents fixed on lands held by tenants is very different from that of a lambardar who is unable to arrange for the cultivation of lands sometime held by him as *khud-kasht*. In the present case even were s. 209 applicable, the lower Courts have neither found that more was realized from the land than has been accounted for by the lambardar, nor that the failure to realize more was owing to gross negligence or misconduct on his part. Such being the state of things disclosed by the record, we are of opinion that the decree of the lower Courts cannot be sustained. We accordingly decree the appeal and dismiss the suit with costs in all the Courts.

Appeal allowed.

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2 A. 241 (P.C.)=4 C.L.R. 331=6 I.A. 126=3 Ind. Jur. 334=4 Sar. P.C.J. 31=3 Suth. P.C.J. 627.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colville, Sir M. E. Smith, and Sir R. P. Collier.

[*On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.*]

STUART SKINNER *alias* NAWAB MIRZA (*Plaintiff*) *v.* WILLIAM ORDE AND OTHERS (*Defendants*). [20th and 21st March, 1879.]

Pauper petition—Payment of Court-fees by petitioner—Date of institution of suit—Limitation—Act VIII of 1859, *s.* 13*—Transfer of suit.*

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and

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PRIVY COUNCIL.

2 A. 241 (P.C.)=4 C.L.R. 331=6 I.A. 126=3 Ind. Jur. 334=4 Sar. P.C.J. 31=3 Suth. P.C.J. 627.

his petition is allowed upon such payment to be [242] numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time.

Section 13, Act VIII of 1859, enacts that where a suit is brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit is brought shall apply to the Sudder Court to which he is subject for authority to proceed, and the Sudder Court to which the application is made, with the concurrence of the other Sudder Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court subordinate to another Sudder Court. *Quære.*—Whether Sudder Courts acting in concurrence have power to make such a transfer?

[F., 15 A. 65; 21 B. 576; 22 B. 849; 28 C. 427; 15 M. 78; 28 M. 493 (495)=15 M. L.J. 219; 2 Ind. Cas. 1; 3 L.B.R. 194; 4 O.C. 250 (251); 74 P.R. 1903; 123 P.R. 1907=82 P.W.R 1907; **Rel.**, 12 A. 129; **Appl.**, 4 A. 37 (39)=A.W.N (1881) 129; **R.**, 5 C. 807; 19 C. 780; 20 C. 41; 26 C. 925; 1 O.C. 272 (276); 59 P.R. 1903 =129 P.L.R 1903; 78 P.R. 1906=150 P.L.R 1906; 159 P.L.R. 1901; 1 S.L.R. 71; **D.**, 13 A. 305; 18 A. 206 (208, 209)=A. W.N (1896) 33; 20 B. 508; 24 C. 889; 20 M. 319; 9 Bom. L.R. 204; 7 L.B.R. 90=22 Ind. Cas. 884.]

THIS was an appeal from a decision of the High Court of the North-Western Provinces, dated the 29th May 1876 (1), affirming a decision of the Subordinate Judge of Meerut, dated the 6th July 1875.

The question of law raised by the case was as to whether the claim of the appellant, who had originally applied for leave to sue *in forma pauperis*, but had afterwards paid the institution fees, was barred by limitation.

The facts of the case are fully set forth in the judgment of their Lordships of the Privy Council.

Mr. *J. D. Mayne* (Mr. *C. W. Arathoon* with him) for the appellant.—The question whether the appellant was a pauper was decided by the Deputy Commissioner of Delhi, who had jurisdiction to decide it, and whose decision on the point was, consequently binding on the Meerut Court to which it was transferred. To enable him to decide the question of pauperism, the Deputy Commissioner did not require any special authority from the Chief Court of the Punjab. Had he found that the appellant was not a pauper, he would have had no occasion to apply to the Chief Court for leave to try the case. There would have been no suit to try. Sections 11, 12 and 13 of Act VIII of 1859, which relate to suits where the property is situated in different districts, assume that all that is necessary has been done to bring the proceedings into the form of a *suit*. The petition of a person alleging himself to be a pauper does not become a *suit* until he is found to be a pauper and his [243] application is admitted as a plaint. It is only proceedings *in* the suit which, under the sections referred to, require sanction from the Sudder Court. If, after finding the appellant to be a pauper, the Deputy Commissioner failed to cause the petition to be numbered and registered as a plaint, that was his fault, and cannot prejudice the appellant. He applies to the Chief Court of the Punjab for leave to try the suit. The order of the Chief Court treats the matter as having assumed the form of a suit. It directs the *plaint* to be returned to the *plaintiff*, with instructions to him to proceed in a Court of the North-Western Provinces. That order must have been passed with the concurrence of the High Court of the North-Western Provinces, otherwise the Chief Court could only have refused leave for the

(1) The judgment of the High Court is printed at page 230, Vol. I of these Reports.

1879 March 21. — Privy Council. — 2 A. 241 (P.C.)=4 C.L.R. 331=6 I.A. 126=3 Ind. Jur. 334=4 Sar. P.C.J. 31=3 Suth. P.C.J. 627.

trial of the case by its own Subordinate Court. The order passed implies a transference of the record or change of venue. When the case went back to the Court of the Subordinate Judge of Meerut, it went back as a suit in which the plaintiff's pauperism had been established, ripe for the settlement of issues and for trial on the merits.

If, however, the finding of the Deputy Commissioner of Delhi was not binding on the Meerut Court, and the latter Court had to try the whole matter *de novo*, still, as the plaintiff was in fact a pauper both when he first presented his petition and also afterwards when with the money of friends he paid the Court-fees, his plaint when it was admitted should have been treated as filed on the date when it was originally presented as apetition. The appellant's application for leave to sue as a pauper being made *bona fide* and without fraud, it was inquitable and unjust that the mere payment by him of the Court fees should have the effect of putting him out of Court on the plea of limitation. Section 308 of Act VIII of 1859 enacts that where the pauper's application is granted, his petition is to be deemed a plaint, but it does not enact that the petition shall not be deemed a plaint, if, pending the inquiry into his pauperism, the petitioner finds means to pay the Court-fees. The decision in *Seetaram Gour* v. *Goluk Nath Dutt* (1) was as applicable to a case like the present as to the case where leave is actually given to a petitioner to sue as a pauper; and the *Explanation* appended to s. 4, Act IX of 1871, was not **[244]** inconsistent with the view that the appellant's plaint was filed from the date when it was presented as a petition. His application was in fact a plaint, *plus* a request for leave to sue as a pauper, and although it became unnecessary for him to obtain that leave, the plaint was not abandoned. If the Courts below were right in their view, a person who, after presenting a petition for leave to sue as a pauper within the period of limitation, happened to succeed to property, might find himself disabled from proceeding.

Mr. *Leith*, Q.C., and Mr. *Doyne*, for the respondent.—The appellant's argument assumes that the Delhi Court had authority to determine that the appellant could sue as a pauper not merely in the Delhi Court but in the Courts of another Province. It was clear, however, that when the case came before it, the Meerut Court was entitled and bound to ascertain whether the appellant was a pauper or not. He might have been a pauper when before the Delhi Court, and yet no pauper when he came to Meerut. The authority of the Chief Court of the Punjab is only over its own subordinate Courts. It may forbid this to try a suit relating to lands partly within the jurisdiction. But no order of the Chief Court of the Punjab is binding on a Court subordinate to the High Court of the North-Western Provinces. The suit could not therefore be transferred from Delhi to Meerut by any order of the Chief Court of the Punjab. It might have been different if the High Court of the North-Western Provinces had intervened and directed a transfer in concurrence with the Chief Court. The case not having been transferred, the appellant, when he came back to the Meerut Court, must be taken to have commenced proceedings *de novo*, and as he withdrew his application for leave to sue as a pauper, that application could not become a plaint, since, under s 308, Act VIII of 1359, it could only become a plaint upon the claim to sue as a pauper being admitted. The case was governed by s. 310 of the Act, which permits a fresh suit to be instituted [Sir Montague Smith.—The

(1) Marshall's Reports, 174.

2 A. 241 (P.C.)=4 C L.R. 331=6 I.A. 126=3 Ind. Jur. 334=4 Sar. P.C.J. 31=3 Suth. P.C.J. 627.

Courts have allowed the old plaint to stand, and yet say it is only to date from the payment of the stamp fees.] It is not a plaint until it is stamped. [Sir ROBERT COLLIER.—May it not be stamped *nunc pro tunc*? Sir MONTAGUE SMITH.—May not stamps be added as though it had been filed originally with too small a stamp?] A wholly unstamped plaint is not to be received.

[245] Mr. *Mayne* in reply.—The suit was regularly transferred. If not, the Merrut Court had no jurisdiction to take it up without leave from the High Court of the North-Western Provinces. In that case the proceedings in the Meerut Court should be quashed as *coram non judice*, and the appellant allowed to begin again deducting the time occupied by the abortive proceedings. [Sir MONTAGUE SMITH.—It may be doubted whether, with reference to s. 13 of Act VIII of 1859, the High Court and the Chief Court together have power to transfer a suit. The Act omits to provide such a power.] The finding of the Delhi Court makes the question of pauperism *res judicata*. [Sir MONTAGUE SMITH.—Not if this is a new suit. The question of pauperism is not a point in the cause; it is a mere matter of procedure.] Section 310 of Act VIII only applied where leave to sue had been refused. Here there was no refusal, and consequently no necessity to bring a fresh suit. The proceedings could properly be continued on the stamp fees being paid. The appellant's original appliation bore an eight-anna stamp, and under s. 31 of Act VIII of 1859 the stamp could be increased.

JUDGMENT.

On the conclusion of the argument their Lordships' judgment was delivered by

SIR MONTAGUE E. SMITH.—The decision of this appeal is attended with considerable difficulty, since it presents a case which is not provided for by the Code of Civil Procedure. It becomes of importance to the parties, because the decision of the point of practice determines the question whether or no the Statute of Limitations is a bar to the claim of the plaintiff. The original petition was filed in the Court of the Subordinate Judge of Meerut on the 20th February 1873. The claim of the plaintiff was to a share of the property devised by the will of the late Colonel Skinner. His claim arose upon the death of his father, Major Skinner, which occurred on the 22nd April 1861. The petition set out all the particulars required in a plaint, and prayed that the plaintiff might be allowed to sue *in forma pauperis*. The claim embraced landed property which was situate partly within the jurisdiction of the High Court of the North-West Provinces and partly within the jurisdiction of the Chief Court of the Punjab. The Judge of Meerut, [246] apparently of his own motion, rejected the petition on the ground that the question of the plaintiff's pauperism could be more conveniently tried in the Punjab. The plaintiff thereupon filed it in the Court of the Deputy Commissioner of Delhi, and on the 14th April 1873 an order was made by that Court, after examining witnesses, admitting the plaintiff's suit *in forma pauperis*. Before proceeding further with the suit, the Deputy Commissioner applied to the Chief Court of the Punjab for authority to proceed under s. 13 of the Code of Civil Procedure. That section enacts: "If the districts within the limits of which the property is situate are subject to different Sudder Courts, the application shall be submitted to the Sudder Court to which the district in which the suit is brought is subject, and the Sudder Court to which such application is made may, with the concurrence of the

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Sudder Court to which the other district is subject, give authority to proceed with the same." On the 29th of May 1873 the Chief Court of the Punjab, presumably not without having consulted the High Court of Allahabad, directed that "the plaint should be returned to the plaintiff, with instructions that he should present it to some Court in the North-West Provinces." Accordingly the plaintiff took the proceedings back to the Court of Meerut from which he had been originally driven, and on the 19th July 1873 an order of the Subordinate Judge of Meerut was made: "That the case be brought on the file, and numbered." Their Lordships think it must be assumed that this order was complied with, and that the plaint was brought upon the file, and was numbered.

The first question which arises is, whether the finding of the Deputy Commissioner of Delhi, that the plaintiff was a pauper, can be imported into the suit when it found its way upon the file of the Court at Meerut, and that depends upon the construction to be given to ss. 11, 12 and 13 of the Code of Civil Procedure. Undoubtedly, when a suit is in the position in which the present suit stood in the Court at Delhi, it would be convenient and proper when an application had been made by the Judge of the Delhi Court to the Chief Court of the Punjab, and that Court is required, before it acts, to consult the Judges of the High Court in the jurisdiction to which the plaint is to go, that those two Courts having consulted together should have power to direct that the cause [247] should be transferred in its then state to the Court to which they think it right and expedient that it should go. But the legislation stops short of enacting that it should be so transferred. What it enacts is that the Judge shall apply to the High Court to which he is subject for authority to proceed, and the Court to which such application is made may, with the concurrence of the other High Court, give authority to proceed. There is no express power to transfer. Their Lordships having come to the conclusion to decide the case in favour of the appellant upon another ground, do not desire unnecessarily to express an opinion upon this first point. There being a grave doubt, at the least, whether the two Courts have power to make the transfer, they think it would be a proper addition to be made to this section, that this power should be conferred upon them.

The other question which has been raised is as to the effect of the proceedings in the Court of Meerut, and whether the judgment of the High Court affirming that of the Subordinate Judge of Meerut is correct in holding that the suit is to be considered as instituted when the plaintiff paid the amount of the stamps into Court, and that the petition was converted into a plaint from that time only.

In order to explain the view their Lordships have taken of this point, it will be necessary to refer to some of the proceedings. The order of the 19th July 1873 directing the case to be put on the file and numbered has been already adverted to. When that was done the defendants put in written statements objecting that the plaintiff ought to establish his position as a pauper in the Meerut Court, treating what had taken place at Delhi as irrelevant, and upon these statements, on the 10th November 1873, the Subordinate Judge of Meerut directed that the case could not be heard, and rejected the plaint. There was an appeal to the High Court from that decision, and on the 10th July 1874 the High Court held that the time of the abortive proceedings at Delhi should be deducted from the period of limitation, and "remanded the suit" to the Subordinate Judge, directing him to proceed with it. That being so, proceedings were taken by him with a view to an inquiry into the pauperism of the plaintiff. Issues

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were framed, and a day was fixed for the trial of those issues; the day so fixed [248] was the 27th November 1874. On that day the plaintiff presented a petition praying for leave to deposit the amount of the stamps, alleging that he had succeeded in negotiating a loan for a sum of money sufficient to cover the amount of the institution stamps. It appears that on the same day, having obtained the permission of the Subordinate Judge, the plaintiff paid the proper stamps into Court. That having been done, the defendants raised two objections; first, that the suit ought not to proceed, because the plaintiff had fraudulently applied to be made a pauper when he had property; and secondly, that the suit should be regarded as instituted on the date the Court-fee was paid, which was beyond the period of limitation. The Subordinate Judge went into evidence on the first issue, and found that there had been no fraud on the part of the plaintiff in filing a petition to be allowed to sue as a pauper, and therefore it must now be taken that that petition was filed *bona fide*, and without fraud. On the other point the Judge held in effect that he saw no reason why, upon payment of the fee, the suit should not be deemed to be instituted on the day "which the pauper admittance would have carried," and added: "The Court, then, would allow the case to proceed on its present basis, but at the same time would suggest to the defendants the advisability of appealing to the High Court to determine whether by the substitution of the institution fee, the case is to be deemed a plaint and deemed to be filed on the day on which the application to sue *in forma pauperis* was originally submitted." The Judge then directed that the application should be numbered and registered, and be deemed the plaint in the suit, and that a day be fixed for the settlement of issues. This was the first opinion of the Subordinate Judge, but he appears afterwards to have resiled from it, and to have framed issues, two of them raising the questions which are now before their Lordships for decision. First—"Can an 'application' to be allowed to sue *in forma pauperis* be converted into a 'suit' as between parties at any subsequent date by filing the institution fee, and in the latter instance, from what date should the institution of suit be calculated; the second, "Is the suit barred by efflux of time?" Three other issues were settled as to the merits of the case, and the Judge, after settling these issues, examined witnesses. On the 6th July 1875 he gave judgment. Having referred to the dates of the application to sue *in forma pauperis*, and to [249] some of the other dates of the proceedings, he says: "The granting of the application, then, constitutes an essential ingredient to further progress, as an ordinary suit with the privilege of limitation counting from the day the petition to sue *in forma pauperis* was presented, and not from the date when it was registered under s. 308. But it will be seen that prior to the application to sue *in forma pauperis* being granted and whilst the question was still under inquiry and investigation, the plaintiff has converted the matter into a regular suit, the consequence of which is that he has by his own act given up the advantages or disadvantages (as the case might be) of the position he may have become possessed of. By such act the pauper application died a natural death, and by the conversion the regular suit came into operation on its own individual and inherent basis from date of such conversion, and as a consequence, in computing limitation, the computation must be made from date of such conversion, which places the plaintiff out of Court." No doubt, if the Judge is right, the plaintiff would be barred by the Statute of Limitations, and the plaint would be properly rejected. There was an appeal from that decision to the High Court, which affirmed it. The following

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passage of their judgment gives the view of the High Court on the question: "But there is no provision in the law which allows the application presented under s. 299 of the Code to be deemed the plaint in the suit when such application has been in effect revoked and superseded by the payment of the fees chargeable under the Court Fees Act. In such a case we conceive that the date of the presentation of the plaint and institution of the suit must be taken to be the date of the payment of the fees." The High Court does not decide that the plaint ought to be rejected altogether. It seems to consider that the petition should be retained as a plaint, but that it should be taken to be converted into a plaint only from the day when those fees were paid.

Now a petition to sue *in forma pauperis* contains all that a plaint is required to do. By s. 300 "the petition shall contain the particulars "required by s. 26 of this Act in regard to plaints, and shall have annexed "to it a schedule of any moveable or immoveable property belonging to "the petitioner, with the estimated value thereof, and shall be subscribed "and verified in the manner [250] hereinbefore prescribed for the sub-"scription and verification of plaints." Therefore it contains in itself all the particulars the statute requires in a plaint, and, *plus* these, a prayer that the plaintiff may be allowed to sue *in forma pauperis*.

The Act provides what shall happen if the prayer of the petition be granted by s. 308. It also provides by s. 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that, unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one. Then what are the facts in this case? The petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed so to sue, but no more. The defendant, so far from being a sufferer by that change, is benefited, as both parties will go on with the litigation on equal terms. Is there, then, any thing in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether, and the plaintiff be compelled to commence *de novo*? Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees. To be logical, the Court should have rejected it altogether. The petition of plaint was placed upon the file and numbered on the 19th July 1873, and this is the plaint that is allowed to go on. Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

[251] This case, which is not provided for by the Act, approaches more nearly to the state of things contemplated by s. 308 than that contemplated by s. 310. There are no negative words in the Act requiring the rejection of the plaint under circumstances like the

present, nor anything in its enactments which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not, when the money has been paid for the fees, be considered as a plaint from the date that it was filed. It is obvious that very great injustice might be done if this were not to be the practice. There could hardly be a stronger instance of the mischief which might arise than what would have happened in this case. Their Lordships of course say nothing about the merits of the case. The claim may be utterly untenable, but on the assumption that the claim is a good one, nothing more unjust to the plaintiff could have happened than that he should have been deprived, by having done an act which is in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. He was a pauper when his petition was filed. Supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different.

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Their Lordships have only to advert to the Statute of Limitations, Act IX of 1871. Their Lordships think that their decision is in no way inconsistent with this Act. The explanation in s. 4 is this: "A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper when his application for leave to sue as a pauper is filed." In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed.

In the result their Lordships will humbly advise Her Majesty to reverse both the decisions below, and to remand the case for trial on the merits. The respondents must pay the costs of the appeal.

Agent for the appellant: Mr. *T. L. Wilson*.

Agents for the respondents: Messrs. *Young*, *Jackson*, and *Beard*.

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2 A. 252=4 Ind. Jur. 249.

[252] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAGHU NATH DAS (*Plaintiff*) *v.* ASHRAF HUSAIN KHAN AND ANOTHER (*Defendants*).* [25th March, 1879.]

Act X of 1877 (*Civil Procedure Code*), s. 111—*Set-off—Mortgage.*

The usufructuary mortgagee of certain land sued the mortgagor for the money due under the mortgage. The mortgagor alleged that the mortgagee had committed waste and was liable to him for compensation which he claimed to set off. *Held* that under s. 111 of Act X of 1877 the amount of such compensation could not be set-off.

[D., 15 M. 290 (291).]

THE facts of this case, so far as they are material for the purposes of this report, were as follows: On the 12th September, 1869, Ashraf Husain Khan and Sharif-un-nissa, who each owned a certain share in a garden, jointly gave Hingan Lal a usufructuary mortgage of their shares for a term

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* Second Appeal, No. 1031 of 1878, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 9th September, 1878, modifying a decree of Babu Parmoda Charn Banarji, Munsif of Benares, dated the 22nd June, 1878.

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of five years. Hingan Lal's interests under this mortgage were sold in the execution of a decree, and were purchased by Raghu Nath Das, who in January 1878 sued Ashraf Husain Khan and Sharif-un-nissa, the term of the mortgage having expired, to recover Rs. 569-4-0, the money due under the mortgage. The defendants claimed to set off their shares of a sum of Rs. 1,161-1-4, being the value of certain trees which they alleged had existed in the garden, and which Hingan Lal had either cut down or destroyed, and of the materials of certain buildings which they alleged had existed in the garden, and which Hingan Lal had pulled down and sold the materials off. The Court of first instance, in giving the plaintiff a decree, allowed the defendants a set off of Rs. 275 on account of the acts of waste committed by Hingan Lal. On appeal by the plaintiff the lower appellate Court held that the defendants were entitled to a set off on such account, but reduced the amount to Rs. 150.

The plaintiff appealed to the High Court, contending that the set-off claimed by the defendants could not be allowed.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

[253] Mir *Akbar Husain*, for the respondents.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows:

We are of opinion that the plaintiff's objection to the set-off allowed by the Courts below is valid. Under s. 111, Act X of 1877, it is only an ascertained sum of money legally recoverable that can be the subject of set-off, and it is necessary that in such claim both parties fill the same character as they fill in the plaintiff's suit, the claim must be certain and determinate and actually due and in the same right and of the same kind. The claim by the defendants in this suit, for estimated damages to property mortgaged as security for money lent, does not meet the requirements of the law, so as to be capable of being set-off against the plaintiff's claim for the money lent.

It has been held that mesne profits is in the nature of damages and is not a debt so as to form a subject of set-off (1); and it was held in a suit by a carrier for the price of the carriage of goods the defendant cannot set-off the amount of damages claimed against the plaintiff for injury to the goods, but must sue to recover the damage in a separate suit (2). We must therefore allow the plaintiff's appeal.

(1) *Ruteerummom Opadhya* v. *Grijanund Opadhya*, 7 Wym. Rep. 218.
(2) *Scanlan* v. *Herrold*, 10 W. R. 295.

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APPELLATE CRIMINAL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* BALDEO SAHAI. [7th April, 1879.]

Attempt to obtain an illegal gratification—Act XLV of 1860 (Penal Code), s. 161—Act X of 1872 (Criminal Procedure Code), ss. 218, 351—Warrant case—Defence—Right of accused person to cross-examine the witnesses for the prosecution—Power of the Court to summon material witness.

To ask for a bribe is an attempt to obtain one and a bribe may be asked for as effectually in implicit as in explicit terms.

Where, therefore, *B*, who was employed as a clerk in the Pension Department, in an interview with *A*, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by "*kar-rawai*," and on the overture being rejected, concluded by declaring that A would rue and [254] repent the rejection of it, *held* that the offence of attempting to obtain a bribe was consummated.

The charge having been read to the accused person he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence.

Held, per SPANKIE, J., that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused, on the date fixed for the examination of the witnesss for the defence.

Held also *per* SPANKIE, J., that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined.

[Appr., 32 C. 292=9 C.W.N. 547.]

THIS was an appeal to the High Court by the Local Government against a judgment of acquittal by Mr. H Lushington, Sessions Judge of Allahabad, dated the 22nd November, 1878. One Baldeo Sahai was convicted by Mr. J. B. Thomson, Magistrate of the first class, on the 16th September, 1878, under s. 161 of the Indian Penal Code, of attempting to obtain an illegal gratification. On appeal Baldeo Sahai was acquitted by the Sessions Judge, the Judge, holding that the acts of the accused were not acts committed towards the commission of the offence of attempting to obtain an illegal gratification, but acts preparatory towards the commission of such offence, and that consequently the accused could not be convicted of such offence. The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

Mr. *Colvin* and Mr. *L. Dillon*, for Baldeo Sahai.

JUDGMENTS.

The following judgments were delivered by the Court.

SPANKIE, J.—The accused was charged that he on or about the 30th July, 1878, being a public servant, attempted to obtain from Abbas Ali, for himself, a gratification other than legal remuneration, as a motive or reward for showing favour in the exercise of his official functions, and thereby with having committed an offence punishable under s. 161 of the Indian Penal Code.

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[255] If we accept the evidence of Abbas Ali, it is clear that he at least quite understood that Baldeo Sahai had expressed every readiness to use his influence in his (Abbas Ali's) favour provided that he was paid for doing so. I felt some difficulty at first when I considered the case whether "an attempt to obtain" an illegal gratification had been made out. But I am satisfied that not only was the intent to commit the offence defined in s. 161 of the Penal Code present in the mind of Baldeo Sahai, and for some time too, but that he made preparations to do so, and when these preparations and his plans were ripe, he attempted to carry out his intention. It is shown in evidence that the grant of a pension to Abbas Ali was received in the Accountant-General's Office on the 15th June. But an anonymous letter had reached the office suggesting that there had been breaks in Abbas Ali's service and great care should be taken in passing his pension; that the Assistant Accountant-General in charge of the Pension Department directed that the "permanent payable order" should be issued, that he took no notice of the letter because it was anonymous; and that he made over the file to Baldeo Sahai, who is a clerk in the Pension Pay department, to carry out his orders.

It is also shown that the Government of the North-Western Provinces had sanctioned the pension on the 12th June 1878. It is also shown that the file was made over, as stated above, on the 14th August or thereabouts by Mr. Carnac after the objections of the Deputy Accountant-General to the pension had been considered by the Local Government and overruled, so that Baldeo Sahai must have been fully aware that no further objections to its payment would be entertained. When Abbas Ali first saw Baldeo Sahai, which I agree with Mr. Thomson must have been about the middle of August, he was told by Baldeo Sahai that an anonymous petition had been received objecting to the pension; that from what was written he was afraid that there would be a fuss about it; that Biss Sahib had raised several objections, and a report had been prepared that Rs. 25 a month in excess of the proper pension had been sanctioned, and Baldeo Sahai promised next day to show Abbas Ali the petition. The next day Abbas Ali met Baldeo Sahai near the Accountant-General's Office with the file in his hand and drove him home. It was evening, and Baldeo Sahai said that [256] it was too late, he had better come the next morning, and "I will show you the letter."

So far Baldeo Sahai had made his preparations for carrying out his previously conceived plans and intention. He had also stimulated the curiosity of Abbas Ali and excited his fears by the false assertion that there were still difficulties in the way of his getting the full pension already sanctioned. The next day at 8 A.M. Baldeo Sahai showed the anonymous petition and told Abbas Ali of two pension cases which had been carried through by him. In one instance he had obtained half pay instead of one-third as pension for Mirza Ali, and in the other he had increased the pension of Ali Bakhsh Khan to Rs. 400 a month. There can be no doubt that, if this evidence be true, this statement of his successful efforts to secure better pensions for persons was meant to act upon Abbas Ali and induce him to follow the lead which Baldeo Sahai was now bent upon giving to him. He now begins what may be called business and what I think constitutes an attempt on his part to obtain a gratuity from Abbas Ali (1).

(1) "He (Baldeo Sahai) said that the office was a large one, much authority was vested in him, and by such *kar rawai (i.e.,* I supposed giving and taking money) such things were effected; I gave him to understand that nothing of that need be expected from me; that as the report had been written which he had shown me, he could have no power

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The intention had been conceived, the plans had been matured, and all preparations made, and though no specific sum had been asked for, the transaction had so far advanced, that Abbas Ali had thoroughly understood what was being done, and put a stop to what might have been successful, if he had not refused to enter into any arrangement and intimated to him, that he "would not give him anything." That Baldeo Sahai understood that his attempt had failed is clear from his declaration, "You will rule and repent it." If Baldeo Sahai had found a willing listener, there can be no reasonable doubt that his offer to arrange the business, if Abbas Ali wished it, in the manner suggested by "*kar-rawai*," which he understood to be the giving and taking of money, would have been accepted. Not only would Baldeo Sahai have succeeded in his attempt to obtain a gratuity, but he would have caused Abbas Ali to commit an offence punishable **[257]** under s. 116 of the Penal Code. I think therefore that there can be no doubt that, if the evidence be true, the offence charged under s. 161 of the Code against the accused has been made out.

On the merits I entertain no doubt of the accused's guilt. I fully accepted Mr. Thomson's judgment in this respect. It is full and exhaustive, and deals with all the apparent difficulties, such as contradictory statements and discrepancies. The accused in no way made out his defence that he was the victim of a conspiracy on the part of the office hands organized by the head of his office, and so far from Abbas Ali being eager to secure the punishment of Baldeo Sahai, there is proof on the record that he did not wish that there should be any criminal charge. He from the first stated to the Deputy Commissioner at Lucknow that he wished no notice to be taken of his complaint. If he could have got his pension order made out, he would have been quite content.

An objection was taken by Baldeo Sahai's counsel that the Magistrate had contravened a ruling of this Court and had refused to summon the complainant in order that he might be cross-examined on the day fixed for hearing the defence. The law as laid down in s. 218 of the Criminal Procedure Code is: "If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution." It appears from an order by the Magistrate dated the 4th September, after hearing the defence, that accused's pleader was offered an opportunity under s. 218 of cross-examining the witnesses. The pleader refused to cross-examine them and said that he would apply to the Court after he had examined his witnesses. The Magistrate held that he could not do this. The accused at that time had no witnesses in attendance. The case was adjourned and the witnesses were summoned. The ruling (1) cited by the respondent's counsel did not determine the point whether, if the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time, the Magistrate would thereupon **[258]** be at liberty to discharge the witnesses for the prosecution. This point the learned Judge expressly said "need not now be determined in" the case before him. In the same volume with the ruling referred to is

in the matter: he then said that the office was a large one, if I wished it, everything might be accomplished: I said I did not wish to do anything of the nature of the '*kar-rawai*' he wished, that is, I intimated to him I would not give him anything: as I left he said you will rue and repent it."

(1) *Queen* v. *Lal Mahomed*, H.C.R. N.W.P. 1874. p. 284.

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another (1) by Mr. Justice Pearson in which it is laid down that the section does not say that accused shall only be allowed to recall and cross-examine the witnesses for the prosecution, provided that he expresses his wish to do so at the time when he is called upon to make his defence, and provided that these witnesses be still in attendance in the Court and do not require to be re-summoned. The plain meaning and intention of the section was to allow him the right in question at any time while he is engaged in his defence and before his trial is concluded. The object of the section is clearly to secure the accused the opportunity of cross-examining the witnesses for the prosecution after he has been informed as to the nature of the specific charge which he is required to answer. Until he knows this he is not in a position to decide on what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of recalling the witnesses. If the witnesses for the defence are in attendance, they are to be examined, and after that the accused shall be allowed to recall and cross-examine the witnesses for the prosecution. But if the witnesses for the defence were not in attendance, the accused would still be at liberty to recall the witnesses for the prosecution. If he refuses to exercise this right *after he has entered on his defence*, he cannot, I think, demand as a right the recall of the witnesses for the prosecution, if the case be adjourned because he has not produced his witnesses. He has had the opportunity intended by the section. What his own witnesses may say can have little or no bearing on the cross-examination of the witnesses for the prosecution who are called to support the charge, but not to refuse the evidence for the defence. There is also a second objection that the Magistrate acted illegally and against the practice of the Criminal Courts, inasmuch as he recorded evidence for the prosecution, both oral and documentary, after the case for the defence had been closed. Section 351 of the Criminal Procedure Code, however, gives the Magistrate power to summon any witness at any stage of any proceeding, inquiry or trial, if the [259] evidence of such person appears essential to the just decision of the case. "Trial includes the punishment of the offender" (s. 4), so I see no valid objection to the course adopted by the Magistrate. The trial had not closed until he had sentenced the accused, if convicted.

In conclusion I may state that the sentence passed was, in my judgment, too lenient for the offence committed. I now find that my honorable colleague proposes to increase the amount of punishment by a fine, in which proposal I quite agree with him.

PEARSON, J.—I concur with my honorable colleague in the opinion that, for the reasons set forth in the Joint Magistrate's able and well considered judgment, the evidence of Abbas Ali is substantially trustworthy, and that it convicts the accused of an offence punishable under s. 161, Indian Penal Code. Nor does it appear to me that the Joint Magistrate's procedure is obnoxious to material objections. The view of the Sessions Judge, that "the accused has not committed any act towards the commission of the offence," and that "all that he has done is only preparatory to the commission of the offence," is erroneous. It may be that the accused in sending for Abbas Ali and showing him the anonymous petition and exhibit B and making him aware of their contents was only paving the way for the commission of the offence in question. But when, after referring to his own influence in the office and instancing two cases

(1) *Queen* v. *Lal Sing*, H. C. R. N. W. P. 1874, p. 270.

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in which by that influence increased pensions had been obtained, he proceeded to intimate that anything might be effected by *kar-rawai*, and on the overture being rejected, concluded by declaring that Abbas Ali would rue and repent the rejection of it, the accused was actually offering inducements for the purpose of obtaining a bribe. To ask for a bribe is an attempt to obtain one; and a bribe may be asked for as effectually in implicit as explicit terms. As soon as he had caused Abbas Ali to understand that he was willing to render him a service for a bribe, the offence of attempting to obtain a bribe was consummated, and the Sessions Judge is wrong in holding that it was not consummated, but that the accused might have foregone his intention of committing it. The punishment awarded by the Joint Magistrate's sentence is, however, scarcely adequate to the offence. [260] I would, therefore, set aside the order passed by the Sessions Court in appeal, and restore the finding and sentence of the Court of the Joint Magistrate with this modification, that, in addition to the punishment awarded by the sentence, the criminal Baldeo Sahai pay a fine of Rs. 200, or in default of payment undergo a further imprisonment for six months

Appeal allowed.

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2 A. 260 = 4 Ind. Jur. 250.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* ASGHAR ALI AND OTHERS. [10th April, 1879.]

Evidence of Accomplice—Confession by Accused person—Act X of 1872 (*Criminal Procedure Code*), ss. 344 345, 347—*Act* I *of* 1872 (*Evidence Act*), s. 24—*Pardon.*

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, *held* that, the tender of pardon to such person not being warranted by s. 347 of Act X of 1872, he could not legally be examined on oath, and his evidence was inadmissible.

Held also, that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X of 1872 and s. 24 of Act I of 1872.

[Appl., Rat. Un. Cr. C. 461; R., 23 B. 213 (217); 33 C. 1353 (1359) = 10 C.W.N. 962 = 4 Cr.L.J. 165; 25 M. 61 (69) (P.C.) = 3 Bom. L.R. 540 = 5 C.W.N. 866 = 28 I.A. 257 = 11 M L.J. 233 = 8 Sar. P.C.J. 160; 5 A.L.J. 691 (698) = A.W.N. (1908) 259 = 16 C.P.L.R. 112 (114); 10 M.L.J. 147 (159); 52 P.L.R. 1902; 12 P.R. 1902 = 100 P.L.R 1902; D., 16 B. 661; 13 Cr.L.J. 33 = 13 Ind. Cas. 273 = 5 S.L.R. 174; L.B.R. (1872—1892), 246 (248, 252)]

THIS was an appeal to the High Court by Asghar Ali, Hamid-ud-din, and Achal Behari, from convictions by Mr. W. Duthoit, Sessions Judge of Shahjahanpur dated the 16th November 1878. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court. On behalf of all the appellants it was contended that the statement made on the trial of the appellants by the witness Irtiza Ali was not admissible as evidence against the appellants and that, such statement being rejected, there was no evidence remaining which would justify the convictions of the appellants.

Mr. *Colvin* for Asghar Ali and Hamid-ud-din, and Mr. Leach and Babu *Dwarka Nath Mukharji* for Achal Behari.

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The Junior Government Pleader (Babu *Dwarka Nath Banerji*) for the Crown.

The Court (PEARSON, J., and OLDFIELD, J.) delivered the following

JUDGMENT.

[261] The appellants have been convicted by the Sessions Judge of offences under ss. 261, 262, 409, 411 and 414, of the Indian Penal Code, in connection with certain stamp frauds in the Civil Courts of Shahjahanpur. Asghar Ali is the deputy record-keeper of the Judge's Court. Hamid-ud-din is the decree-writer, and Achal Behari is a literate chaprasi in the Court of the Shahjahanpur Munsiff. The appellants, together with Irtiza Ali Khan, a copyist in the Judge's office, and four others, were sent up by the police to the Magistrate on charges under ss. 411 and 379, and in the course of the inquiry the Magistrate offered a pardon to Irtiza Ali Khan and admitted him to be a witness for the prosecution. The Magistrate finally committed four of the accused to the Sessions on charges under ss. 261, 263, 109 and 263, 409, 411. In the course of the trial an objection was preferred on their behalf to the Judge to the admission of the evidence of Irtiza Ali Khan, but was disallowed and his evidence was admitted.

The case for the prosecution is that it was part of Achal Behari's business under orders from the Munsarim to punch the stamps on plaints presented, and of Hamid-ud-din to punch them the second time; that Achal Behari instead of punching them removed the unobliterated stamps and replaced them with old stamps that had been once punched supplied by Hamid-ud-din, who in his turn removed once-punched stamps from plaints passing through his hands, replacing them with twice-punched stamps obtained from the record office and taken from old records, such stamps being in their turn replaced by low value stamps from B., files. In brief it was Achal Behari who stole the fresh stamps, and the others assisted in concealing the fraud by a concerted plan of tampering with the stamps in the records, and that the spoil obtained by the sale of the stolen stamps was divided among them.

The fact that the stamps have been taken off the plaints and the records tampered with appears placed beyond doubt, but the objection taken on behalf of the appellants is that the evidence of the approver is inadmissible, and that apart from it there is no sufficient evidence on which the appellants can be convicted of being concerned in the frauds.

[262] These objections are in our opinion valid. The Magistrate is empowered to tender a pardon to an accused person with a view to examine him as a witness for the prosecution against other persons charged at the same time with him for an offence, in the manner and in the cases specified in s. 347 of the Code of Criminal Procedure, that is, "after recording his reason he may tender a pardon to any one of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column 7 of the fourth schedule annexed as triable exclusively by the Court of Session."

In the present case the Magistrate omitted to record his reason for tendering a pardon to Irtiza Ali Khan, and none of the accused before him were charged with any offence exclusively triable by a Court of Session, and we have no ground for inferring that Irtiza Ali Khan was supposed to have been directly or indirectly concerned in or privy to such an offence, and, therefore, the offer of a pardon to him and his examination as a witness by the Magistrate and Judge were illegal and not authorised

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by s. 347. This examination as a witness not being permissible under s. 347 was contrary to express law.

After the offer to him of a pardon he was under the provisions of s. 347 detained in custody pending the termination of the trial, and his position as one under accusation of an offence was in no way changed when he appeared before the Judge, and could not be altered until he had been discharged, acquitted, or convicted, and with reference to the express provisions of s. 345, being an accused person, so long as he was in that position he could not be put on his oath or examined as a witness in the case in which he was accused.

His statement is also irrelevant and inadmissible with reference to s. 344, Criminal Procedure Code, and s. 24, Evidence Act. The evidence of Irtiza Ali Khan is therefore absolutely inadmissible.

There is a decision by the Bombay High Court (1) quite in point and to a similar effect, and another by the same Court under the old Criminal Procedure Code, where evidence taken illegally under s. 209 of that Code on an offer of pardon was rejected (2).

[263] The case referred to by the Sessions Judge (3) is not in point, or in that case the prisoner had been discharged by the Magistrate for want of evidence and does not appear to have been offered a pardon. We may add that the statements of Irtiza Ali Khan are exceptionally untrustworthy, for he is believed by the Magistrate and the Judge to have fabricated false evidence against some of those whom he accused, and on this ground we should reject his statements against the appellants unless distinctly corroborated as against them which we do not find to be the case.

Setting aside the evidence of the accomplice, there is nothing against the prisoners but bare suspicion arising out of the positions they held and opportunities they had of access to the records. On two occasions some old stamps were found, in Asghar Ali's house once, and on another occasion hidden under the carpet where Nur Ali, a relation of the recordkeeper, was sitting, but the Courts below suspected that these stamps were placed by Irtiza Ali Khan in the place where they were found. As to any opportunities the appellants may have had of getting at the stamps on the plaints and records, it is clear that Hamid-ud-din and Achal Behari were not the only persons through whose hands the records passed, and others besides them had access to them in the Munsif's Court, and these persons have one point in their favour, that the record-keeper of the Judge's Court gave receipts for the records, and they may say, with some show of reason, that the receipts would not have been given if the records had been tampered with. Nor was Asghar Ali the only person in the record office who had access to the records, and indeed it is admitted that many other persons must have been engaged in the frauds.

There is nothing therefore to fix the guilt on any of the appellants, and indeed the counsel for the prosecution was unable to support the conviction on other evidence than that of the approver, whose testimony we have rejected. We set aside the convictions and direct the release of the prisoners.

Convictions quashed.

(1) *Reg.* v *Hanmanta*, 1 B. 610. (2) *Reg.* v. *Remedios*, 3 B.H.C. R. Cr. C., 59.
(3) *Queen* v. *Behari Lal Bose*, 7 W. R., Cr. 44.

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APPELLATE CIVIL.

2 A. 264.

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[264] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

SHIB GOPAL AND OTHERS (*Defendants*) *v.* BALDEO SAHAI (*Plaintiff*).* [15th April, 1879.]

Act X of 1877 (*Civil Procedure Code*) *s.* 32—*Dismissal or Addition of Parties—Revenue Court, Power of—Act XVIII of* 1873 (*N.W.P. Rent Act*), *s.* 106.

B and *N*, the mortgagees of a mahal, granted the mortgagors a lease of the mahal, the mortgagors agreeing to pay "the mortgagees" a certain rent half yearly "on account of the right they held in equal shares," and that in default of payment of such rent, "the mortgagees" should be entitled to sue for payment. The mortgagors having made default in payment of the rent, and *N* refusing to join in a suit against the mortgagors to enforce payment, *B* sued them alone for a moiety of the rent due. The Revenue Court of first instance held, with reference to s. 106 of Act XVIII of 1873, that *B* could not sue separately. *Held* by the High Court that the order of the Revenue Court of first appeal directing, *inter alia*, that the Court of first instance should retry the suit after making *N* a defendant in the suit was not illegal, notwithstanding that the provisions of s. 32 of Act X of 1877 were not made applicable to the procedure of the Revenue Courts by Act XVIII of 1873.

Held per SPANKIE, J., that s. 106 of Act XVIII of 1873 did not apply, and *B* was entitled separately to sue for the whole of the rent.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Pandit *Nand Lal*, for the appellants.

Babu *Oprokash Chander Mukerji*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the High Court:

PEARSON, J.—If s. 32 of Act X of 1877 had been declared to be applicable to the procedure of Revenue Courts, the lower appellate Court's order would have been fully warranted by the terms of its second clause. Merely by reason of the absence of any such declaration, or of similar provisions in the Rent Act of 1873, I am not prepared to hold the order to be illegal. It is a reasonable, equitable order, consonant to judicial practice, conducive to the ends of justice, and not repugnant to anything in Act XVIII of 1873. I would dismiss the appeal with costs.

[265] SPANKIE, J.—The plaintiff is a joint mortgagee of the shares of the defendants, the mortgagors, in an undivided estate. The mortgagees leased the estate to the mortgagors, taking from them a counterpart of lease dated 24th April 1877, the date apparently of the mortgage. By the terms of the lease the mortgagors were to pay Rs. 357 to the mortgagees, half at the *kharif* and half at the *rabi* yearly, on account of the right they held in equal shares. The suit is brought by one mortgagee for half the rent due in respect of 1283 fasli and 1284 fasli. The defendants contend that plaintiff is a co-sharer in an undivided estate, and has never collected rent separately: he is barred from suing separately by s. 106 of Act XVIII of 1873.

The Assistant Collector holds that the case turns on the terms of the counterpart of the lease; this document recites that defendants take over from Mangat Rai and Baldeo Sahai certain lands, whereof Mangat

* Appeal No. 60 of 1878, from an order of R.M. King, Esq., Judge of Meerut, dated the 28th May 1878.

Rai and Baldeo Sahai are possessed in equal shares, in consideration of the payment of Rs. 357 yearly, the former being liable for the Government demand: beyond these words there is no separation of the mortgagees: their relation to the farmers is a joint one: no one of them, the Assistant Collector holds, can sue for a share under a division which may obtain as between the mortgagees themselves: the plaint was informal and the suit must be dismissed.

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In appeal the Judge considered that the plaintiff could get no redress unless the Court exercised its powers under s. 32 of Act X of 1877. "This being so," the Judge adds, "I think the Rent Court should have exercised its powers, and so conduced to the redress of what is certainly an injury suffered by the plaintiff, *viz.*, the non-realisation of his rent." He, therefore, remanded the case with direction that the plaintiff should have leave to amend his plaint, to pay additional institution fee, and request the Court to make Mangat Rai a co-defendant.

It is contended in second appeal that s. 106 of Act XVIII of 1873 bars the suit: the direction under s. 32 of Act X of 1877 to the first Court to amend the plaint and make Mangat Rai a party to the suit is wrong in law, as that section is expressly limited to the first hearing of the suit.

[266] Section 32 of Act X of 1877 operates in two ways. The Court on or before the first hearing, upon the application of either party, may order the name of any party, whether as plaintiff or as defendant, improperly joined, to be struck out; and it may at any time either upon or without such application, and on such terms as it thinks just, order any plaintiff to be made a defendant, or that any defendant, may be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. So that if s. 32 of the Act could be applied to the case before us, the objection taken by the appellant fails. No person, however, can be added as a plaintiff without his own consent thereto.

The present Rent Act, except so far as ss. 84, 148, 179 and 210 are concerned, has made no provision for adding parties. Nor did Act X of 1859 do so, except under ss. 77 and 140. But the Courts heretofore have always held themselves at liberty to exercise the power vested in them under s. 73 of Act VIII of 1859 in such cases as the one before us. The order of the Judge, I agree with my honorable and learned colleague, is one that is equitable and not repugnant to Act XVIII of 1873, whilst it is consonant to judicial practice and the ends of justice. In this particular case the plaintiff could have no redress unless he made the co-mortgagee a defendant in the suit. It is stated in the plaint that Mangat Rai had been invited to join in the suit and that he refused, being in league with the defendants. The plaintiff sent a registered letter to him asking him to join in the suit, but got no reply. Therefore the plaintiff was compelled to sue for his half share. If, however, s. 106 of the Rent Act applies to this case, the plaintiff should be instructed to sue for the entire share due, making the co-mortgagee a co-defendant. I, however, do not regard s. 106 as in any way operating to bar the suit. The property referred to in s. 106 is an undivided landed estate, and the co-sharer is the co-sharer in that estate, which is still the property of the mortgagors. It is true that the mortgagees represent the mortgagors as being in temporary proprietary possession of the property, but it is not in the character of a co-sharer in an undivided property that the plaintiff brought

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[267] this suit. On the contrary, the terms of the lease show that though the mortgage was made to Baldeo Sahai and Mangat Rai, their shares in the mortgage were recognized by the mortgagors. Their shares were equal. It is true that it was provided that in case of default the mortgagees might bring a suit and realise the amount due. But there is the recognition by the lessees that under the terms of the mortgage deed the plaintiff is entitled to half the sum payable under the lease, and on this account I think that the plaintiff was entitled to sue for his share of it. It may, however, be more strictly regular that he should sue for the whole sum due, making his co-mortgagee a defendant; and if this is the course which the lower appellate Court is pursuing, for his order is not very clear, I concur with Mr. Justice Pearson, and would dismiss the appeal with costs.

Appeal dismissed.

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2 A. 267 (F.B.) = 4 Ind. Jur. 251.

FULL BENCH.

Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

CHAMAILI KUAR (*Defendant*) *v.* RAM PRASAD (*Plaintiff*).*
[16th April, 1879.]

Hindu Law—Power of the Father to alienate Ancestral property.

F, during the minority of his son *R*, sold in order to raise money for immoral purposes, the ancestral property of the family. The purchaser acted in good faith and gave value for such property. *Held* by the majority of the Full Bench (SPANKIE J., and OLDFIELD, J.). in a suit by *R* against the purchaser and *F* to recover such property and to have such sale set aside as invalid under Hindu law, that such sale was not valid even to that extent of *F*.'s share, and that *R* was entitled to recover such property as joint family property. *Held per* PEARSON, J., that *R* could not recover such property, and that the purchaser, having acted in good faith, took by the sale *F*'s share in such property, and might have such share ascertained by partition.

[F., 5 A. 384 (385) = A.W.N. (1883) 61; Appr., 15 A. 339 (350) (P.C.) = 20 I.A. 116 = 6 Sar. P.C.J. 313; R., 8 A. 205 (208) = A.W.N. (1886) 58.]

THE plaintiff in this suit claimed to recover the possession of certain immoveable property, and to have a sale of such property, dated the 30th December 1859, made by his father, Fateh Chand, set aside. He made his father a defendant in the suit, and he sued on the allegation that the sale was invalid, the [268] property being ancestral property, and the sale not having been made for purposes recognized by the Hindu law as necessary purposes. The purchaser set up as a defence to the suit that the plaintiff could not maintain the suit in his father's lifetime, and that the sale had been made for necessary purposes and was valid. The Subordinate Judge, on the 5th October 1874, for reasons which it is not material to state, dismissed the suit. The District Judge, on the 25th December 1875, on appeal by the plaintiff remanded the case to the Subordinate Judge for the trial of the issue, for what purpose was the property in suit alienated? The Subordinate Judge, on the 17th March 1877, found that the property in suit was alienated by Fateh Chand for the support of himself and the plaintiff, his minor son, and his wives and dependants.

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* Second Appeal, No. 1068 of 1877, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 18th July 1877, reversing a decree of Moulvi Muhammad Wajib-ul-la Khan, Subordinate Judge, Moradabad, dated the 17th March, 1877.

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2 A. 267 (F B) = 4 Ind. Jur. 251.

The District Judge, on the 18th July 1877, when the case came again before him, held that the sale was made without necessity, observing on the question of necessity as follows: "From the evidence on the record it is clearly established that applicant's father, who sold the property, was a man of immoral habits; that he was given up to wine and women, and he wanted money in consequence of those habits; it is even asserted pretty often that his illness arose from those habits; it is not alleged that he was in debt, and he certainly did not require the money (Rs. 260) some eighteen years ago for the necessary expenses of his son, then about three years old: the only possible ground that can be urged as an adequate one for the alienation is that the vendor was actually in want of means for his support and that of his family: this I consider not shown: how have they got on *these eighteen years since*; it has been repeatedly urged by respondent on the part of the heirs of the purchaser that the vendor then had no other property left when he sold this garden, but it does not therefore follow that there existed any real necessity for alienating *this* property: he has got on ever since without alienating property." The decree of the District Judge directed that the deed should be retained in the custody of the Court for three months, and that, if the plaintiff paid the purchase-money into Court within that period, the deed of sale should be delivered to him, and possession of the property in suit be given to him.

The defendant appealed to the High Court.

[269] The Division Court (SPANKIE, J., and OLDFIELD, J.) before which the appeal came for hearing referred to the Full Bench the questions set forth in the order of reference, which was as follows:

ORDER.

The suit has been brought by a son of a Hindu to obtain possession in his father's lifetime of joint ancestral property alienated by the father under a deed of sale, and to cancel the sale. This sale took place in 1859, since when the appellant, defendant and they whom he represents have held possession, and it affected the entire family property and not merely a share of it. The Judge has decreed the claim for possession, subject to the refund of the purchase money to appellant, and reversed the decree of the Court of first instance, and has found on the evidence that the father of the plaintiff, Fateh Chand, who was made a defendant, but did not defend the suit, was a man of immoral habits, who sold the property to further his vicious pleasures, and not under any necessity recognised by Hindu law. There is no reason to believe that the purchaser acted otherwise than *bona fide*. We refer to the Full Bench of the Court the question whether the son can obtain possession of the family property, and whether the appellant by his purchase has acquired the share of the respondent's father, Fateh Chand, and may have that share ascertained by partition.

Pandit *Ajudhia Nath* and Babu *Oprokash Chander Mukerji*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

PEARSON, J.—An answer to the first question must apparently be given in the negative, regard being had to the Hindu law as expounded by our Courts.

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On the hypothesis that the purchaser acted in good faith, I should, notwithstanding the lower appellate Court's unsatisfactory finding that the sale was made without any necessity, be inclined to answer the second question in the affirmative.

OLDFIELD, J.—The question of the power of a son to set aside a sale of joint ancestral property effected by the father, and the [270] liability of the joint ancestral estate for a father's debts, was discussed by their Lordships of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* and *Muddon Thakoor* v. *Kantoo Lall*, decided 12th May 1874 (1), and the principle there laid down will be a guide in the decision of the case before us. In the first of those cases, a son sued as in the case before us, to cancel a sale made by his father of joint ancestral property, and to recover possession of the whole estate.

Their Lordships cited the authority of *Hanoomanpersaud Panday* v. *Baboee Munraj Koonweree* (2), to show the extent of the liability of the ancestral estate, quoted the remarks in that case of Lord Justice Knight Bruce, and observed : "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him : it would be a pious duty on the part of the son to pay his father's debts and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce :—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.'" And they go on to observe : "It is necessary therefore to see what was the nature of the debt for the payment of which it was necessary to raise money by sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it, and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt." And further on in their judgment a case decided by the same Court, *Junnuk Kishore Koonwar* v. *Rughoonundun Singh* (3) is cited, in which it was held "that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose ;" in that case sales had been made simply in order to raise money for some [271] purpose or another. Their Lordships refused to set aside the sale in the case of *Girdharee Lal* v. *Kantoo Lall* (1), finding that the sale had been made *bona fide*, and for value, in order to save ancestral property from sale in execution of a decree obtained on a bond, which it was not shown had been given for an immoral purpose.

In the case now before us, however, the facts, as found by the lower appellate Court—and we must accept them—are widely different, and if we apply to them the principle which has been laid down, a case seems to have been made out for cancelment of the sale. It has been found that the sale was not made for the purpose of satisfying any debts due, nor for the use of the family, or from proper necessity, the family being in fairly easy circumstances, but entirely to provide money for the indulgence by

(1) 14 B.L.R. 187. (2) 6 M. I. A. 393. (3) S.D.A., L.P., 1861, p. 213.

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2 A. 267 (F.B.) = 4 Ind. Jur. 251.

the father of immoral and vicious pleasures. A sale under such circumstances would be liable to be set aside at the instance of the son. Nor can we say this is a case in which the purchaser, as dealing with the guardian of a minor, or the Manager of joint ancestral property, can claim partition, for though the transaction was so far *bona fide* on his part that he paid value for the property, it is clear that, if he had made reasonable enquiry, he could have learnt the circumstances under which the sale was being made, and been placed on his guard.

It remains to be seen whether the sale is valid to the extent of the father's interest in the property. Referring to West and Bühler, page 289, we find that it is stated that a single member cannot, according to the Shastras and to Colebrooke, deal directly with any portion of the common property, but that, acting on the dictum of Colebrooke, that, in case of an alienation for valubale consideration, equity would perhaps award partition to the alienee, the Court has allowed execution against the common property to ascertain the individual share, and make it available to the creditor, and has recognised that a single co-parcener may sell or incumber his own share for valuable consideration, the vendor acquiring a right to partition; and the Madras and Bombay High Courts have acted on [272] this principle in the case of both voluntary and involuntary sales (1). But the principle cannot be said to have been hitherto recognised on this side of India. In a recent decision, however, of the Privy Council *Deendyal Lal* v. *Jugdeep Narain Singh*, dated 25th July 1877 (2), the question has been discussed. In that case a father had executed a bond in favour of defendant who had obtained a decree on it, and taken execution by sale of the father's interest in ancestral property which he himself bought. The son brought the suit to recover the property. A question arose whether under the law of Mitakshara the share of one co-sharer in a joint family estate could be taken and sold in execution of a decree against him alone. After commenting on the cases decided by the Madras and Bombay Courts, and remarking that they affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners, and admitting that the latter proposition is opposed to several decisions of the Courts of Bengal, the Privy Council decided that the law, as respects the rights of an execution-creditor and of a purchaser at an execution sale, should be declared to be the same in Bengal as that which exists in Madras; and in the case before them they varied the decree which had been given for possession of the property to be held for the benefit of the joint family, by adding a declaration that the purchaser at the execution-sale has acquired the share and interests of the father in that property, and is entitled to take such proceedings as shall be advised to have the share and interest ascertained by partition. No decision was made in that case whether the same principle should apply to the case of a purchaser in a voluntary sale, which is the case before us; but their Lordships went on to observe that, "however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution-sale may be, it is clear that a distinction

(1) See *Palanivelappa Kaundan* v. *Mannaru Naikan*, 2 M. H.C.R. 416; *Vasudev Bhat* v. *Venkatesh Sanbhav*, 10 B.H.C.R. 139. *Udaram Sitaram* v. *Ranu Panduji*, 11 B.H.C.R. 76; and *Mahabalaya* v. *Timaya*, 12 B.H.C.R. 138.
(2) 3 C. 198.

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may, and in some cases does, exist between them." The objection that the sale is invalid even to the extent of a co-parcener's share is based mainly on the texts of Mitakshara, ch. i, s. i, vv. 27 to 30, and the [273] constitution of the joint Hindu family as defined in *Appovier* v. *Rama Subha Aiyan* (1). The opposite view is supported by dicta of Colebrooke, Ellis and Strange, and is that followed in the Madras and Bombay Presidencies, and the question was fully discussed in *Vasudev Bhat* v. *Venkatesh Sanbhav* (2) But the question cannot be said to be at this time an open one on this side of India. There is no doubt a current of decisions by this Court, invalidating sales by one co-parcener, without the consent express or implied of his co-parcener, and I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest,—*Ajoodhya Pershad* v. *Lalta Pershad* (3); *Boboo Ram* v. *Gajadhur Singh* (4); *Byjnath Singh* v. *Rameshur Dyal* (5); *Jeynarain Singh* v. *Roshun Singh* (6). The question has been decided in the same way by the Calcutta High Court in *Sadabart Prasad Sahu* v. *Foolbash Koer* (7). The law may be said to have been settled by a course of decisions, and it would be undesirable to disturb it.

On this view the sale must be set aside, and the plaintiff is entitled to have possession of the property to be held as joint family property.

SPANKIE, J.—I accept the opinion of Mr. Justice Oldfield on the point referred to the Full Bench.

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2 A. 273 = 4 Ind. Jur. 304.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

SHEO PRASAD (*Judgment-debtor*) *v.* ANRUDH SINGH (*Decree-holder*).*
[17th April, 1879.]

Execution of Decree—Act IX of 1871 (*Limitation Act*), *sch. ii, art.* 167, *cl.* 2.

The words "where there has been an appeal" in cl. 2, art. 167 of sch. ii of Act IX of 1871, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree under s. 119 of Act VIII of 1859.

[R., 16 B. 123 (125); D., 4 A. 274 (276).]

[274] THE decree in this case was a decree for money and was made *ex parte* against the defendant on the 2nd December 1874. The defendant applied to the Court which made the decree, under the provisions of s. 119 of Act VIII of 1859, for an order to set it aside. The Court rejected this application, and the defendant appealed against the order of rejection. The appellate Court, on the 17th April, 1875, affirmed the order of rejection, and dismissed the appeal. On the 12th April, 1878 the plaintiff,

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* Second Appeal, No. 104 of 1878, from an order of C. W. Watts, Esq., Judge of Farukhabad, dated the 29th June, 1878, affirming an order of Maulvi Abdul Basit, Munsif of Chibramu, dated the 10th May, 1878.

(1) 11 M. I. A. 75. (2) 10 B.H.C.R. 139.
(3) S D.A. N.W.P., 1864. vol. ii. p. 315.
(4) N. W. P. H. C. Rep. F. B. R. 1866-67. p. 86.
(5) S.D.A. N.W.P. 1864, vol. i, p. 299. (6) S. D. A.N.W.P. 1860, p. 162.
(7) 3 B. L. R. F. B. 31.

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the decree-holder, applied for the execution of the decree. The defendant, the judgment-debtor, set up as a defence to this application that the execution of the decree was barred by limitation. The Court of first instance held, with reference to the provisions of cl. 2, art. 167, sch. ii of Act IX of 1871, that the period of three years allowed for the execution of the decree began to run from the date of the order of the appellate Court dated the 17th April, 1875, and the application for execution was consequently preferred within time. On appeal by the judgment-debtor the lower appellate Court concurred in the view taken by the Court of first instance of the question of limitation.

The judgment-debtor appealed to the High Court, contending that there had been no appeal within the meaning of cl. 2, art. 167, sch. ii of Act IX of 1871.

Munshi *Hanuman Parshad*, for the appellant.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

The judgment of the High Court was delivered by

PEARSON, J.—In our opinion the lower Courts are wrong in holding that the period of three years allowed by law for the execution of the *ex parte* decree, dated 2nd December, 1874, should be reckoned from the date of the order of the appellate Court which upheld the first Court's order refusing the application made by the defendant for the re-hearing of the suit. The first two clauses of art. 167, sch. ii, Act IX of 1871, allow three years for the execution of a decree from the date of the decree, or (where there has been an appeal) from the date of the final decree of the appellate Court. We think it beyond doubt that the words, "where there [275] has been an appeal," contemplate and mean an appeal from the decree; and no other appeal. In the present case there was no appeal from the decree now sought to be executed; nor indeed under the provisions of the old Code of Procedure was that decree appealable. The application for execution of the decree of 2nd December, 1874, presented on 12th April, 1878, was clearly beyond time, and should have been disallowed. We reverse the orders of the lower Courts and decree the appeal, with costs in all Courts.

Appeal allowed.

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2 A. 275 = 4 Ind. Jur. 357.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

RAM KISHEN (*Decree-holder*) v. SEDHU (*Judgment-debtor*).*
[21st April, 1879]

Execution of Decree—Act X of 1877, (*Civil Procedure Code*), *s.* 230.

Held that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 mean an application under that section, and not an application under Act VIII of 1859.

[R., 6 C. 504 (512)]

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* Second Appeal, No. 93 of 1878, from an order of H. G. Keene, Esq., Judge of Agra, dated the 31st July 1878, affirming an order of Maulvi Mubarak-ul-lah, Munsif of Muthra, dated the 15th June 1878.

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THE decree-holder in this case applied in February 1878, under s. 230 of Act X of 1877, for the execution of the decree. He had previously applied under Act VIII of 1859 for the execution of the decree in July 1877. The Court executing the decree refused to grant the application for reasons which it is not necessary for the purposes of this report to state. On appeal by the decree-holder the lower appellate Court refused to grant the application, with reference to the third clause of s. 230 of Act X of 1877, on the ground that the decree-holder had not on the application made, in July 1877, used due diligence to obtain complete satisfaction of the decree.

The decree-holder appealed to the High Court, contending that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 meant the last preceding application under that section, and not a preceding application under Act VIII of 1859.

Munshi *Hanuman Prasad*, for the appellant.

[276] The Junior Government Pelader (Babu *Dwarka Nath Banerji*), for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—The Judge has disallowed the application for execution on the ground, though, not taken by the judgment-debtor, that the execution of the decree is barred under the provisions of s. 230, Act X of 1877, as due diligence was not used to procure complete satisfaction of the decree on the last preceding application. But the last preceding application to which s. 230 refers is an application made under that section, and in the case before us the last preceding application was made in July 1877 before Act X of 1877 came into force. Those proceedings in execution were ultimately disposed of in December 1877, but there was no fresh application for execution of the decree made intermediately between July and December 1877. We reverse the order of the Judge and decree the appeal, and allow execution of the decree to proceed. The appellant will have costs in all Courts.

Appeal allowed.

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CRIMINAL JURISDICTION.

Before Mr. Justice Spankie.

EMPRESS OF INDIA *v.* NILAMBAR BABU. [21st April, 1879.]

Act X of 1872 (*Criminal Procedure Code*), *ss.* 4, 297. 415, 416, 417. 418, 419, 420—*Stolen property—High Court, Powers of Revision—"Judicial Proceeding."*

Where a person was accused of dishonestly receiving stolen property knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen, *held* that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418 of Act X of 1872 regarding its disposal (1).

Where there is a Court of Appeal, resort should be had thereto before application is made to the High Court for the exercise of its powers of revision.

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(1) If the Court is of opinion that no offence appears to have been committed regarding the property, it is bound to restore the property to the accused person.—In re *Annapurnabai*, I L.R. 1 B. 630.

Quære.—Whether the issue by the Magistrate of a proclamation under s. 416 of Act X of 1872 is a "judicial proceeding," within the meaning of s. 297 of that Act.

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[R., 9 M. 148=1 Weir 672; A.W.N. (1892) 102; 14 C.P.L.R. 60.]

[277] THIS was an application to the High Court for the exercise of its powers of revision under Act X of 1872. The petitioner and one Khazan Singh were accused, under s. 411 of the Indian Penal Code, of dishonestly receiving stolen commissariat tea, knowing that the same was stolen property. There being no evidence that the tea was stolen commissariat property, the Magistrate, Mr. E. White, discharged the accused persons on the ground that no offence had been proved against them, and ordered that a proclamation under the provisions of s. 416 of Act X of 1872 should issue. The petitioner applied for the revision of the Magistrate's order.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), for the Crown, contended that a proceeding under s. 416 of Act X of 1872 was not a "judicial proceeding," and the High Court could not therefore interfere under s. 297.

Mr. *Colin.*—The Magistrate must be taken to have acted under s. 418 of Act X of 1872 and not s. 416. He could not have acted under s. 416, as the procedure laid down in ss. 415 and 416 applies to property seized by the police under suspicious circumstances, and not to property regarding which an offence appears to have been committed. Orders made under s. 418 are open to revision,—s. 419. No offence having been proved against the petitioner, no offence appeared to have been committed, within the meaning of s. 418, and the Magistrate's order is illegal. The property was not stolen property.

The *Junior Government Pleader.*—The Magistrate considered that the property was stolen property, which was sufficient to enable him to make an order under s. 418. There are good reasons for thinking that the property was stolen.

JUDGMENT.

SPANKIE, J.—A preliminary objection was taken by the Junior Government Pleader that this Court cannot interfere under s. 297 of the Criminal Procedure Code, as the order complained of purports to have been made under s. 416 of the Code, which directs the course to be pursued where the ownership of property seized by the police, as alleged or suspected to have been stolen, is unknown, and therefore the order was not made in the course of a "judicial proceeding." Ordinarily a proclamation issued under s. 416 would be made in consequence of a seizure by any police officer [278] of property alleged (i) or suspected (ii) to have been stolen, or found (iii) under circumstances which create suspicion of the commission of any offence. On receiving the police report the Magistrate is to make such order respecting the custody and production of such property as he thinks proper (s. 415). But when the owner of any such property is unknown the Magistrate may detain it, or the proceeds thereof, if sold, and in case of such detention shall issue a proclamation, the particulars of which are detailed in s. 416.

It may perhaps be doubted, if nothing more be done than the mere issue of a proclamation, whether the course adopted by the Magistrate would have amounted to a "judicial proceeding." At the same time "judicial proceeding" means any proceeding in the course of which evidence is, or *may be taken*, or in which any judgment, sentence,

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or final order is passed on recorded evidence. The action of the Magistrate in issuing the proclamation is to require any person who may have a claim to such property as may be sent in by the police under s. 415 to appear before him and establish his claim within six months. This is possibly a stage of a judicial proceeding, for at the expiration of the term provided by the proclamation, it is probable that a claimant might appear, and evidence would be recorded. But it is not necessary for me to determine the point in this case. For Nilambar Babu and Khazan Singh, the accused, were arrested and sent in to the Magistrate for trial under s. 411 of the Penal Code (the stolen property being alleged to belong to Government) after an investigation made by the police. This therefore was not a case in which, in dealing with the property seized by them, and finding that the owner was unknown the Magistrate had issued a proclamation under s. 416 of the Criminal Procedure Code.

The proceeding that followed was a judicial proceeding in which evidence was recorded, after which the Magistrate felt himself bound to discharge the accused, as there was nothing to establish the fact that any tea had ever been stolen or missed from the Commissariat godowns, and no claim on account of the tea had been made by the Commissariat Department. On the contrary, the Commissariat officials, Lieutenant Spence, Sub-Assistant Commissary-General, Sergeant Griffiths, his subordinate, and Lieutenant Davies; Quartermaster, 22nd Regiment, Sergeant Harris, Quarter- [279] master Sergeant, all concurred in saying that not only no tea had been stolen, but that under the circumstances it was impossible that it should have been stolen. The Magistrate states that special inquiry had been made by the police in order to ascertain how Nilambar Babu, the victualling *gomashta*, could have become possessed of the tea, which was proved to be ration tea, but nothing further had been elicited, the police reporting that the Commissariat officials would not disclose the real facts of the case.

"It must, however," remarks the Magistrate, "be admitted that the case against the two accused is of the very gravest suspicion : a sack of tea precisely resembling ration tea is carried off in a closed *ekka* (*i.e.*, with the curtains down) from the neighbourhood of the Commissariat godown, and no explanation appears as to whence this tea came : further, five similar sacks of tea are found in the possession of the victualling *gomashta*, regarding which he can give no explanation whatever, and which (tea) precisely resembled ration tea, which it is his duty to serve out for the troops. Under the circumstances there may possibly be some justification for the assertion of the police that the Commissariat officials, had they chosen to exert themselves, might have discovered how the *gomashta* could have abstracted the Government tea : perhaps even now a thorough investigation into the Commissariat management here by the Heads of the Department might disclose the manner in which the speculation could have been carried on."

The Magistrate then discharged the accused, subject to their apprehension hereafter on the discovery of fresh evidence, and on the same day by a separate proceeding, or what is called "a foot-note in the case of Nilambar Babu," ordered that a copy of his judgment should be sent to the Commissary General for information, together with a complete list of the military stores found in possession of the *gomashta*, and further that "a proclamation under s. 416, Criminal Procedure Code, will issue regarding these articles." Nilambar Babu applies for a revision of this order under ss. 294, 297 and 419, Criminal Procedure Code, on the ground

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(i) that there was no evidence on record to show that the property was stolen property; (ii) that there was none that would justify action under s. 416 of the Code of Criminal Procedure; (iii) that the remarks made regarding the petitioner are not borne out [280] by the evidence on record, and should be set aside; and (iv) that the property may be released in favour of the petitioner.

Under s. 418 the Magistrate was at liberty, at the close of the inquiry into the police charge under s. 411, Penal Code, to make such order as appeared right for the disposal of the property produced before him, and regarding which any offence appeared to have been committed. It is contended that the Magistrate's finding shows that no offence appears to have been committed. But I do not understand the Magistrate to mean that no offence had been committed. I understand that he reluctantly felt himself compelled to discharge the accused for want of further evidence. The petitioner was aware, it would seem, that the Magistrate's order was made really under s. 418, for he cites s. 419 of the Criminal Procedure Code as one under which this Court could deal with it, and this is so. But there was a Court of Appeal to which he should have first resorted, *viz.*, that of the Sessions Judge, who might have interfered in the matter (1). Resort to this Court as one of Revision was premature, and it has been the practice, I think, of this Court not to interfere in revision, when the petitioner has neglected to avail himself of the ordinary channel of relief below. But as this application has already been admitted by a Judge of this Court, and as the section (419) admits of my interference, it would be better perhaps and more convenient for all to dispose of the case here. My reasons for assuming that the order of the Magistrate was passed under s. 418 is that it was made at the conclusion of the inquiry in his Court into the alleged offence under s. 411 of the Penal Code, and a proclamation under s. 416 was issued, because s. 420 provides that an order passed under ss. 418 and 419 may be in the form of a reference of the property to the Magistrate of the District or to a Magistrate of a Division of a District, who shall in such cases deal with it as "*if the property had been seized by the Police and the seizure had been reported to him in the manner herein before mentioned.*" It was not necessary in this case that Mr. White, the Magistrate, should make the order in the form referred to, as he was already competent to issue the proclamation referred to in s. 416. So far then it appears that [281] the order was one within the competence of the Magistrate to make, and that the Magistrate believed that an offence had been committed, though it was not on the evidence before him established against the accused. Whether action under s. 416 was justified by the evidence was for the Magistrate to determine. I cannot say that he exercised his discretion wrongly regarding the tea regarding which the Babu made no claim. On the contrary, the latter said that the tea was found in the house occupied by Khazan Singh, his servant, and he supposes that Khazan Singh put it there Moreover he did not explain how he became possessed of the tea or sugar either, but he said that they were not ration food. He, however, explained his possession of other portions of the property found. There was moreover some evidence that the guns were his as also the "kukri" and pistol and the cartridges did not appear to bear the Queen's mark. The other articles, too, were such as he could have bought

(1) The words "Court of Appeal" in s. 419 are not necessarily limited to a Court before which an appeal is at the moment pending—*Empress* v. *Joggessur Mochi*, 3 C. 379.

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at public auction or might reasonably have in his own possession. This, too, may be said of the sugar which did not exceed $1\frac{1}{8}$ seers in quantity. The law requires that "an offence should appear to have been committed," and when this is the case, an order may be made under s. 418 of the Criminal Procedure Code. But with respect to the property proclaimed an offence appears to have been committed only as regards the tea. Therefore the proclamation must be confined to the tea found and seized by the police, and in this respect the order must be modified, and the remaining portion of the property will be excluded from the proclamation. I see no remarks on the part of the Magistrate regarding the Babu which are not warranted by the suspicious character and the circumstances of the case, and the Court below was quite justified in refusing to give back the tea, but the petitioner may have the rest of the property restored to him.

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2 A. 281=4 Ind. Jur. 357.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

SOHAN LAL AND ANOTHER (*Decree-holders*) *v.* KARINBAKHSH (*Judgment-debtor*).* [22nd April, 1879.]

Execution of Decree—Act X of 1877 (*Civil Procedure Code*), s. 230—*Limitation.*

The concluding clause of s. 230 of Act X of 1877 refers to the question of limitation, not that of due diligence.

[282] Where, therefore, the decree-holder had not on the last preceding application under s. 230 of Act X of 1877 used due diligence to procure complete satisfaction of the decree, and Act X of 1877 had not been in force three years, *held* that the provisions of the third clause of s. 230 of Act X of 1877 were applicable to a subsequent application under that section.

THE transferees of the decree in this case applied on the 23rd February 1878, under s. 230 of Act X of 1877, for the execution of the decree, which was dated the 30th March 1872. They had previously applied under that section for the execution of the decree on the 21st December 1877. The Court executing the decree ordered on this application that the notices required by ss. 232 and 248 of Act X of 1877 should be given. The notices required by s. 232 were served, but the notice required by s. 248 was not served as the decree-holder failed to pay the Court fees leviable for the service of the notice. In consequence of this failure the application was dismissed by the Court. The judgment-debtor set up as a defence to the application dated the 23rd February 1878, that under s. 230 of Act X of 1877 it ought not to be granted, the decree-holder not having on the preceding application, dated the 21st December 1877, used due diligence to procure satisfaction of the decree. The Court refused to grant the application on the ground that the decree-holder had not on the preceding application used due diligence to procure satisfaction of the decree. On appeal by the decree-holders the lower appellate Court affirmed the order refusing the application.

The decree-holders appealed to the High Court, contending, with reference to the concluding clause of s. 230 of Act X of 1877, that the

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* Second Appeal, No. 114 of 1878 from an order of W.C. Turner, Esq., Judge of Saharanpur, dated the 24th July 1878, affirming an order of Babu Ishri Prasad, Munsif of Deoband, dated the 6th March 1878.

provisions of the third clause of that section were not applicable, three years after the passing of Act X of 1877 not having elapsed.

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2 A. 281 = 4 Ind. Jur. 357.

Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The concluding clause of s. 230 of Act X of 1877 appears to us to refer to the question of limitation, not that of diligence. In this case a previous application had been made to the Court under the section, of which the third clause therefore appears to be applicable. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 283 = 4 Ind. Jur. 358.

[283] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

KADIR BAKHSH (*Decree-holder*) v. ILAHI BAKHSH AND ANOTHER (*Judgment-debtors*).* [23rd April, 1879.]

Execution of Decree—Powers of the Court in executing transmitted decree—Act X of 1877 *(Civil Procedure Code), ss.* 228, 232—*Transfer of Decree.*

Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferee applied for the execution of the decree to the Court to which the decree was sent for execution, *held* that such application should be made not to such Court but to the Court which passed the decree.

[F., 27 C. 488 (492).]

THE decree in this case had been sent by the District Court at Cawnpore to the District Court at Aligarh for execution, and the District Court at Aligarh had directed the Subordinate Judge of Aligarh to execute the decree. On the 7th June 1878 the decree having been transferred by assignment, and the transferee having applied to the Subordinate Judge of Aligarh for its execution, the judgment-debtors objected to the application being made to the Subordinate Judge of Aligarh, contending that it should be made to and be disposed of by the Court which passed the decree. The Subordinate Judge of Aligarh overruled this objection. On appeal by the judgment-debtors the lower appellate Court allowed the objection.

The decree-holder appealed to the High Court, contending that the Subordinate Judge had the same powers under s. 232 of Act X of 1877 as the Court which passed the decree.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the appellant.

The respondents did not appear.

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* Second Appeal, No. 131 of 1878, from an order of G. E. Watson, Esq., Judge of Aligarh, dated the 9th November 1878, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 3rd July 1878.

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2 A. 283=
4 Ind. Jur.
358.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—We see no sufficient reason to interfere with the lower appellate Court's decision which is in conformity with the terms of the law, and is supported by this Court's ruling dated the 20th December 1870 (1). The appeal is therefore dismissed.

Appeal dismissed.

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2 A. 284.

[284] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

COLLINS (*Decree-holder*) *v.* MAULA BAKHSH AND OTHERS (*Judgment-debtors*).* [23rd April, 1879.]

Execution of Decree—Limitation.

Held that an application to the Court which passed a decree, that it may be sent for execution to another Court, is an application to keep such decree in force within the meaning of the Limitation Act.

[F., 22 C. 375 (376); R., 20 C. 29 (32).]

THE decree in this case was passed by the Munsif of Meerut on the 23rd December 1873, and was affirmed by the appellate Court on the 13th June 1874. On the 22nd April 1875 the decree-holder applied to the Munsif of Meerut under s. 285, Act VIII of 1859, for the execution of the decree by the Munsif of Bulandshahr. The Munsif of Meerut granted the certificate required by that section, and, as it appeared, made it over to the decree-holder. On the 22nd July 1877 the decree-holder presented the certificate to the Munsif of Bulandshahr with a view to the execution of the decree. The Munsif refused to receive the certificate, and directed the decree-holder to apply for a fresh certificate. The decree-holder applied to the Munsif of Meerut for a fresh certificate and obtained it, and on the 29th January 1878 applied to the Munsif of Bulandshahr for the execution of the decree. The Munsif held that the execution of the decree was barred by limitation, and dismissed the application. On appeal the lower appellate Court affirmed the order of the Munsif, holding that an application to transfer a decree for execution from one Court to another is not an application to keep a decree in force.

The decree-holder appealed to the High Court.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Nand Lal*, for the respondents.

JUDGMENT.

The judgment of the High Court was delivered by

PEARSON, J.—The appeal must prevail. The decision of the lower Courts is opposed to numerous rulings of this Court (2) to the effect that

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* Second Appeal, No. 123 of 1878, from an order of R M. King, Esq., Officiating Judge of Meerut, dated the 24th September 1878, affirming an order of Muhammad Mir Badsha, Munsif of Bulandshahr, dated the 13th April 1878.

(1) Unreported.

(2) See *Husain Bakhsh* v. *Madge*, 1 A. 525,

an application to transfer a decree for execution [285] from one Court to another is an application to keep a decree in force. We accordingly decree the appeal with costs, and reversing the orders of the lower Courts, direct the Court of first instance to proceed with the application according to law.

Appeal allowed.

2 A. 285.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAGHU RAM AND OTHERS (*Judgment-debtors*) v. DANNU LAL (*Decree-holder*).* [25th April, 1879.]

Execution of Decree—Proceeding to enforce decree—Act XIV of 1859 (*Limitation Act*), *s.* 20—*Limitation.*

Application for the execution of a decree was made on the 21st December 1864, and in pursuance of such application the notice required by law was issued to the judgment-debtor. On the 7th February 1865 the Court executing the decree called on the decree-holder to produce proof of the service of such notice within four days. On the 23rd February 1865, in consequence of the decree-holder having failed to produce such proof, the Court dismissed the application. There was no proceeding either of the decree-holder or of the Court between the 7th and the 23rd February 1865. On the 18th February 1868, application was again made for the execution of the decree. *Held* that the proceeding of the Court of the 23rd February 1865, striking off the former application for default of prosecution was not a proceeding to keep the decree alive, and the latter application was therefore beyond time.

THIS was an application for the execution of a decree. The facts of the case are sufficiently stated in the judgment of the High Court, to which the judgment-debtors appealed from the order of the lower appellate Court granting the application. The judgment-debtors contended that the application was barred by limitation.

Lala *Lalta Prasad*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The question is whether the application of the 18th February 1868 was within time. The last preceding [286] application was made on the 21st December 1864, and in pursuance thereof notice was issued to the judgment-debtor. On the 7th February 1865 the Court required the decree-holder to produce proof of the service of the notice within four days, and on the 23rd idem, in consequence of his having failed to comply with the requisition, struck off the application.

The first Court has held the application of the 18th February 1868 to have been beyond time, being of opinion that the period of three years allowed by law should be reckoned from the 7th February 1865, the date on which the decree-holder ceased to proceed in the matter of the application of the 21st December 1864 The lower appellate Court has held that the

* Second Appeal, No. 67 of 1878, from an order of H. A. Harrison, Esq., Judge of Mirzapur, dated the 29th April 1878, reversing an order of Mirza Abid Ali Beg, Subordinate Judge of Mirzapur, dated the 1st March 1876.

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period of limitation should be reckoned from the 23rd February 1865, the date on which the application of 21st December 1864 was struck off, and consequently that the application of 18th February 1868 was within time. The first plea in appeal impugns the lower appellate Court's ruling on the point in question, and is accepted by us as valid.

There was no proceeding either of the decree-holder or of the Court between the 7th and 23rd February 1865 On the part of the decree-holder, instead of action, there was inaction; and the Court's proceeding of the latter date striking off the application for default of prosecution was certainly not a proceeding to keep the decree alive. The view we take appears to us to be strongly supported by some of the observations in the Privy Council's judgment dated 14th July 1870, in the case of *Dhiraj Mahtab Chund Bahadur* v. *Bulram Singh Baboo* (1) as well as by the judgment (2) to which the lower appellate Court refers in support of its own view.

We accordingly decree the appeal with costs, reversing the lower appellate Court's order and restoring that of the Court of first instance.

Appeal allowed.

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2 A. 287.

[287] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MADHO DAS AND OTHERS *(Plaintiffs)* *v.* RUKMAN SEVAK SINGH AND OTHERS (*Defendants*).* [28th March, 1879.]

Act VIII of 1859 (*Civil Procedure Code*), *s.* 377—*Review of Judgment—Limitation.*

The plaintiff in a suit applied, more than two years after the proper time, for a review of the judgment in such suit, filing with his application a copy of a decision by the High Court, which had been passed subsequently to the date of such judgment, in support of a contention contained in his application which should have been, but was not, urged at the hearing of his suit. Such contention and the other arguments and statements contained in his application might have been adduced within the time allowed by law for an application for a review of judgment. *Held* that, as such contention might have been urged at the first hearing of the case, there was no "just and reasonable cause" for preferring the application after time, and the Court of first instance was therefore not warranted in granting the application and reviewing its judgment.

THE facts of this case were as follows: On the 9th May 1868 one Ranjit Kuar, as the guardian of her minor son, Rukman Sevak Singh, borrowed jointly with one Ajudhia Prasad Singh certain moneys from one Harakh Chand, and gave him a bond for the payment of such moneys, which charged amongst other properties certain immoveable property belonging to Rukman Sevak Singh with the payment of such moneys. This bond was executed by Ajudhia Prasad Singh for himself and as attorney of Ranjit Kuar. In March 1873 Harakh Chand sued to enforce payment of this bond. The Subordinate Judge, on the 23rd August 1873, gave the plaintiff a decree against Ajudhia Prasad Singh, who confessed

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*Regular Appeal, No. 23 of 1877, from a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 24th November 1876.

(1) 5 B. L. R. 616.

(2) *Roy Dhunput Singh Roy* v. *Mudhamottee Debia*, 11 B. L. R. 23.

judgment, but refused to pass a decree against the minor or his property, on the ground that his mother had no power to borrow money on his behalf or to alienate his property without the permission of the District Court, which had granted her a certificate of administration under Act XL of 1858 in respect of her minor son's property. On the 3rd November 1875 Harakh Chand applied for a review of this judgment, stating that he did so, "with reference to evidence which could not be adduced either when the case was decided or within the period allowed by law." The application pointed out that Ranjit Kuar had not, as the Subordinate Judge considered, been [288] granted a certificate of administration under Act XL of 1858 in respect of her minor son's property, but a certificate under Act XXVII of 1860 to collect the debts of her deceased husband, and that the High Court on the 13th August 1875 had decided, in a suit by one Kishna Ram against the defendants in the present suit, that Ranjit Kuar did not stand in need of obtaining permission from the District Court to borrow money on behalf of her minor son or to alienate his property, as she had not been empowered by the District Court under Act XL of 1858 to administer his estate. A copy of this decision by the High Court was the new evidence on which the plaintiff relied. The Subordinate Judge admitted the application, and, notwithstanding that the minor was not then properly represented in the suit, re-heard it, and on the 29th November 1876, in review of his first judgment, gave the plaintiff's representatives, the plaintiff having meanwhile died, a decree against the minor's property, observing that the minor might sue to have the acts of his mother set aside when he became of age, if he had been injured by them.

The plaintiff's representatives appealed against this decree to the High Court, contending that the minor should have been properly represented in the suit, and the Subordinate Judge then should have determined whether the charge which they sought to enforce on his property was valid or not.

Munshi *Hanuman Prasad*, for the appellants.

Mr. *Ross* and Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—This appeal has been pending here for more than two years because one of the defendants, respondents, *viz.*, Rukman Sevak Singh, who is a minor, was not properly represented. He is now at last represented by Dip Narain Singh, who has been duly appointed his guardian, and the appeal is ready for hearing. The appeal relates to a judgment passed by the lower Court on the 29th November 1876, in review of a former judgment dated 23rd August 1873. The decree is in favour of the plaintiffs, appellants; but one of the grounds of the appeal is that the minor aforesaid was not duly represented in that Court. An objection has been taken by the counsel for the guardian of the minor on his behalf that [289] the review was improperly granted more than two years after the date of judgment originally passed in the suit, without any sufficient explanation of the long delay in making the application for review. We have considered the objection, and are of opinion that it is valid and must be allowed.

The application for review of the judgment passed on the 23rd August 1873 bears the date of the 3rd November 1875, and the explanation which it offers of the delay of more than two years in preferring it is that

1879 March 28. — Appellate Civil. — 2 A. 287.

fresh evidence has come to hand, which could not be adduced either when the case was decided or within the period allowed by law. The evidence so tendered was a copy of a judgment of this Court dated 13th August 1875, in regular appeal No. 451 of 1874, Ato Kuar and Ranjit Kuar herself and as guardian of Rukman Sevak Singh, minor, defendants, appellants *v.* Kishna Ram, plaintiff, respondent. In that case, in reference to a transaction then in question between the parties aforesaid, the Court remarked that the minor's mother was competent to act in the transaction as his guardian, and, as she had not been empowered to administer his estate by the Civil Court, was not bound to obtain its sanction to her proceedings. The object of filing the judgment containing the remark aforesaid was to support the contention that the minor was bound by the mortgage-deed executed by his mother as his guardian in the present case. The judgment so filed was not properly speaking evidence at all. It was merely authority in support of a contention which should have been urged upon the Subordinate Judge when hearing the case in the first instance.

We do not say that the grounds set out in the application for review were not good grounds for granting a review, nor can they be called in question. But, however good they were, the application could not be granted unless just and reasonable cause were shown to the satisfaction of the Court for not having preferred it within the time allowed by the law. In this case no such just and reasonable cause was shown. The reference to this Court's judgment dated 13th August 1875 was a mere blind. The argument to which that judgment gave countenance and the other arguments and statements contained in the application might have been adduced within the proper time.

[290] The lower Court was not therefore warranted in granting the application and reviewing its former judgment of 23rd August 1873. We accordingly allow the objection taken here on behalf of the minor respondent, and dismiss the appeal with costs, and set aside the judgment and decree dated the 29th November 1876.

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2 A. 290=4 Ind. Jur. 359.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

SULTAN KUAR (*Judgment-debtor*) *v.* GULZARI LAL (*Decree-holder*).*
[17th April, 1879.]

Execution of Decree—Sale of a Money-decree—Act X of 1877 (*Civil Procedure Code*), ss. 166, 273.

Held that Act X of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in s. 273 cannot lead to its sale.

Held also that the last clause but one of s. 273 applies to other than money-decree.

Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provisions of the first clause of s. 273 of Act X of 1877 were applicable on principle.

[F., 16 B. 522 (524); 20 C. 111 (114); R., 28 A. 771 (774)=3 A.L.J. 585=A.W.N (1906) 237=1 M.L.T. 247; D., 21 A. 405 (407)=A.W.N. (1899) 157; 34 M. 442=1 Ind. Cas. 535=5 M.L.T. 278.]

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* Reference, No. 1 of 1879, by R. F. Saunders, Esq., Judge of Farukhabad.

1879 APRIL 17.

CIVIL JURISDICTION.

2 A. 290 = 4 Ind. Jur. 359.

THIS was a reference to the High Court, under s. 617 of Act X of 1877, by Mr. R. F. Saunders, District Judge of Farukhabad. One Sultan Kuar, on the 8th August 1878, obtained a decree against one Lahro Bai and certain other persons for Rs. 500, in the execution of which she caused certain immoveable property to be attached as the property of the judgment-debtors. One Gulzari Lal objected to the attachment of this property, claiming it as his own, and on the 14th September 1878 the Court to which the decree had been sent for execution ordered that the attachment should be removed, and that Sultan Kuar should pay the costs of the objection, which amounted to Rs. 25 or thereabouts. Gulzari Lal, in order to enforce payment of this amount, caused Sultan Kuar's decree to be attached in the execution of the order dated the 14th September 1878. Sultan Kuar objected to the sale of her decree on the ground that Act X of 1877 did not contemplate the sale of a decree for money. The Court of first instance disallowed the objection and directed that the decree should be sold. Sultan Kuar [291] appealed to the District Judge against the order disallowing her objection, who referred to the High Court the question whether or not Sultan Kuar's decree was saleable in the execution of the order dated the 14th September, 1878.

The parties were not represented.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree in s. 166 of Act X of 1877, yet it is apparent from the provisions of s. 273 of the Act that the sale of a money-decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale.

In our opinion the Judge is wrong in holding the last clause but one of s. 273 to be applicable in the present case. That clause applies to other than money-decrees. Although the two decrees held by Gulzari Lal and Sultan Kuar respectively were not passed by the same Court, nevertheless as they are being executed by the same Court, the provisions of the first class of the section are applicable on principle.

Our opinion may be communicated to the Judge in reply to his reference.

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2 A. 291.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

KANCHAN SINGH AND OTHERS *(Judgment-debtors) v.* SHEO PRASAD *(Decree-holder.)** [28th April, 1879.]

Execution of Decree—Decree for money payable by Instalments—Adjustment of Decree—Act VIII of 1859 *(Civil Procedure Code), s.* 206—*Act IX of* 1871 *(Limitation Act), sch. ii, art.* 167.

A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be

* Second Appeal No. 111 of 1878, from an order of G.L. Lang, Esq., Officiating Judge of Aligarh, dated the 28th May 1878, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 14th December, 1877.

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entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the moneys due under the decree.

[292] *Held per* PEARSON, J., that whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was with reference to art. 167, sch. ii of Act IX of 1871 within time (1).

SPANKIE, J., refused to interfere in second appeal inasmuch as the lower appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree.

THE decree in this case was a decree for the payment of Rs. 2,750 by annual instalments and was dated the 6th April 1866. The annual instalments were fixed by the decree at Rs. 250, and extended to 1876, and were payable in the month of Bhadon, the first instalment being payable in Bhadon 1866. Under the terms of the decree, all payments were to be endorsed on the decree, and, if the judgment-debtors failed to pay two instalments in succession, the decree-holder was empowered to enforce payment of the whole amount due under the decree. The decree-holder, alleging that he had received all but Rs. 100, being a portion of the instalment for 1875, and Rs. 250, the whole of the instalment for 1876, applied on the 17th July 1877, to recover Rs. 350 by the execution of the decree. It appeared that the payments which had been made under the decree had been endorsed on the copy of the decree in the decree-holder's possession. The judgment-debtors objected to the execution of the decree on the ground that the application for execution was barred by limitation, alleging that the payments which had been made had been made out of Court, and contending that, inasmuch as under s. 206 of Act VIII of 1859 payments of instalments out of Court could not be recognised, it must be taken that the judgment-debtors had failed to pay the first and second instalments, and the decree-holder should have applied for the execution of the decree within three years from the dates those instalments became due. The Court of first instance allowed this contention and held that the application was beyond time. On appeal by the decree-holder the lower appellate Court held that the payments of the instalments had been made in accordance with the terms of the decree, and such payments could be recognised, and that the application was within time.

[293] The judment-debtors appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Ajudhia Nath*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

PEARSON, J.—Article 167, sch. ii of Act IX of 1871, provides that an application to enforce payment of an instalment which the decree directs to be paid on a specified date may be made within three years from the date so specified. The present application to enforce the payment of instalments which became due under the decree in Bhadon 1875 and

(1) See, however *Dulsook Rattanchand* v. *Chugon Narrun*, 2 B. 356 where it was held, in the case of a decree payable by instalments, with a proviso that in default of payament of any one instalment the whole amount of the decree should become payable at once, the decree is barred, if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

Bhadon 1876 was preferred on the 17th July 1877 within the time allowed by the law. It is difficult therefore to understand how it can be contended that the application is barred by the Limitation Law. The ground of the contention is that there is no legal proof of any previous payments having been made under the decree which was passed in April 1866; and that, as the decree-holder was empowered by the terms of the decree to realise the whole amount at once in the event of two instalments not being duly paid, and failed to do so within three years from Bhadon 1868, he is now precluded from recovering the instalments of 1875 and 1876. This contention appears to me to be quite untenable. The decree-holder's omission in 1868, 1869, and 1870 to avail himself of his right to realise at once the entire amount of the judgment-debt may possibly preclude him from now enforcing that right; but he is not seeking to do so. By foregoing or forfeiting that right he has not lost his right to the instalments annually falling due. It seems to me to be immaterial whether former instalments have been paid or not; but I observe that it was not seriously pleaded in the lower Courts that they had not been paid. What the judgment-debtors pleaded was that payments out of Court do not save limitation; and the Court of first instance held that the payments having been made out of Court could not be recognised. The non-recognition of those payments does not, however, exclude the present application from the operation of the clause above quoted of art. 167, sch. ii, Act IX of 1871. The pleas in appeal are worthless in my opinion and I would dismiss the appeal with costs.

[294] SPANKIE, J.—On the facts found by the lower appellate Court that there had been no such default as that referred to in the decree in the payment of instalments, I do not think that I could interfere in second appeal, and this appears to be the more proper course, because the judgment-debtor does not really seem to have denied the payments out of Court allowed by the decree-holder to have been made to him in accordance with the terms of the decree. I would dismiss the appeal and affirm the order with costs.

Appeal dismissed.

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2 A. 294.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

HARSAHAI MAL AND OTHERS (*Defendants*) v. MAHARAJ SINGH (*Plaintiff*).* [29th April, 1879.]

Determination of Title—Act XIX of 1863, *ss.* 8, 9—Res judicata.

Where *M*, the recorded proprietor of an estate, applied to have his share of such estate separated, and an objection was made to such separation by *H*, another recorded proprietor of the estate, which raised the question of *M's* proprietary right to a portion of his share, and the Collector proceeded under s. 8 of Act XIX of 1863 to inquire into the merits of such objection and decided that *M's* interest in such portion of his share was that of a mortgagee and not a proprietor, and *M* did not appeal against such decision and it became final, *held*, in a suit in the Civil Court by *M* against *H* in which he claimed a declaration of

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* First Appeal, No. 127 of 1878, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 28th June, 1878.

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his proprietary right to such portion, that a fresh adjudication of his right was barred.

[F., 5 A. 280 (284) = A.W.N. (1883), 20; D., 2 A. 839 (843).]

THIS was a suit brought in May 1877, in which the plaintiff, who was in possession of a share of nineteen biswas and sixteen biswansis and a half in a certain village, claimed a declaration of his right as proprietor to four biswas and ten biswansis of this share. The defendants set up as a defence to the suit that they were the proprietors of the property in suit, and the plaintiff was only in possession of it as a mortgagee and not as a proprietor. The Court of first instance gave the plaintiff a decree, holding on the issue whether the plaintiff was the proprietor or the mortgagee of the property in suit that he was the proprietor of it.

The defendants appealed to the High Court, contending, with reference to certain partition proceedings under Act XIX of 1863 which are set forth in the judgment of the High Court, that the [295] Collector had in 1872 inquired into plaintiff's title and had declared that the plaintiff's interest in the property in suit was that of a mortgagee and not of proprietor, and the question of the plaintiff's title to such property was *res judicata* and could not be again tried.

Mr. *Spankie*, with him the Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellants. The question of the plaintiff's title to the property in suit was raised in 1872 in the partition proceedings. The Collector under s. 8 of Act XIX of 1863 inquired into this question and declared the plaintiff's interest in the property to be that of a mortgagee. A decision passed by a Collector under that section is, under s. 9, to be held to be a decision of a Civil Court, and if not appealed from becomes final. The question of the plaintiff's title having been heard and finally determined by a Court of competent jurisdiction is a *res judicata*. It cannot be tried again in this suit.

Pandit *Bishambhar Nath*, with him Pandit *Nand Lal*, contended that the question of the plaintiff's title had not been decided by the Collector, and that a final decision under s. 8 of Act XIX of 1863 on a question of title was no bar to the question being raised again in a suit brought in the Civil Court.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—Having inspected the Collector's proceedings we are of opinion that the first ground of appeal is valid and must be allowed. It appears that the plaintiff's father applied for a partition of 19 biswas and $16\frac{1}{2}$ biswansis share of the mauza under Act XIX of 1863, and that an objection was taken to this application by Har Sahai and the other defendants in the present suit on the ground that out of the share claimed by him $4\frac{1}{2}$ biswas belonged to them in proprietary right and was in his possession only as a mortgagee. They demanded an inquiry into their objection and claim under s. 8 of the Act above mentioned; and the Collector ordered the Tahsildar to receive the evidence tendered by the parties in support of their respective claims and to submit a report on the point in dispute. The Tahsildar made a full inquiry and submitted a report; whereupon the Collector decided that the applicant for partition was only in possession of 15 biswas and 6 [296] biswansis as proprietor, the remaining $4\frac{1}{2}$ biswas being held by him as mortgagee. There can be no doubt that his decision was an adjudication of a question of title or of proprietary right which, not

having been set aside in appeal in the manner provided by s. 9 of Act XIX of 1863, became final, and bars any fresh adjudication of the question so decided. We have therefore no alternative but to allow the appeal and to dismiss the suit by reversal of the lower Court's decree with costs of both Courts.

Appeal allowed.

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2 A. 296.

[296] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

MANNI KASAUNDHAN (*Plaintiff*) v. CROOKE, SECRETARY TO THE MUNICIPAL COMMITTEE OF GORAKHPUR (*Defendant*).* [6th May, 1879.]

Act XV of 1873 (*North-Western Provinces and Oudh Municipalities Act*), *ss.* 40, 43—*Suit against Secretary to Municipal Committee—Substitution of President as defendant —Act XV of* 1877 (*Limitation Act*), *s.* 22.

Where after the notice required by s. 43 of Act XV of 1873 had been left at the office of a Municipal Committee, such committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary, instead of in the name of their President, as required by s. 40 of Act XV of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary, *held* that by reason of such substitution, such suit could not be deemed to have been instituted against such Committee when such substitution was made, s. 22 of Act XV of 1877 applying to the case of a person personally made a party to a suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made.

Semble.—S. 43 of Act XV of 1873 contemplates suits in which relief of a pecuniary character is claimed for some act done under that Act by a Committee, or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally, and not a suit against a Committee for a declaration of the plaintiff's right to reconstruct a building which had been demolished by the order of such Committee, and for compensation for such demolishment.

[**Appl.**, 4 A. 102 (106); **Appr.**, 4 A. 339 (342) (F.B.) = A.W.N. (1882), 63; 32 C. 582 (598) = 9 C.W.N. 421; **R.**, 16 M 296 (299); A.W.N. (1908), 165; 6 C.W.N. 218 (220, 221); **D.**, 28 A. 600 (604) = 3 A.L J. 341 = A.W.N. (1906), 107.]

THIS was a suit instituted on the 8th November 1877 against William Crooke, Secretary to the Municipal Committee of Gorakhpur, in which the plaintiff claimed a declaration of his right to re-construct certain buildings which the Municipality had directed to be removed by an order dated the 2nd August 1877, and compensation [297] for the removal of such buildings. Notice of the suit required by s. 43 of Act XV of 1863 was given in the Office of the Municipal Committee. On the 28th January 1878 the plaintiff prayed that the President of the Municipal Committee might be substituted as a defendant for the Secretary, as the suit should have been instituted against the President and not the Secretary. This application was refused by the Court of first instance. On the same date, which date had been fixed for the settlement of the issues, the Court of first instance dismissed the suit on the ground, amongst others, that the suit should have been instituted against the President of

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* Second Appeal, No. 1129 of 1878, from a decree of Maulvi Sultan Hasan, Subordinate Judge of Gorakhpur, dated the 28th June 1878, affirming a decree of Maulvi Azmat Ali, City Munsif of Gorakhpur, dated the 28th January, 1878.

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the Committee and not the Secretary, and that, even if the President had been substituted for the Secretary when application was made by the plaintiff in that behalf, the suit would not have been maintainable, regard being had to s. 43 of Act XV of 1873 and s. 22 of Act XV of 1877, as it would have been brought more than three months after the accrual of the plaintiff's cause of action. On appeal by the plaintiff the lower appellate Court concurred in the ruling of the Court of first instance.

The plaintiff appealed to the High Court.

Lala *Lalta Parshad*, for the appellant.

The Senior Government Pleader (Lala *Juala Parshad*), for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—The plaintiff appears to have made the Secretary, instead of the President, of the Municipal Committee, defendant. When he asked the Court to make the President defendant, it refused to do so, and the Courts have held that, though the suit as against the Secretary was in time, it was not so against the President, even if his name had been substituted for that of the Secretary, as it would have been brought more than three months after the accrual of the cause of suit (s. 43, Act XV of 1873).

Notice of the action required by s. 43 was given in the Office of the Municipal Committee. It is true that the suit ought to have been instituted against the Committee in the name of the President, and that if s. 22 of the Limitation Act applied, and the name of the Secretary had been struck out and that of the President added, more than three months would have elapsed from the accrual [298] of the cause of action. But the suit is not against the President personally and s. 22, Act XV of 1877, seems to apply to new plaintiffs and defendants personally made parties to a suit after its institution rather than to cases like the present, where a committee is sued through their officer, and a clerical error is corrected by the Court, and the substitution as defendant of the proper officer for the wrong one might be permitted. It was an error of form only and not an act of wilfulness, and the Committee who are really sued have had full notice of action. Moreover the suits contemplated by the Act seem to be those claiming relief of a pecuniary character for some act done under the Act (XV of 1873) by the Committee, or any of their officers, or any other person acting under their directions, and for which damages can be recovered from them personally. The last paragraph of s. 43 bars all recovery if the person to whom the notice prescribed by the section has been given before the suit is brought tenders sufficient amends to the plaintiff.

The present suit is one to prove the right of plaintiff to build certain verandahs and a platform, which he avers were demolished by order of the Committee, and for which compensation is sought. It may be said that if notice to the Committee was required, it has been given, and that the Courts below should have substituted the name of the President in lieu of the Secretary and have tried the case on the merits. Substantially the requirements of the Act have been complied with, and the substitution of the name of the President for that of the Secretary is not affected by s. 22 of the Limitation Act, the suit against the Committee having practically been instituted within three months after the accrual of the cause of action.

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On the other hand, if this is not one of the suits contemplated by Act XV of 1873, it is not at all affected by s. 43 of the Act, and would be certainly within time if the name of the President was substituted for that of the Secretary. Either way the substitution should be made and the case should be heard on the merits. We therefore decree the appeal, remand the case through the Judge to the first Court, for amendment of the plaint by the substitution in it of the President as provided by s. 40, Act XV of 1873, and for the disposal of the case on its merits. Costs to abide the result.

Cause remanded.

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2 A. 299=4 Ind. Jur. 359.

[299] CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Spankie.

IN THE MATTER OF THE PETITION OF MULO.* [7th May, 1879.]

Sale in Execution of decree—Return of Purchase-money to auction-purchaser—Act X of 1877 (Civil Procedure Code), s. 315—Act VIII of 1859 (Civil Procedure Code).

Where immoveable property was sold in the execution of a decree under the provisions of Act VIII of 1859, and the auction-purchaser, having been subsequently deprived of such property on the ground that the judgment-debtor had no saleable interest in it, applied under s. 315 of Act X of 1877 to the Court executing such decree for the return of the purchase-money, *held* that the Court could entertain the application.

[Diss., 2 A. 780 (783).]

THE facts of this case were as follows: On the 20th September 1877 a certain village was sold in the execution of a decree against Husaini Begam as her property, under the provisions of Act VIII of 1859, and was purchased by Nur Ahmad. Subsequently to this sale one Altaf Ali sued Nur Ahmad for the possession of the property and to set the sale aside on the ground that the property belonged to him, he having purchased it from Husaini Begam under a private sale before it was sold to Nur Ahmad by auction. He obtained a decree in this suit on the 30th January 1878, which the High Court affirmed on appeal on the 13th November 1878. Nur Ahmad thereupon applied to the District Judge of Bareilly, by whom the decree against Husaini Begam had been executed, for the refund of his purchase-money, on the ground that he had been deprived of the property by reason that Husaini Begam had no saleable interest in it. He made this application with reference to ss. 313 and 315 of Act X of 1877. The decree-holders objected to this application that it could not be entertained under Act X of 1877, as the sale had taken place while Act VIII of 1859 was in force and under its provisions, and that the latter Act did not provide for such an application in the execution of a decree, but left the auction-purchaser to institute a suit. The District Judge held that the provisions of s. 315 of Act X of 1877 were applicable to the case, and ordered the refund of the purchase-money.

[300] The decree-holder applied to the High Court to set aside the order of the District Judge, under the powers conferred on it by s. 622 of

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*Application, No. 3-B of 1879, for revision of an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 20th December 1878.

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Act X of 1877, on the ground that the District Judge had exercised a jurisdiction not vested in him by law.

Mr. *Conlan*, with him the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, showed cause.—The application by the auction-purchaser for the refund of the purchase-money was a fresh proceeding, and instituted after Act X of 1877 came into operation, and the District Judge was therefore competent to entertain it. In acting under the provisions of s. 622 of Act X of 1877, the High Court is not compelled to set aside every order that is made without jurisdiction. The order of the District Judge was just and equitable, and the High Court in the exercise of its discretion should allow it to stand.

Pandit *Ajudhia Nath*, with him Mr. *Colvin* and Lala *Lalta Prasad*, for the petitioner.—The sale having taken place while Act VIII of 1859 was in force, and consequently under its provisions, the District Court could only deal with the purchase-money under the provisions of that Act. That Act does not contain any provisions for the refund of the purchase-money such as are contained in ss. 313 and 315 of Act X of 1877. In applying these sections and entertaining the application the District Judge acted without jurisdiction, and his order should be set aside.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The judge's order seems to be a very right, just and proper one, with which we ought not to interfere, unless absolutely bound to do so. The proceedings commenced under Act VIII of 1859 appear to have terminated with the sale. The application under s. 315 of Act X of 1877 may be regarded as a new proceeding. We are not prepared to say that the Judge could not entertain the application preferred to him under the second clause of s. 315, Act X of 1877; and we therefore decline to interfere, and dismiss this application with costs.

Application dismissed.

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[301] APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* LALAT. [16th May, 1879.]

Act XXVI *of* 1870 (*Prisons Act*), *ss.* 3, 45, 54—*Entering a Havalat with intent to convey food to Prisoner—Rules made by Local Government for the management and discipline of Prisons—House-trespass—Offence in relation to Prison—Act XLV of* 1860 (*Penal Code*), s. 442—*Previous Acquittal—Act X of* 1872 (*Criminal Procedure Code*), *ss.* 454, 460.

Per SPANKIE, J., and OLDFIELD, J. (STUART, C.J., *doubting*) that a havalat (lock-up) is a prison within the meaning of the Prisons Act.

Per STUART, C J., that food is not an "article" within the meaning of s. 45 of that Act.

Per STUART, C J., and OLDFIELD, J, that the conveyance of food into a havalat not being expressly prohibited by the rules made by the Local Government under s. 54 of that Act for the management and discipline of prisons, is not "contrary to the regulations of the prisons" within the meaning of s. 45 of that Act, and is therefore not an offence punishable under section.

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Held therefore *per* STUART, C.J., and OLDFIELD, J., that where a person entered into a havalat with intent to convey or attempt to convey food to an under-trial prisoner, such Act on his part did not amount to house-trespass within the meaning of s. 442 of the Indian Penal Code and it was not an act punishable under s. 45 of the Prisons Act.

Per SPANKIE, J., *contra*.

Per STUART, C.J., that the fact that such person had been tried for house-trespass and acquitted was no bar to his being tried subsequently for an offence under s. 45 of the Prisons Act.

THESE were appeals by the Local Government from two judgments of acquittal of Mr. C. Daniell, Sessions Judge of Gorakhpur, dated the 31st May 1878 and 24th August 1878 respectively. The facts of these cases are sufficiently stated for the purposes of this report in the judgments of the Division Bench (STUART, C.J., and SPANKIE, J.) before which the appeals came for hearing.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

Munshi *Kashi Prasad*, for the respondent.

The Junior Government Pleader.—The term "prison" is defined in s. 3 of the Prisons Act, 1870, to mean "any gaol or [302] penitentiary, and include the airing-grounds or other grounds or buildings occupied for the use of the prison." The word "gaol" means a place of confinement for persons legally commited to it for crime or for persons committed to it for trial—Webster's Dictionary.—"Havalat" is a Persian word meaning "safe custody." The "havalat" in Gorakhpur is under the charge of the Superintendent of the District gaol. Lalai, by attempting to supply cooked food to an under-trial prisoner confined to the havalat committed the offence described in s. 45 of the Prisons Act. Under that section whoever, contrary to the regulations of the prison, conveys or attempts to convey, any letter or other article not allowed by such regulations, into or out of any such prison, shall, on conviction before a Magistrate, be liable to rigorous imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both. The Local Government, by virtue of the power given to it under s. 54 of the Act, is empowered to make rules consistent with the Act as *to the food* and clothing of criminal prisoners, and according to s. 3 of the Act "criminal prisoner" means a person charged or convicted of a crime. Chapter 29 of the rules framed by the Local Government refers to prison dietary, and these include the diet scale for native non-labouring prisoners, and rule 418 provides that prisoners under trial shall receive the non-labouring prisoner's rations of the gaol, and the non-labouring ration is wheat flour (second quality) *bajra*, *dal*, vegetables, oil or *ghi*, firewood, chillies, salt. It is submitted that under these rules an under-trial prisoner is not entitled to get any thing besides what is laid down for his ration in the above rules. He is not entitled to procure cooked food from home. True it is that he can cook his own food in gaol, unlike the convict prisoner who is not allowed that privilege, but he cannot get food prepared for him outside the gaol. Inasmuch then as a punishment is provided for the breach of any of the prison rules, any person who does offend against any of those rules commits an offence, as that term is defined in s. 2, Act XXVI of 1870. Lalai entered the havalat intending to give an under-trial prisoner food, that is to say, with intent to commit an offence, and thereby committed the offence of criminal trespass as defined in s. 441 of the Indian Penal Code, the punishment for which offence is provided in s. 448 of the Code. The first conviction therefore of the defendant by the Assistant Magistrate under

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s. 448 [303] of the Indian Penal Code was good and valid and should not have been quashed on appeal.

Munshi *Kashi Prasad*, for the respondent, contended that a havalat was not a prison within the meaning of the Prisons Act. Havalats are places which do not form part of the prisons. They existed before the Act was passed and the Act does not mention them. The prison rules do not expressly prohibit under-trial prisoners from procuring cooked food from outside. Such prisoners can cook their own food, and the prisoner in this case might have prepared "*puris*" for himself. There is no reason then why they should not be prepared outside the gaol and given to him.

The Junior Government Pleader in reply.—Prisoners can only provide their food out of the rations given to them by the gaol authorities, and as they are not able to procure any food for themselves from outside the gaol, it is an offence against the prison regulations to take food inside the gaol.

The following judgments were delivered by the Division Bench :

STUART, C. J.—These are two appeals by the Government against two acquittals of the same respondent, and on the same facts, although under different charges or different denominations of crime. The facts common to both cases are these :—On or about the 29th April 1878 an octroi muharrir, otherwise called a chungi muharrir, had been sent to the havalat at Gorakhpur on a charge of embezzlement. On the following day the accused Lalai in company with his brother named Lochan, an octroi chaprasi, came to the havalat about 12 o'clock noon and asked the head-constable, Bakhtawar Khan, who was in charge of the guard, to allow them to give some food to the chungi muharrir who was confined there ; this the head-constable refused and told the accused and his brother Lochan to go away. About half an hour after, an alarm was raised by a constable on duty that some one was on the top of the havalat wall where there is a platform for the police sentry. The police were sent to the spot and the prisoner was taken. On being searched there, there was found on him a packet of "*puris*" (wheat-cakes fried in *ghi* or oil) and vegetables, and these together were the food which the accused and his brother attempted to give to the octroi muharrir. On these facts the accused Lalai was [304] first charged with house-trespass under s. 448, Indian Penal Code, and tried before and convicted of that offence by the Joint Magistrate, and sentenced to rigorous imprisonment for three months. On appeal to the Judge the Magistrate's order was reversed, the appeal allowed, and the accused ordered to be discharged ; the Judge's order to that effect was dated 31st May 1878. Subsequently and on the same facts the accused respondent was tried before the Deputy Magistrate of Gorakhpur on a charge preferred under s. 45 of the Prisons Act XXVI of 1870, and convicted and sentenced on the 19th August 1878 to rigorous imprisonment for three months, but on appeal to the Judge the Magistrate's order was reversed and the prisoner again released from custody.

It would be convenient to notice and dispose this second appeal first. But before considering the merits in this second appeal, I would notice an objection in the way of a plea of *res judicata*, and which objection was allowed by the Judge. "In this case," he said, "I consider that there can be no doubt that appellant has been imprisoned for committing the same offence for which he was tried and sentenced on 15th May 1878, and released on appeal on 31st May. Under these circumstances his second trial and imprisonment for the same offence must be quashed under s. 460 of the Criminal Procedure Code." In this opinion I do not concur.

By the second paragraph of s. 460 it is provided that a person convicted or acquitted of any offence may afterwards be tried for any other offence for which a separate charge might have been made against him on the former trial. Under s. 454, Criminal Procedure Code, first paragraph which provides that "if in one set of facts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time;" s. 460, however, providing that this may be done "afterwards." The Judge's objection therefore of *res judicata* or of *autrefois acquit*, as they would call it in English criminal pleading, fails, and the second prosecution and all that followed upon it were perfectly valid.

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But on the merits I am of opinion that it is too doubtful a case to justify Lalai's conviction. Lalai was charged under s. 45 of [305] Act XXVI of 1870 of an offence against the Prisons Act, in that he had taken to the havalat and attempted to give to the octroi muharrir food contrary to the prison regulations. Now a conviction on such a charge involves two things: first, that the havalat is a prison within the meaning of that term in s. 3 of Act XXVI of 1870, and secondly, that the act of introducing food into a prison is prohibited by the prison regulations and therefore an offence. With reference to the first point a prison is by s. 3, Act XXVI of 1870, defined to mean "any gaol or *penitentiary*, and includes the airing-grounds or buildings occupied for the use of the prison," meaning by a gaol or penitentiary, as I understand those terms, a place of permanent confinement for a fixed and definite period, and not a mere place of temporary or preliminary custody, which appears to be the meaning of the term havalat. I observe that Act XXVI of 1870, s. 30, makes a clear distinction between criminal prisoners before trial and "convicted prisoners" and very properly, because the ultimate condition of the former class has yet to be determined. I am therefore rather of opinion that a havalat is not a prison within the meaning of s. 3, Act XXVI of 1870. As regards the second point, and assuming that a havalat is a prison as defined by s. 3, Act XXVI of 1870, I doubt very much whether the act of introducing food into a havalat in the way alleged in this case was an offence against the prison regulations. Such an act cannot, I consider, be deemed to be such an offence unless it can be shown to be so against some prohibitory law or regulation. Now I can find nothing of that character either in Act XXVI of 1870 or in the rules for the management and discipline of prisoners adopted under the Act. This conviction appears to proceed on s. 45 of the Act, cl. 3, where it is provided that "whoever contrary to such regulations (of the prison) conveys or attempts to convey *any letter or other article not allowed by such regulations* into or out of any such prison or place" shall, on conviction, be liable, &c. The question thus at once arises whether the food attempted to be taken into the havalat by the accused was an "article" within the meaning of this section. According to the principles upon which statute laws are usually interpreted "article" here would mean something of the same kind with a letter such as other documents or a newspaper or a book or other [306] matter brought to the accused in a printed or written form, and whatever else may have been intended, food does not necessarily come within the category, and this being a criminal case, we are not to determine against an accused person what is not plainly expressed or necessarily implied. Then as to the prison regulations, I was referred to No. 418 which is one of the rules relating to prisoners under trial (and I presume received into havalat for that purpose). This rule provides that such

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prisoners shall receive the non-labouring rations of the gaol with certain additions of *ghi* and mustard oil. I was also referred to rule 524 which prescribes a dietary for native prisoners with a suggestion that such was the food the prisoners were to receive, and no other. That may have been the intention of the rule, but such intention is nowhere expressed, nor can I find any prohibition whatever against a friend of a prisoner in custody before trial and not after conviction doing what is here charged against Lalai. And again, I say we must not forget that this is a criminal case in which the presumption is against guilt, and we are not to assume that guilt without some express rule to the contrary, or without evidence which necessarily and irresistibly shows or, it may be, implies the accused's complicity. In fact these prison regulations merely prescribe the diet that is to be given to different classes of prisoners without any other meaning in a penal sense, and there is nowhere in any of them any rule or order against such a contribution to a prisoner's food as Lalai attempted in the present case. It is also to be observed that Lalai and his brother came openly in the first instance to the havalat, and requested permission of the head constable to give their friend who was in custody then a little food. This was refused, but it does not appear that Lalai was then informed that what he asked permission to do was against the rules of the havalat, much less that it was a criminal offence to give a little *puri* to a prisoner there. It may, as I have suggested, be reasonable to believe and to imply that the diet detailed in a prison regulations was to be all the food that the prison authorities were to provide, but it does not therefore follow that what was here done was a criminal violation of the regulations, unless we are to read s. 45 of the Act otherwise than I have done and so as to include within its sanction what Lalai attempted. But I repeat this is a **[307]** criminal case and everything charged against the accused should, to justify his conviction, be clearly shown to be contrary to express law, and not merely to be implied by any covert inference, however reasonable unless it be irresistible.

For all these reasons I consider the validity of Lalai's conviction under Act XXVI of 1870 is too doubtful, and I would quash it.

This, so far as my judgment is concerned, determines the second appeal before us, and I shall now proceed to dispose of the other or first appeal, and with a like result. The legality of the conviction in this first appeal depends on the solution of the question whether what Lalai did was an "offence" within the meaning of s. 40 of the Indian Penal Code and Act XXVI of 1870. That question I have already determined by the opinion I have expressed in the second appeal to the effect that what Lalai did was not an offence as that term is so defined, or what is the same thing, that what he did was of too doubtful a character to necessitate conviction as an offence. That being so, Lalai was neither guilty of criminal trespass nor of house-trespass, the *intent* to commit an *offence* being essential under both sections. I would therefore disallow the appeal and affirm the order of the Judge in both these respects.

Spankie, J.—It appears to me that on the facts found Lalai Ahir did commit the offence of criminal trespass. It was established by the evidence that an octroi muharrir had been sent to the havalat at Gorakhpur in custody on a charge of embezzlement. The next day Lalai Ahir came to the havalat about noon and asked the head-constable in charge of the guard to allow him to give some food to the muharrir. The head-constable refused to do so and warned him off. Sometime afterwards an alarm was raised that some one was on the top of the havalat wall, where there is a

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platform for the police sentry. Constables were sent to the spot and Lalai Ahir was caught. On being searched, a packet of "*puris*" and vegetables were found on his person. The Assistant Magistrate being of opinion that a havalat does not come under the definition of a prison within the terms of s. 3, Act XXVI of 1870, convicted Lalai Ahir on the charge of house-trespass under [308] s. 448, Indian Penal Code. The Sessions Judge considered that no offence had been committed. Lalai had entered the havalat for the purpose of giving food, and the giving food under such circumstances was not punishable by law. He therefore annulled the conviction.

Under s. 441, Indian Penal Code, whoever commits criminal trespass, by entering into or remaining in any building, tent, or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit house-trespass. This havalat or lock-up is certainly a place used as a human dwelling. Its officers, guards, and persons accused of offences occupy it as a dwelling place. The introduction of any part of the trespasser's body is entering and sufficient to constitute house-trespass. But the trespass must be criminal. Under s. 441, Indian Penal Code, whoever enters into or upon property in the possession of another, with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence is said to commit criminal trespass. Now Lalai Ahir himself was a constable enrolled under the Police Act, and a public servant. Presumably he was quite aware that he was entering a place in which parties accused of offences were kept in custody, and that the head-constable of the guard was only doing his duty when he refused to allow him to give food to a person in custody and warned him to leave the premises, which he did do. But instead of keeping away, he managed to effect another entry and was caught. After due warning from the head-constable in charge of the building who was lawfully in possession of it, that he could not be allowed to give food to a person in custody therein, and after being told to leave the building, he is found after a short interval on the top of the wall with the food and vegetables, which he was told could not be given to the prisoner, concealed on his person. We must judge of his intent from his conduct, and it appears to me that his re-entry into the lock-up was, on the facts established, made with an intent to commit an offence against prison regulations and rules, and thereby an offence against the Prisons [309] Act. If he had no such intention, why did he conceal the food, and re-enter a building which he had been told to leave?

There cannot I think be a doubt that to secretly introduce food into the lock-up was an offence against the Prisons Act and therefore the offence of criminal trespass was committed, and on the facts found, which are also beyond a doubt, the offence of house-trespass was also committed. The conviction therefore under s. 448 might have been sustained by the Sessions Judge. But if there had been any room for doubt, the second conviction under s. 45 of Act XXVI of 1870 appears to have been good. I cannot admit that a havalat or lock-up is not a prison within the meaning of the Act. In s 3 prison means any gaol or penitentiary, and includes the airing-grounds or other grounds or buildings occupied for the use of the prison. Criminal prisoner means any prisoner charged with or convicted of a crime. By s. 4 the Local Government is to provide for prisoners' accommodation in a prison or prisons constituted and regulated

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in such manner as to comply with the requisitions of this Act in respect to the separation of prisoners. By s. 30, cl. 3, criminal prisoners *before trial* shall be kept apart from convicted prisoners. By ss. 34 and 35 a civil prisoner may maintain himself but is not allowed to sell any part of his food, clothing, bedding or necessaries to any other prisoner. By s. 45 whoever, contrary to the regulations of the prison, conveys, or attempts to convey, any letter or other article not allowed by such regulations into the prison, is liable on conviction to rigorous imprisonment for a period not exceeding six months, or to a fine not exceeding Rs. 200, or to both. By s. 54 the Local Government may make rules consistent with the Act, amongst others, as to the food and clothing of criminal prisoners. The Government has exercised such powers, and rule 417 allows prisoners under trial to cook their own food, and directs that they shall be subjected to no further restraint than is absolutely necessary for their safe custody. Rule 418 directs that these prisoners under trial shall receive the non-labouring rations of the jail, with the addition of two chittaks of *ghi* or mustard oil to each group of 25 prisoners, the oil to be given with their vegetables and the *ghi* with their *dal*. So that the food they are allowed to cook is not food which they purchase for themselves, but food which is supplied [310] as rations. The head of a prison is the Superintendent (s. 7 of the Act), and the Inspector-General of Prisons for the North-Western Provinces has been vested with the general control and superintendence of all prisons situate in the territories under the Government, North-Western Provinces (s. 6). By the 424th rule made by the Government, the Inspector-General of Prisons is to exercise a legitimate watchfulness over the numbers and excessive detention of prisoners confined in the havalats under his inspection, and to call the attention of Government to the subject if circumstances necessitate this action. The classification of gaols in the North-Western Provinces authorized by the Government includes (i) Central Prison, (ii) 1st class District gaols, (iii) 2nd class District gaols, (iv) 3rd class District gaols, (v) 4th class District gaols, (vi) lock-ups (1). But it may be said that these lock-ups are within the prisons, and persons committed for trial by the Magistrate are confined therein, and that the term lock-up does not include the Magistrate's havalat. This however is not the case, as rule 14, p. 18 of the work just cited above, directs that—"In lock-ups shall be confined all the prisoners under trial before any Court, unless, where the lock-up is separate from the District gaol, the Magistrate or committing officer may think it necessary for greater security to send any prisoner committed to the Sessions to the District gaol. On the 27th August 1864, the Lieutenant-Governor was pleased to approve of the proposal that all the "havalats" (lock-ups) in the North-Western Provinces should be placed under the supervision of the Inspector-General of Prisons from 1st May 1865 (2). The resolution also approved of the suggestions made by the Inspector-General of Prisons regarding the diet and clothing to be supplied to prisoners under trial.

The Magistrate of Gorakhpur reports to this Court that up to 1862 the gaol and lock-up were under charge of the Magistrate of the District. In 1862 the gaol was placed under charge of the Civil Surgeon as Superintendent. But the lock-up remained as before in charge of the Magistrate.

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(1) Rules for the management and discipline of prisons authorized by Government, North-Western Provinces, published at Allahabad in 1874.

(2) General Department No. 2663 A. of 1864, dated Naini Tal, the 27th August 1864.

In 1864 it was placed under the supervision of the Inspector-General of Prisons under the Government order dated 27th August 1864 quoted above, and in 1868 it was also [311] placed under the supervision of the medical officer in charge of the district gaol by order dated 28th July 1868 (1).

It appears therefore to be quite certain that the Magistrate's havalat or lock-up is, under the rules which the Local Government is authorized by s. 54 of the Act to make, a fifth class gaol within the meaning of prison as defined in s. 3 of the Act, and therefore if the accused committed any breach of the regulation in force and authorized to be made by the Prisons Act, the conviction would be legal, if had under s. 45 of the Act. On the merits there can be no doubt that the facts proved in the second case show that an attempt was made to introduce to a prisoner charged with an offence articles of food not allowed by the regulations. I would therefore decree the appeal and reverse the decision of the Sessions Judge and re-affirm the conviction and sentence passed under s. 45 of Act XXVI of 1870.

I would also decree the appeal in the house-trespass case, but as the subsequent conviction by the Magistrate has been affirmed in the other case, I do not think it necessary to do more than reverse the Sessions Judge's order and to approve the conviction of the Assistant Magistrate. There does not appear to be any necessity for pressing the sentence against the accused under s. 448, Indian Penal Code, and it might be remitted.

The learned Judges of the Division Bench having differed in opinion, the case was consequently referred to Oldfield, J., under s. 271-B of Act X of 1872.

JUDGMENT.

OLDFIELD, J.—I will first deal with the offence under s. 45 of Act XXVI of 1870.

The definition of the word prison in s. 3 of that Act appears to me to include a havalat or lock-up in which prisoners under trial are confined. That such was the intention of the Act would appear from the definition of criminal prisoner in s. 3, which "means any prisoner charged with or convicted of an offence," and by the Act treating of prisoners under trial as well as conviction. It is unnecessary, however, for me to determine this point, for assuming that an offence against the prison regulations of the nature of [312] those provided for in s. 45 committed with reference to a prisoner under trial confined in the havalat will be an offence under s. 45, I am unable to hold that such an offence has been committed in this case. The offence alleged against the accused is that he conveyed or attempted to convey some food to a man confined in the havalat and under trial, and by doing so has contravened s. 45 of Act XXVI of 1870, which provides, *inter alia*, that "whoever, contrary to such regulations (*i.e.*, the regulations of the prison), conveys or attempts to convey, any letter or other article not allowed by such regulations into or out of any such prison or place, shall on conviction before a Magistrate be liable to rigorous imprisonment for a term not exceeding six months, or to fine not exceeding Rs. 200, or to both." Before, however, a conviction can be had under this part of s. 45, it must be shown that to convey food to a prisoner in the havalat is contrary to the regulations of the prison. Now the only regulations on

(1) Government, North-Western Provinces, Circular No. 9A of 1868, No. 148A of 1868, to all Commissioners of Divisions, dated Naini Tal, 28th July 1868.

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the subject to which we are referred is rule 418 of Rules for the management and discipline of prisoners in the North-Western Provinces issued under the authority of Government under s. 54 of the Prisons Act. This rule refers to prisoners under trial and amongst other provisions provides that "they shall receive the non-labouring rations of the gaol with the addition of two chittaks of *ghi* or mustard-oil to each group of 25 prisoners, the oil to be given with their vegetables, and the *ghi* with their *dal* ;" and the authorised scale of dietary is laid down in rule 524.

It is urged that, inasmuch as these rules provide a particular ration of food to be supplied by the prison authorities, it is contrary to the regulations to convey any food to such prisoners, and to do so will amount to the offence contemplated in s. 45. But this contention cannot, in my opinion, be maintained. To render the act of conveying, or attempting to convey, any articles to a prisoner in havalat penal, it must be shown distinctly that there is a regulation which prohibits it. The rules in question merely deal with the articles of food which such prisoners are to receive from the prison authorities; they contain no prohibition against their receiving any other supplies of food, or any prohibition against any person conveying or attempting to convey food to them; and we are not at liberty to make assumptions or introduce prohibitions not contained in the regulations. We cannot hold that an act done [313] by a person is "contrary to the regulations" merely because it is something not affirmatively allowed by the regulations. I hold therefore that the conviction under s. 45, Act XXVI of 1870, cannot be maintained, and it will follow that there can be no conviction of the offence of house-trespass or criminal trespass, since it cannot be shown that there was the intent required to constitute criminal trespass. It is not urged that there was an intent to commit an offence punishable under the Penal Code, and there was none to commit an offence punishable under special or local law, since the only offence under such a law to which such an intent could be referred is the offence under s. 45, Act XXVI of 1870, which, in my opinion, is not proved in this case.

I therefore affirm the order of the Judge in both the appeals before this Court.

Appeals dismissed.

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2 A. 313.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

SURJAN SINGH (*Defendant*) *v.* JAGANNATH SINGH (*Plaintiff*).*
[21st May, 1879.]

Mortgage—Property situated partly in Oudh and partly in the N.W.P.—Foreclosure—Regulation XVII of 1806, *s.* 8.

Where a mortgage of land situated partly in the District of Shahjahanpur in the North-Western Provinces and partly in the District of Kheri in the Province of Oudh was made by conditional sale, and the mortgagee applied to the District Court of Shahjahanpur to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property, and that Court granted such application, *held*, with reference to the ruling of the Privy Council in *Ras Muni Dibiah*

* First Appeal, No. 166 of 1878, from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Shahjahanpur, dated the 29th August 1878.

v. *Pran Kishen Das* (1), that, where mortgaged property is situated in two Districts, an order of foreclosure relating to the whole property mayrbe obtained in the Court of either District, that the circumstance that Oudh was in some respects a distinct Province from the North-Western Provinces did not take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings.

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2 A. 313.

THIS was a suit to have a conditional sale dated the 16th November 1866 declared absolute, and to obtain the possession of [314] the land mortgaged. The mortgaged land was situated partly within the District of Shahjahanpur in the North-Western Provinces, and partly within the District of Kheri in the province of Oudh. The application to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property was preferred to the District Court of Shahjahanpur. That Court served the mortgagors, through the District Court of Kheri, with the notice of foreclosure required by s. 8 of Regulation XVII of 1806. The present suit was instituted in the Court of the Subordinate Judge of Shahjahanpur. The defendants contended, *inter alia*, that the District Court of Shahjahanpur was not competent, in respect of the land situated in the District of Kheri, to grant the application for foreclosure, such land being situated beyond the local limits of its jurisdiction, and consequently the foreclosure proceedings in respect of such land were invalid, and the suit in respect thereof was not maintainable. The Subordinate Judge held that the District Court of Shahjahanpur was competent to grant the application for foreclosure in respect of the land situated in the District of Kheri, and the foreclosure proceedings were valid in respect of such land, and gave the plaintiff a decree.

The defendant appealed to the High Court raising the same contention as to the validity of the foreclosure proceedings as he had raised in the Court below.

Mr. *Conlan* and Munshi *Sukh Ram*, for the appellant.

Mr. *Colvin* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The first and last of the pleas in appeal are not pressed and are indeed admitted not to be tenable. The second plea is overruled, in reference to the Privy Council's ruling in the case of *Ras Muni Dibiah* v. *Pran Kishen Das* decided on the 27th June 1848 (1), that, according to s. 8, Regulation XVII of 1806, where mortgaged property is situate in two Districts, an order of foreclosure relating to the whole property may be obtained in the Court of either District. The circumstance that Oudh is in [315] some respects a distinct Province from the North-Western Provinces does not, in our opinion, take the case out of the operation of that ruling, inasmuch as Regulation XVII of 1806 was in force in Oudh as well as in the North-Western Provinces at the time of the foreclosure proceedings. The appeal is dismissed with costs.

Appeal dismissed.

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(1) 4 M.I.A. 392.

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MAY 23.

APPEL-
LATE
CIVIL.

2 A. 315=
4 Ind. Jur.
414.

2 A. 315=4 Ind. Jur. 414.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

JAMNA (*Plaintiff*) *v.* MACHUL SAHU (*Defendant*).* [23rd May, 1879.]

Hindu widow—Maintenance.

A wife is, under the Hindu law, in a subordinate sense, a co-owner with her husband: he cannot alienate his property, or dispose of it by will, in such a wholesale manner as to deprive her of maintenance.

Held therefore, where a husband in his lifetime made a gift of his entire estate leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance.

[F., 23 A. 86 (87); R., 6 A. 617 (621)=A.W.N. (1885). 192; 5 B. 99 (108); A.W.N. (1899), 210; 8 C.L.J. 489=12 C.W.N. 808; 11 C.L.J. 580=6 Ind. Cas. 244; 36 P.R. 1907=11 P.L.R. 1908=118 P.W.R. 1907; D., 5 A. 367 (368)=A.W.N. (1883), 65; 31 C. 476 (478).]

THIS was a suit, instituted in April 1877, for a declaration of the plaintiff's right to an allowance for her maintenance of Rs. 25 per mensem. The plaintiff was the widow of Ramjewan, and the defendant was Ramjewan's nephew, to whom Ramjewan had in his lifetime, shortly before his death, made a gift of all his real and personal estate, under which the defendant had acquired possession of such estate in Ramjewan's lifetime. The material portion of the deed of gift, which was dated the 8th January 1850 was as follows: "I have made a gift of my whole and entire property and possessions in lands, capital, houses made of bricks and mud situated in the city aforesaid, both ancestral and mortgaged, &c., money, ornaments, vessels, carpets, cash, &c., such as fall under the denomination of, and are called, property, constituting my whole estate and right, to Machul, son of Munna Lall and my nephew, who carries on the business of the firm jointly with me, and whom in absence of a son I have adopted as my son: I have made him its proprietor and my representative: the gift is valid, and lawful, [316] it vests property and is just and proper: it is made in the form of *sila* (gift to a relative) without any dispute, and without any consideration or hopes (from the donee): it is unconditional and free from vicious and false conditions: I have put the said donee in possession, in my place, in respect of the whole and entire property the subject of the gift aforesaid, which is free from all defects and disputes: I have exempted this gift wholly from any claim of resuming it: the said donee may realize by virtue of this deed all that is due from the tenants on account of immoveable property and the money due, and may enjoy and possess the villages under *zur-i-peshgi* lease, &c., by having his name recorded in respect of the same: in short he may enjoy and possess all the villages sold and mortgaged to, or taken on farm or purchased at auction and held by, me: after my death none of my heirs shall, for any reason or cause, have any right, claim, or cause of action thereto: and as the said donee has accepted the said gift and transfer of property, these few lines have been executed in the shape of gift and assignment of proprietary right, which may serve in evidence when required."

* Second Appeal, No. 1027 of 1878, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 1st June 1878, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 11th May 1877.

The defendant set up as a defence to the suit that he was not bound to maintain the plaintiff, and that Ramjewan had provided for the plaintiff's maintenance by gifts of money and jewels. The Court of first instance held that, inasmuch as the defendant had not succeeded to the estate of Ramjewan by inheritance, and inasmuch as the deed of gift did not provide for the plaintiff's maintenance, and the defendant had not entered into any agreement to maintain her, the defendant was not legally bound to maintain the plaintiff. The Court of first instance accordingly dismissed the suit, without determining the second issue raised by the defence, observing that the plaintiff might have impugned the gift on the ground that no provision had been made for her maintenance, had she not acquiesced in its validity for so long a period of time. On appeal by the plaintiff the lower appellate Court affirmed the decision of the Court of first instance, observing with reference to the second issue raised by the defence, that the great delay which had occurred in the institution of the suit supported the defendant's assertion that the plaintiff's husband had made a provision for her.

[317] The plaintiff appealed to the High Court, contending, amongst other things, that she was entitled to be maintained out of her husband's estate, and that the defendant was equitably bound to maintain her, it not being shown that any provision had been made for her maintenance by her husband.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Munshi *Hanuman Prasad*, Pandit *Bishambhar Nath*, and Lala *Jokhu Lal*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

PEARSON, J.—The lower Courts have disallowed the plaintiff's claim to be maintained out of her husband's estates given by him on the 8th January 1850, shortly before his death, to the defendant, who was his nephew and partner in business, and who is stated in the deed of gift to have been adopted by him as a son, on the ground that, under the terms of that instrument, which bestows the whole estate on him without exception, reservation, or condition, she has no right to what she claims. I am not prepared to hold that the deed has been misconstrued, but the second ground of the appeal appears to me to be valid. A wife is, under the Hindu law, in a subordinate sense a co-owner with her husband; he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of maintenance; and I am therefore of opinion that the donee of the entire estate must be deemed to have taken and to hold it subject to her maintenance. This opinion is supported by the remarks at p. 366 of West and Buhler's Hindu Law of Inheritance and Partition, 2nd ed., and the Privy Council decision dated 30th November and 2nd December 1852 in the case of *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dassee* (1), and by a judgment of the Madras High Court dated 27th October 1860, in which a sale of a piece of land by a Hindu was set aside on his wife's suit on the ground that it left her without maintenance.

The plea that provision was made for the maintenance of the plaintiff in the present case by her husband in the shape of an [318] assignment

(1) 8 M.I.A. 66.

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of cash and jewels seems inconsistent with the terms of the deed, and the lower Court's finding that his entire estate was without exception or reservation given to the defendant, but the Courts below have not distinctly adjudicated upon it. I would direct the lower appellate Court to adjudicate on that plea, and, if it should disallow it, to proceed to determine whether Rs. 25 per mensem, or what monthly amount, would be a suitable allowance for the plaintiff's maintenance. The lower appellate Court should be instructed to submit its findings, when a week might be allowed for objections.

SPANKIE, J.—I agree with my learned and honorable colleague's proposal to refer the issue laid down above for determination by the lower appellate Court.

Cause remanded.

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2 A. 318.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

GULAB DAI (*Plaintiff*) *v.* JIWAN RAM AND OTHERS (*Defendants*).*
[26th May, 1879.]

Failure of Plaintiff to pay Court-fee for issue of Summons—Non-appearance of Defendant—Act VIII of 1859 (*Civil Procedure Code*), *s.* 110—*Act XXIII of* 1861, *ss.* 5, 7—*Fresh suit—Act X of* 1877 (*Civil Procedure Code*), *s.* 99.

Where the plaintiff in a suit failed to deposit the *talabana* required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in such suit, and the Court on that ground irregularly dismissed such suit as against such original defendants by an order purporting to be made under s. 110 of Act VIII of 1859, on a day previous to that fixed for the hearing of such suit, *held* that such order of dismissal did not preclude the plaintiff from instituting a fresh suit.

THE facts of this case were as follows: On the 3rd August 1866 one Radha Kishen instituted a suit against one Lachman Das and certain other persons in the Court of the Munsif for the possession of certain land. The 23rd August 1866 was fixed for the settlement of issues in this suit. On that date no issues were fixed, but the Munsif made an order which had reference to the addition of other persons as defendants in the suit. On the 27th August 1866 the pleader for the plaintiff applied that certain persons whom he named might be made defendants in the suit, and [319] that summonses might be served on them. The Munsif consented to this application and fixed the 23rd September 1866 for the next hearing of the case. On the 30th August 1866 it having appeared that the pleader for the plaintiff had endorsed on the summonses which were to be served on the new defendants that the plaintiff would not deposit the Court-fees requisite for the service of such summonses, and that he (the pleader) could not proceed, the Munsif made the following order: "Whereas it appears that the plaintiff has made a default, it is therefore ordered that the suit be dismissed under s. 110." On the 21st March 1878 Gulab Dai, the representative of Radha Kishen, instituted a fresh suit against the

* Second Appeal, No. 955 of 1878, from a decree of R. M. King, Esq., Judge of Meerut, dated the 29th June 1878, affirming a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 19th February 1878.

representatives of Lachman Das and the other persons for the possession of the same land, claiming under the same title as Radha Kishen had claimed in the former suit. The Court of first instance determined the suit on its merits, and dismissed it. On appeal by the plaintiff the lower appellate Court held, looking at the circumstances of the former suit, that the order dismissing the former suit should be taken to have been made under the concluding portion of s. 97 of Act VIII of 1859, and that such order consequently was a bar to the fresh suit.

The plaintiff appealed to the High Court, contending that the order dismissing the former suit should be taken to have been an order made under s. 5 of Act XXIII of 1861, and the plaintiff was entitled, with reference to s. 7 of that Act, to institute a fresh suit.

Pandit *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath* and Babu *Oprokash Chandar Mukerji*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The lower appellate Court's finding that the former suit was withdrawn by the plaintiff is, in our opinion, an incorrect construction of the fact. The fact is that she failed to deposit the *talabana* required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in the suit. The proper course for the Munsif to have pursued was to have proceeded with the suit on the date fixed for hearing and to have disposed of it in respect of the original defendants. Instead of so doing, he precipitately [320] dismissed it as against them for the default aforesaid, which did not apply to them, on a day previous to that fixed for the hearing, in reference to the provisions of s. 110, Act VIII of 1859, which were wholly inapplicable. Had they been applicable the order of dismissal would not have precluded the institution of a fresh suit within the period allowed by law. It is true that the provisions of s. 5, Act XXIII of 1861, were also inapplicable to the circumstances, but the default for which the suit was dismissed by the Munsif was of the same nature as that contemplated by that section; and it is observable that the dismissal of a suit under that section does not preclude the institution of a fresh suit within the time allowed by the law of limitation. It would be hard to hold that the plaintiff should have been deprived of a right which she would have been free to exercise if her suit had been dismissed under s. 110, Act VIII of 1859, or s. 5, Act XXIII of 1861, not because she committed a greater fault than is punishable under those laws, but because the Munsif committed a strange irregularity which the Legislature had not anticipated and for which it has not made any express provision. It would be more just and reasonable to apply the spirit of s. 7, Act XXIII of 1861, which has been re-enacted in s. 99 of the new Procedure Code. It is not found by the lower appellate Court that the matter of the present suit is a *res judicata* under s. 13 of that Code.

Accordingly we decree the appeal, and setting aside the lower appellate Court's decree remand the case to it for disposal of the appeal on the merits, and direct that the costs of this appeal shall follow the event.

Cause remanded.

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APPELLATE CIVIL.

2 A. 320= 4 Ind. Jur. 415.

2 A. 320=4 Ind. Jur. 415.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

HARDEO DAS AND ANOTHER (*Plaintiffs*) *v.* HUKAM SINGH (*Defendant*).*
[29th May, 1879.]

Act X of 1877 (*Civil Procedure Code*), s. 210—*Decree payable by Instalments.*

Held that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the property hypothecated by such bond (1).

[321] In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments.

[F., 7 B. 332 (335); Appr., 5 B. 604 (607).]

THIS was a suit on a bond dated the 1st August 1872, whereby the payment of Rs. 12,000 within three years from that date together with interest at the rate of twelve per cent. per annum was secured. This bond charged certain immoveable property with the payment of the principal amount together with interest at twelve per cent. per annum. The plaintiffs claimed Rs. 21,200 on the bond, that is to say, the principal amount, Rs. 12,000 and interest on that amount at the rate of twelve per cent. per annum calculated from the 1st August 1872 to the 21st December 1878, when the suit was instituted, which interest amounted to Rs. 9,200; and they prayed that they might be allowed to recover the amount claimed by the sale of the hypothecated property. The defendants contended *inter alia*, that the plaintiffs were not entitled to interest from the date the bond became due at the rate of twelve per cent. per annum, such rate being excessive, and they prayed the Court of first instance to direct that the amount of the decree should be paid by instalments. The Court of first instance gave the plaintiffs a decree for the principal amount claimed by them together with interest to the date of the decree at the rate of one per cent. per annum, directing that the amount of the decree should be paid by fifteen annual instalments, that the property should remain charged with the payment of the amount of the decree, and that should default be made in the payment of any instalment, or any risk arise of the decree-holder losing the security of the hypothecated property, the decree-holder should be entitled to enforce payment of the whole amount due under the decree.

The plaintiffs appealed to the High Court contending that the Court of first instance was not competent to make a decree for payment by instalments, and that it had improperly reduced the rate of interest fixed by the bond.

Babu *Dwarka Nath Mukerji*, for the appellants.

Munshi *Sukh Ram*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PEARSON, J.—The appeal must, in our opinion, prevail. The lower Court has erred in applying the provisions of s. 210, Act X [322] of 1877

*First Appeal, No. 17 of 1879 from a decree of Maulvi Muhammad Maqsud Ali Khan, Subordinate Judge of Agra, dated the 24th January 1879.

(1) See *Binda Prasad* v. *Madho Prasad*, 2 A. 129, where Turner, J., expresses an opinion to this effect and Oldfield, J., a contrary opinion.

to this suit, which is not a mere suit for money but asks for the recovery of the amount of a bond-debt by the sale of the property hypothecated in the bond. S. 210 was not intended to enable the Courts to set aside and override such a contract as that on the basis of which the present claim is laid. The security over the hypothecated property which it gave for the payment of the debt would be of little value, if it could be so set aside and overridden. The plaintiffs are entitled to an award against the defendants of the principal sum (Rs. 12,000), with interest at the rate of twelve per cent. per annum to date of decree, and to interest from the latter date to the date of realization at the rate of six per cent per annum, and to their costs with interest thereon at the same rate; and to be empowered to recover the amount of the bond debt by the sale of the hypothecated property. The decree of the lower Courts is modified accordingly; and the costs of this appeal are allowed.

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Decree modified.

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2 A. 322 = 4 Ind. Jur. 461.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

BALL (*Defendant*) v. STOWELL (*Plaintiff*).* [19th May, 1879.]

Instalment Bond—Cause of Action—Act XV of 1877 *(Limitation Act), sch. ii, arts.* 66, 67, 75 *and* 80.

B and *S* executed a bond, dated the 15th August 1874, in favour of plaintiff in consideration of a loan of Rs. 15,000 agreeing to repay the same within three years from the above date, and covenanting to pay every half-year interest on the same, at the rate of 8 per cent. per annum; and also to pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim and, if necessary, to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years.

Held that the bond was not an instalment-bond, and therefore art. 75, sch. ii of Act XV of 1877, was inapplicable.

Held, by STUART, C.J., that limitation commenced after the expiration of the three years allowed by the bond for payment of the debt.

Held, by SPANKIE, J.—Art. 80, sch. ii of Act XV of 1877, applies to the suit, and limitation would run from the date when the bond became due; [323] that, according to the stipulation in the bond, it would become due on failure in payment on date of both the interest and premia, and not on failure in payment of either of them only.

Held, further, that arts. 67 and 68, sch. ii of Act XV of 1877, were not applicable to the suit.

[R., A.W.N (1881) 157; 8 O.C. 77 (78); D., 20 M. 245 (246); 19 Ind. Cas. 738 = 16 O.C. 45.]

THIS was a suit for money due on a bond dated the 15th August 1874, the suit being instituted at Agra in the Court of the Subordinate Judge on the 16th July 1878. The terms of this bond were as follows:—"Know all men by these presents that we the undersigned, Edward

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* First Appeal, No. 154 of 1878, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 22nd August 1878.

1879 MAY 19. — APPELLATE CIVIL. — 2 A. 322= 4 Ind. Jur. 461.

Charles Ball and William DeRussett Stowell, having jointly and severally borrowed and received the sum of rupees fifteen thousand (Rs. 15,000) from Christopher William Stowell, at Agra, do hereby covenant and agree to pay or cause to be paid at Agra, unto the said Christopher William Stowell, or to his order, or to his heirs, executors, and assigns the said sum within three years from date hereof; interest on the same at the rate of 8 per cent. per annum being payable half-yearly, namely, on the 30th June and 31st December in each calendar year, and premia on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance Company.

"In the event of failure in the payment on due date of the interest and premia, and whether advice be or be not given of such defaults, we hereby jointly and severally render ourselves liable to pay up the full amount of this bond, or such portion or balance thereof as may be due or may become due according to the account of the said Christopher William Stowell, from date of such default to payment of loan in full and other charges that may or shall be incurred on account of the said loan.

"It shall be optional to the said Christopher William Stowell to claim and, if necessary, to sue for the full amount due on the bond, on the failure of any one or more stipulated payment, or on the full expiry of the period this bond was originally intended to run, if all its provisions had been fulfilled by us."

The defendant Ball alone defended the suit; his defence to the same being that it was barred by limitation, in the first place, with reference to art. 75, sch. ii of Act XV of 1877, inasmuch as interest being payable half-yearly the bond was one payable by instalments, and default having been made in the payment of interest, the period [324] of limitation ran from the time when the first default was made; and in the second place, if the bond was not one payable by instalments, inasmuch as the plaintiff's cause of action arose on the first default, then the period of limitation ran from the date of the default, notwithstanding the concluding words of the bond. The Subordinate Judge gave the plaintiff a decree holding that the bond was not one payable by instalments but a single bond, where a day was specified for payment, such day being the 15th August 1877, and that the suit was consequently one governed by art. 66, sch. ii of Act XV of 1877, and within time. Against this decree the defendant Ball appealed to the High Court.

Mr. *Hill* (Mr. *Howard* with him) for the appellant.—The sole question in this case is—when did the period of limitation begin to run? The difficulty lies in the "optional clause" at the conclusion of the bond, but apart from it, it is clear, on principle as well as authority, that the suit would be barred. The Subordinate Judge has chiefly discussed the question—Under what particular class of bonds does the instrument in suit fall? His finding is, that it is a bond of the description provided for by art. 66, *i.e.*, a single bond in which a day is specified for payment. In this, it is submitted, he is wrong. The money was repayable *within* three years, that is, at any time the obligors might select within three years. There is a material and well-recognised distinction between such a case and one in which the contract is that the money shall be repayable on the expiration of a given period. It cannot, therefore, be said, from this point of view, that the money was repayable on a specified day. But further, the parties stipulate that the money may become payable on the occurrence of an uncertain event, *viz.*, a default in the payment of interest and premia, which might happen on any of the half-yearly recurring dates

on which such payments fell due. If then the bond be a single bond, and no day be specified for payment, art. 67 will apply, and the limitation period begin to run from the date of execution. It is, however, submitted that the bond is not a single bond, but a bond subject to a condition, and governed by art. 68, or if not that, that it is unprovided for by the Act, otherwise than by art. 80. It hardly, however, seems material to determine with strict accuracy under what particular article the bond falls, since the period in all cases of purely [325] money bonds is three years from the date when a right to sue for the whole sum secured first accrued. If this be so, and dealing with the question apart from the "optional clause," there can be little doubt in the matter. The Statute begins to run when the plaintiff might have first sued for the whole amount: Darby and Bosanquet on the Statutes of Limitation, p. 18; Chitty on Contracts, p. 750; *Hemp* v. *Garland* (1); *Hurronath Roy* v. *Maherullah Mullah*(2). There was, however, a suggestion in the lower Court that supposing a right of action did in fact accrue to the plaintiff on the first default in payment of interest, that right was waived, and the argument presumably was that then, by a series of tacit waivers, the vitality of the bond was preserved, as each default occurred, until the expiry of the full term of the bond. But it is submitted there was no waiver here. The conduct of the plaintiff relied upon to establish a waiver is, I presume, his forbearance to sue, for nothing else on his part has been proved or suggested, but this is not enough. There must be an overt act. Simply lying by and witnessing a forfeiture is not sufficient: *Keen* v. *Biscoe* (3); *Doe* v. *Allen* (4). The argument is apparently founded on analogies derived from the rule laid down in art. 75, sch. ii of the Limitation Act: that article, however, clearly shows that forbearance to sue, *per se*, does not amount to a waiver, for it is there provided that the right of suit arising out of a default shall co-exist with forbearance to sue until the right is altogether barred by the lapse of three years. Moreover, unless the effect contended for is expressly given to a waiver by the Act, it has not the effect of stopping the running of the limitation period: *Gumna Dambershet* v. *Bhiku Hariba* (5), where the authorities are collected. The general rule of law is that once the Statute has begun to run, nothing can stop it: Act XV of 1877, s. 9; *The East India Company* v. *Oditchurn Paul* (6). In the present case the lower Court has held that the bond falls under an article of the Limitation Act which is silent as to waiver. If it be conceded that the Statute began to run when the plaintiff might first have sued for the full amount of the bond, and that there was no waiver, or, if there were, that it was ineffectual, it remains only to be considered whether the effect of the "optional clause" is to take the case out [326] of the Statute. It is submitted that it has no such effect; were it otherwise, it would involve the anomaly that a person might have two successive causes of action in respect of one and the same debt. The plaintiff here might have sued for the whole amount on the first default, but he could not do so unless he had then a cause of action for the whole amount. Mr. Addison, in his work on contracts, thus states the principle:—"It is a general rule that where there has once been a complete cause of action, the Statute begins to run, and that subsequent circumstances which would, but for the prior wrongful act or default, have constituted a cause of action, are disregarded." See also the judgment in *Hemp* v. *Garland* (1) and

(1) 12 L. J. N. S. Q. B., 134. (2) 7 W. R. C. R. 21. (3) L. R. 8 Ch. 201.
(4) 3 Taunt. 78. (5) 1 B. 125. (6) 5 M. I. A. 43.

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Navalmal Gambhirmal v. *Dhondhiba bin Bhagvantrav* (1), in the latter of which cases, Westropp, C.J., observes:—"There is, it is true, a proviso in the bond here that the obligee might waive the right to sue for the whole, and instead accept payment by instalments, but that proviso gave him nothing more than the right of waiver, which the law gave him, which right, as has been above observed, there is nothing here to show he exercised." In the present case all that the "optional clause" gives to the plaintiff is similarly a right to do that which he could by law do, namely, sue at the expiry of the term of the bond, if in the meantime he preserved his rights thereunder by waivers of his antecedent rights of action. It is hardly necessary to cite authority for the position that the parties to a contract cannot by agreement avoid the effect of the law of limitation: see however, *The East India Company* v. *Oditchurn Paul* (2); *Krishna Kamal Sing* v. *Hira Sirdar* (3); *Stowell* v. *Billings* (4). Statutes of Limitation are in fact to be strictly applied, see the observation of the Privy Council in *Luchmee Buksh Boy* v. *Ranjit Ram Panday* (5). Interest beyond three years is not recoverable.

Mr. *Conlàn*, with him the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondent.—The appellant's contention is deprived of any force it might otherwise have by the circumstance that no such breach as is contemplated by the forfeiture clause of the bond has occurred. A two-fold failure on the part of the obligors is there contemplated—a failure, that [327] is, in the payment of interest *and* premia, not of one without the other. Interest may not have been paid, but the premia on the life policies have been regularly paid. Therefore, no cause of action accrued to the obligee until the full original term of the bond expired. We contend that the bond comes under art. 66 of the schedule, and that three years have not elapsed from the day specified for payment. Time does not necessarily run from the date on which a cause of action accrues, but the periods given in the schedules are to govern, and these have been fixed by the Legislature without necessary reference to the date on which a cause of action accrued. For example, in a case of pre-emption, the cause of action arises on the date of the sale, but the period under the Act does not begin to run until the purchaser takes possession. We do not deny that parties cannot by agreement avoid the effect of the Statute, but we submit that it is competent to parties when entering into a contract of loan to determine the date on which the loan shall be repayable. Here the obligee is expressly empowered to sue on the expiry of the full term of the bond. The defendant, having voluntarily given the plaintiff the option of suing either on the happening of a default or on the expiry of the term of the bond, is estopped from pleading that his creditor cannot avail himself of the option.

Mr. *Hill*, in reply.—The bond gives a right of action on the failure in payment of any *one* or more stipulated payment. A default in payment of interest is a default in payment of interest and premia, and would confer a right of action under this bond.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—The decree of the lower Court in this case is clearly right, both in regard to the question of limitation and the joint liability of the defendants for the sum decreed. In the lengthened and anxious

(1) 11 B. H. C. R. 155. (2) 5 M. I. A. 43. (3) 4 B.L.R. (F.B.) 101.
(4) 1 A. 350. (5) 13 B.L.R. 177 (182).

argument of the counsel for the appellant, numerous authorities in the English Courts, and also in the Courts in this country, were cited to show that the bond in this case was an instalment bond, and it is chiefly from a desire to examine these authorities that I have delayed my judgment. I have now carefully considered all the authorities, and find that they all assume and relate to the case of an undoubted instalment bond In the present case, however, I am quite clear that the bond sued on [328] is not an instalment bond, but a bond simply acknowledging the debt with interest payable half-yearly, with the proviso that if not so paid the obligors should be liable to pay up the whole amount from date of such default, that is, from date of failure in payment of interest. As to the limitation pleaded, the period clearly runs from the expiration of three years allowed by the bond for the payment of the debt, that is, from the 15th of August 1877, the date of the bond itself being the 15th of August 1874. Such appears to be the real nature and position of the bond, but it contains an allusion to policies of assurance, and premia thereon, as to which there is no contract apparent on the face of the bond itself, although there would appear from the evidence to have been an arrangement of the kind between the parties to fortify and further secure the bond debt. Be that as it may, we are only concerned with the decree made by the Subordinate Judge, and we affirm that decree with costs in both Courts.

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SPANKIE, J.—The bond recites that the sum of Rs. 15,000 borrowed from C. W. Stowell, the plaintiff, respondent, obligee, is to be payable within three years from the date thereof (15th August 1874); that the interest is to be payable half-yearly, namely, on the 30th June and 31st December in each calendar year, that premia on life-policies are to be endorsed to the said C. W. Stowell periodically according to the rules of the Insurance Company. The second clause recites that in the event of failure in the payment on due date of the interest and premia, and whether advice be or be not given of such default, the defendants, obligors, jointly and severally render themselves liable to pay up the full amount of the bond, or such portion or balance thereof as may be due, according to the account of C. W. Stowell, from date of such default to payment of loan in full and other charges that may or shall be incurred on account of the bond. In the third clause of the bond there is a condition that "it shall be optional to the said C. W. Stowell to claim, and if necessary to sue for the full amount due on the bond on this failure of any one or more stipulated payment, or on the full expiry of the period this bond was originally intended to run, if all its provisions had been fulfilled by us." There are two defendants, one, Mr. W. De Russett Stowell (son of C.W. Stowell, the obligee), unreservedly [329] admitted the justice of the claim. The other, E. C. Ball, acknowledged execution of the bond but pleaded limitation generally. His counsel, however, contended that art. 75, Act XV of 1877, applies to the bond, which is one payable by instalments, as interest, the fruit of principal, was payable half-yearly; the plaintiff's cause of action arose when default occurred which gave him a right of suit, and from that time limitation would run; the proviso could not stop limitation from running; nor, if the bond is one payable by instalments, does the proviso amount to a subsequent waiver, and, therefore, it gives the plaintiff no further right than the law allowed him before it was written. The Subordinate Judge held that the bond contemplated in art. 75, sch. ii of the Limitation Act, is one in which the principal amount secured by the bond is made payable by instalments; that the bond in suit was not payable by instalments, but it was stipulated that the amount secured by the bond should be paid in a

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lump sum within three years from the date of the bond (15th August 1874); that the lump sum became due on the 15th August 1877, and, therefore, this suit instituted on the 16th July 1878, was within time. The Subordinate Judge also held that the stipulation to pay interest half-yearly, with the proviso that in the event of default in such payment the principal as well as the interest shall be payable at once, cannot convert the bond into one under art. 75. He further held that art. 68 would not apply to the bond, as there was no stipulation in it for any penalty; but the bond came under art. 66 which provides for a single bond or a bond without a penalty, and being of this character the suit was not barred by limitation. The Subordinate Judge, therefore, decreed in favour of plaintiff against both defendants. E. C. Ball, defendant, alone appeals from the decree, and his counsel insisted upon the pleas on which appellant's defence rested in the lower Court, citing various authorities to show that, as the bond was one payable by instalments, the cause of action accrued to the plaintiff on the occurrence of the first default, and that limitation began to run from that date, the plaintiff not being at liberty to fall back upon the proviso that it was optional to him to wait until the term of repayment fixed in the bond had expired; that there had been no waiver of the right to sue, and consequently the suit was barred. Further, it was contended that, even if there was not a bond payable [330] by instalments, the right to sue accrued when the default provided for in the bond occurred, and, therefore, the suit was barred; that art. 66 did not apply to the deed, as no day of payment was specified in the bond, and, therefore, limitation ran from the date of execution, and again the suit was barred. It was also urged that art. 68, sch. ii, might apply, the bond being subject to a condition, but this point was not seriously pressed, it being contended that art. 80 applied, which refers to a suit on a bill of exchange, promissory note, or bond herein not expressly provided for, and the time from which limitation begins to run in such a suit is when the bill, note or bond becomes payable, and this suit should be barred, as the cause of action accrued on the first default. I propose first to deal with these contentions, and then dispose of the remaining objections in the memorandum of appeal to which I will subsequently refer.

I am not prepared to admit that the bond in suit is one payable by instalments. There was no contract between the parties that the sum borrowed should be paid off by instalments, that is to say, there was no agreement that the money borrowed and secured by the bond should be repaid in certain portions at different times. Interest may not be a part of a contract between the parties to it. If there is a condition in a bond that simple interest should be paid at a certain rate, then it is as much payable by virtue of the contract as the principal. It is a necessary incident to the original debt, but it is not a part of the original sum borrowed. It is the sum of money paid or allowed for the use of the money lent for a certain time at a fixed rate per cent. It is not added to the principal as a part of the original debt, but principal and interest in case of failure to pay make up the amount due under the bond. If I hold (as I do hold) that the bond in suit is not one payable by instalments, then art. 75, sch. ii, Act XV of 1877, does not apply to it. But I am quite willing to admit that if this article could be applied to it, then on the ruling of the authorities cited (1) this suit might be barred,

(1) *Hemp* v. *Garland*, 12 L. J. N. S., Q. B., 134; *Karuppanna Nayak* v. *Nallamma Nayak*, 1 M. H. C. R. 209; *Navalmal Gambhirmal* v. *Dhondibabin Bhagvantrav*, 11 B. H. C. R., 155.

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assuming that the circumstances of this case are on all fours with those quoted, and that there had been no waiver. I was at first disposed to [331] apply art. 66 to the bond, accepting the conclusion of the Court below on this point. The bond at first sight appears to be a single bond, no penalty being attached to it, in which a day is specified for payment, and the time from which limitation begins to run is the day so specified. It is true that the day, the 15th August 1877, is not so specified in so many words. But the debt is to be paid within three years from the date of the bond : any one is entitled to tender payment of a debt of this nature within the time fixed for its repayment, and the bond in suit allows this to be done, but the time at which the debt must be repaid is specified in this case, and the last day would be the 15th August 1877. If this be so, the suit clearly is, unless otherwise barred, not beyond time, as it was instituted in 1878, and the period of limitation is three years from that date. If this view be correct, then art. 67 does not apply, as it cannot be said that the bond is one in which no day for repayment has been specified. Had the bond been silent in this respect the period of limitation would begin to run from the date of its execution, and art. 67 would have applied. I have, however, no doubt that art. 68 is not appropriate, as I do not find that the bond is subject to a condition. In the third section of the Limitation Act (XV of 1877) "bond" includes any instrument whereby a person obliges himself to pay money to another on condition that the obligation shall be void, if a specified act is performed, or is not performed, as the case may be. Bearing in mind this interpretation of the word bond, and applying it to sch. ii of the Act, the instrument now before us does not contain any condition of the nature described in s. 3, and, therefore, it does not come under art. 68. But, as I have already stated, the learned counsel for the appellant did not press this point. But the learned counsel for the appellant has argued that art. 80, sch. ii of the Act applies, and, after full consideration of the point, I come to the conclusion that there is something more in the bond than meets art. 66. It is a single bond, and there is a day specified for payment, but there is also a liability for immediate demand of the entire amount due before the expiration of the term of the bond on the occasion of default of payment. This provision may, and, I think, does take the bond out of art. 66, and, in the absence of any provision for it in the schedule, places it under art. 80, and the limitation would run from the date when the bill, note, or bond became due. This brings us to the [332] very serious contention as to the date when the cause of action accrued. Whether this be or be not a bond payable by instalments, it is urged that the right to sue accrued when the default occurred, and that limitation began to run from that date. The authorities cited to us and already referred to relate to bonds payable by instalments, but it is argued that the principle laid down in the Indian cases and in *Hemp* v. *Garland* (1) applies equally to any bond in which the right to sue is given on the occurrence of a default It is laid down that if a plaintiff chose to wait till all the instalments became due, no doubt he might do so. But that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it. On the principle that every person is bound to sue when there is a complete present cause of action, the question in this case would be, when did the cause of action arise ?

(1) 12 L.J.N.S. Q.B. 134.

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When the defendant failed (if he did fail) to pay the interest on the first half-year and premia, or when the bond became payable on the 15th August 1877? The bond certainly recites that in the event of failure of the payment on due date of the interest and premia the defendants were liable to pay the full amount of the bond, or such portion or balance as might be found to be due according to plaintiff's account. But the third clause leaves it optional with plaintiff to claim his money at once, and if necessary to sue for the full amount due on the bond, on the failure of any one or more stipulated payment, or he might sue when the term of repayment fixed by the bond had fully expired. But it is contended on the further authorities cited (1) that "if to an action for the original cause of action the Statute of Limitations is pleaded, upon which issue is joined, proof being given that the action did clearly accrue more than six years before the commencement of the suit, the defendant, notwithstanding any agreement to inquire, is entitled to the verdict." In the Full Bench ruling of five Judges of the Presidency High Court (2), it was ruled by a majority of four Judges, one Judge alone dissenting, that no arrangement between parties could be recognised which enlarged the period of limitation allowed by law for the execution of decrees, and it was observed in that decision: "If a man having a [333] cause of action against another to recover immoveable property, or to recover money, or to recover damages for a trespass upon his land, or for an assault, should say, 'I will not sue you for twenty years,' he would not acquire a right to sue after the period of limitation fixed by law: if he does not intend to give up his right to sue at all he must take care not to bind himself beyond the time within which the Law of Limitation allows him to sue." This Court also recognised the force of this ruling in the case of *Stowell* v. *Billings* (3).

It is true that by the terms of the contract between the parties an option is given to the plaintiff either to take his money at once on the occasion of default or to postpone his suit until the full term of the bond has expired, and the contract in this respect may be supposed to represent the true meaning of the parties and might not unreasonably be construed in favour of the plaintiff, who was at liberty to elect which of the two courses he would adopt. But the Act of Limitation would still control his choice. Mr. Justice Story has remarked on the Statute of Limitation that "it was intended to be a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demand after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of the witnesses." The Indian Law of Limitation certainly insists upon the peremptory strictness with which its provisions are to be enforced, and it fixes upon the Courts an obligation to dismiss all suits, appeals and applications made after the peroid of limitation as prescribed in sch. ii of the Act, although limitation has not been set up as a defence. The words, therefore, already cited from the Presidency Full Bench ruling (2), "If he does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the Law of Limitation allows him to sue," may be quite relevant to this case. For if it can be established that there was a default on which a right of action was given to the obligee to sue, there would be a good defence on the plea of limitation.

(1) *The East India Company* v. *Oditchurn Paul*, 5 M. I. A. 43.
(2) *Krishna Kamal Singh* v. *Hira Sirdar*, 4 B.L. R. F.B. 101.
(3) 1 A. 350.

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2 A. 322=
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[334] It has been argued below by appellant's counsel that the third clause in the bond contemplates the occurrence of default of payment either of interest or premia as giving rise to an immediate cause of action, and that it is not necessary that the default should be in the payment both of interest and premia, although there had been default of this nature as a matter of fact: on the other hand, it is contended by respondent's counsel that the words in the third clause "any one or more stipulated payment" refer to the terms of the second clause "in the event of failure in the payment on due date of the interest and premia," and, therefore, there must be a default in the payment both of interest and premia, and that it is solely on condition of both these events happening that the obligors made themselves liable to an immediate demand of the entire sum due. It seems to me that the terms of the bond in the second and third clauses read together, and they must be so read in order to understand the real meaning of the parties, provided for the default both of interest and premia, and that in the event of default in the payment either of interest or premia only, and not of both, the obligee is not called upon to choose whether he will at once demand the amount due, or postpone his suit until the full term of the bond has expired. I therefore would hold that if the default does not extend beyond the interest or premia, a complete and present cause of action has not arisen. It is admitted that no interest has been paid on the bond, but it has not been established that there has been any default in respect of the premia. The bond is very carelessly or inaccurately expressed in words: "Interest on the same at the rate of 8 per cent. per annum being payable half-yearly, namely, on the 30th June and 31st December in each calendar year, and premia on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance Company." But owing to the form and position of the words used and to the punctuation, there is some ambiguity. It has been argued that the premia on life policies are, by the terms of the bond, to be endorsed to the obligee periodically, but this is not to my mind the meaning of the bond or the intention of the parties. The meaning doubtless is that the interest and premia are to be payable, the former half-yearly, on the dates named, the latter periodically, according to the rules of the [335] Insurance Company. This may be gathered from the succeeding clause which shows what is to be regarded as a default: "In the event of failure in the payment on due date of interest and premia." These are the words. The punctual payment of the premia is necessary to keep the policies alive. There was no necessity to endorse the receipts for premia. The life-policies, in order to make the security more perfect, might be formally assigned to the obligee; but it was no part of the condition, the breach of which would give to the obligee the right of calling in his money at once. If the words "being payable" had been added to "premia," thus, "and premia being payable on life policies to be endorsed to the said Christopher William Stowell periodically, according to the rules of the Insurance office," there would have been no room for doubt as to what was meant. The life-policies, though not endorsed to plaintiff, were nevertheless in his possession and were filed by him and are on the record of this case. There has been no default in the payment of the premia. The plaintiff has filed the evidence of the regular payment of the half-yearly renewal premia required by the Company's rules. There are on the record receipts for such premia on Stowell's life-policy, dated 13th May 1876, 13th November 1875, and 5th December 1876, respectively. There is a joint receipt to Messrs. Ball and Stowell of payment of the half-yearly renewal

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premia on Stowell's insurance due on the 10th day of May 1878. There are receipts for the payment of the half-yearly premia on the life of Ball, dated 13th May 1875, 13th November 1875, and 5th December 1876. These receipts show that there was no default in the payment of Stowell's premia up to the 10th May 1878, or of premia on Ball's life up to the 13th day of November 1876, consequently if there had been default after that date, and a cause of action had arisen, the suit would be within the period of limitation, assuming that the suit was one coming under art. 80, sch. ii of the Limitation Act. Besides these receipts there are Positive Promissory Notes for Rs. 166-10-8 each under the policies both of Ball and Stowell payable to bearer three months after sight, and the death of Ball and Stowell respectively, and redeemable three days after presentation at the office of the Positive Government Security Life Assurance Company, Limited, according to the rules of the Company, which were in the possession of plaintiff. Of all [336] these receipts and notes one only was filed by the defendant Ball. The promissory notes payable on the death of Ball are dated 13th November 1874, 13th May 1875, 17th November 1875, 17th May 1876, 8th December 1876, and 18th June 1877. Those payable on the death of Stowell are dated 18th November 1874, 13th May 1875, 17th November 1875, 17th August 1876, 8th December 1876, 18th December 1877, and 12th June 1878. With this evidence before us which shows that there has been no default in the payment of premia, and entertaining the opinion that the default giving rise to a right of immediate demand for payment of the amount due on the bond before its expiration must be a default in respect of both interest and permia, I must come to the conclusion that there was no such default that gave to the plaintiff a complete and present cause of action. Therefore the contention that more than three years had elapsed from the date of default, and thereby the suit was barred, fails, the suit being within time, and the debt being acknowledged by one defendant and execution of the bond by the other, limitation alone being pleaded, the plaintiff would be entitled to a decree.

I have now considered all the points involved in the first to the fourth plea inclusive. There are two other pleas to be noticed, the fifth and sixth.

The fifth plea has no force, for if the interest had been barred by limitation, the suit must have been barred by the same limitation. The plea was not pressed before us, and I only notice it because it is on the memorandum of appeal. The sixth plea—that the Judge should have dismissed the suit with costs—is disposed of by this judgment.

I would dismiss the appeal, and affirm the decree of the lower Court, with costs.

Appeal dismissed.

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2 A. 336.

APPELLATE CRIMINAL.

Before Mr. Justice Spankie.

EMPRESS OF INDIA *v.* MURLI. [17th July, 1879.]

High Court, Powers of Revision—Act X of 1872 *(Criminal Procedure Code)*, s. 297.

Held, that great laxity in weighing and testing evidence is a material error in a judicial proceeding, within the meaning of s. 297 of Act X of 1872.

[R., 14 B. 331 (345).]

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[337] AT a Sessions for jail delivery held at Agra on the 27th April 1875, seven prisoners, *viz.*, Harphal, Dipa, Bhawani, Dhan Singh, Bhima, Murli, and Jhentar were charged with the offence of dacoity. Jhentar was acquitted, and the first six were convicted and sentenced to transportation for life. Murli was sent to the Andaman Islands, to undergo the sentence of transportation for life. From there and through the Chief Commissioner of the Andaman and Nicobar Islands he forwarded his petition of appeal to the High Court in the month of May 1879, urging in his petition of appeal that, through want of friends and funds, he could not appeal before. The petition of appeal was received by the High Court, and was heard by Mr. Justice Spankie, by whom the appeals of the first five were heard and disposed of.

JUDGMENT.

The following was the judgment delivered by

SPANKIE, J.—The petitioner, convict No. 21013, Murli, is undergoing sentence of transportation for life in the penal settlement of Port Blair. He was convicted on the 27th April 1875, by Mr. H. G. Keene, the Sessions Judge of Agra, on a charge of dacoity, under s. 395 of the Indian Penal Code. Six other persons, Harphal, Dipa, Bhawani, Dhan Singh, Bhima, and Jhentar were tried at Agra with him. Jhentar was discharged by the Sessions Judge, and the others, including Murli, were transported for life. The five persons appealed to this Court, and on the 26th June 1875 were acquitted, and it was directed that they should be released. Murli did not appeal at the time, but does so now in a petition received through the Chief Commissioner of the Andaman and Nicobar Islands and Superintendent of Port Blair and Nicobars, that officer following the instructions conveyed to him in the letter of the Secretary to the Government, Home Department (1). Murli states that he was undergoing imprisonment for two years, on conviction of the offence of being in possession of stolen property, knowing the same to have been acquired by theft, when he was named by Pita, an informer, as having been one of the persons concerned in dacoity. He was put on his trial before the Sessions Judge of Agra, and convicted and sentenced to transportation for [338] life. Five persons appealed and were released. But he (Murli) was unable to represent his case at that time, having neither funds nor friends. Since his arrival in the penal settlement he has succeeded in obtaining a copy of the judgment of the Sessions Judge of Agra, and now appeals from the order passed by him. The prisoner ought to have appealed to this Court in sixty days from the date of the sentence, the 27th April 1875. The period of limitation has so long expired, and the explanation of the delay in appealing, though there may be some truth in it, is not altogether satisfactory, that I feel compelled to disallow the appeal. It is the case that all convicts have a right of appeal once, but that right is subject to the law of limitation, and I think that it would be unwise so to apply s. 5 of this law as to encourage the idea amongst the convicts of a penal settlement that they can at any time, as in this case, five years after the date of their conviction, appeal to this Court. At the same time, being well acquainted with the facts of the case, as I decided the appeal of the five other persons who had been transported for life, I am quite prepared to admit the petition as one for revision of the proceedings.

(1) Mr. Bernard, C.S.I., Officiating Secretary dated 14th April 1879, to Superintendent of Port Blair and Nicobar Islands.

1879 JULY 17. — APPELLATE CRIMINAL. — 2 A. 336.

The case of Murli is on all fours with that of Harphal and others, and the same reasons which influenced my decision with respect to those appellants, lead me now to say that there is no satisfactory evidence to justify the conviction of Murli, and he ought to be released. My reasons will appear from the copy of my judgment in the case of Harphal and others which I have directed should be put up with this proceeding. I cannot at this time remember how it happened that I did not consider, as a Court of Revision, the case of the petitioner. I can only attribute my not having done so to the uncertainty that prevailed in this respect as to whether the Court was at liberty to interfere with the conviction of a prisoner who had not appealed (when dealing with the case of any person tried with him who had appealed), simply on a question of credibility of evidence. Later decisions both of this and of other Courts for years past have not tended to remove this uncertainty as to what is or is not a material error in a judicial proceeding. I am myself inclined, indeed I have acted in other cases in this view, to regard great laxity in weighing and testing evidence as a material error in a judicial proceeding, [339] and looking at the trial in this case, it would seem to me that there had been great indifference and laxity on the part of the Sessions Judge in this respect. Accepting, however, the judgment of this Court in Full Bench in the matter of *Hardeo* (1) I believe that I have the power of interfering now with the conviction of Murli. If we are not precluded by a judgment of acquittal from exercising the power of revision under s. 297 of Act X of 1872, we cannot be precluded from doing so, where there has been a conviction on evidence which has received no sifting, and which in many respects is so transparently false that, if it had been at all tested, its falsehood could not have escaped notice. And in this opinion I am fortified by the amended new Code of Criminal Procedure of 1879. It seems that the dubious character of s. 297, Act X of 1872, has now been fully admitted. Section 439 of the amended Code, if it stand in the Act when passed, provides that the High Court as one of Revision may exercise all the powers of an appellate Court with regard to appeals from convictions. Being of the opinion that I have the power of revision in this case, in which opinion my honorable colleagues, to whom the papers have been circulated, acquiesce, I have no hesitation in saying that the conviction of Murli ought not to be maintained, but that he ought to be at once released. I therefore annul the conviction of Murli and the sentence passed upon him and direct his release.

Conviction quashed.

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2 A. 339.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* THOMPSON. [18th July, 1879.]

Adultery—Act XLV of 1860 (*Penal Code*), s. 497—*Compounding of Offences—Act X of* 1872 (*Criminal Procedure Code*), s. 188.

N charged *T* with having committed adultery with his wife. On inquiry into the charge by the Magistrate, the case was committed to the Sessions Court for

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(1) 1 A. 139.

trial when *T* was convicted. *T* appealed to the High Court. After conviction *N* and his wife were reconciled, and *N* at the hearing of the appeal asked for leave to compound the offence. *Held*, that at that stage of the case sanction could not be given to withdraw the charge.

1879 JULY 18.

APPELLATE CRIMINAL

2 A. 339.

[R., 11 A.L.J. 13=14 Cr. L.J. 46=18 Ind. Cas. 270.]

ONE Nuttall charged one Thompson with having committed adultery with his wife. The case was inquired into by the Magistrate **[340]** and committed to the Sessions Court, by which the accused was convicted and sentenced to one year's rigorous imprisonment. He appealed to the High Court against the conviction and sentence. After the conviction the husband and wife had been living together, and the husband at the hearing of the appeal asked permission of the Court to be allowed to compound the offence.

Mr. *Leach*, for the prisoner.

JUDGMENT.

The judgment of the Court, so far as it is necessary for the purposes of this report, was as follows:

OLDFIELD, J.—Since the conviction by the Sessions Judge the complainant has taken his wife back to live with him, and has asked this Court to be allowed to compound the offence, a sanction which cannot be given at this stage of the proceedings, but looking to the existing relations between the parties and the fact that the prisoner Thompson has been in custody since the 5th May, the Court is of opinion that the punishment already undergone will suffice, and his release is directed.

Appeal allowed.

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2 A. 340 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA v. MANGU AND OTHERS. [2nd September, 1879.]

Act X of 1872 (Criminal Procedure Code), ss. 272, 297—Arrest pending Appeal.

When an appeal has been preferred under s. 272 of Act X of 1872 the High Court may order the accused to be arrested pending the appeal.

ONE Mangu and six others had been tried on charges of culpable homicide not amounting to murder, and voluntarily causing grievous hurt, by the Sessions Judge of Saharanpur and acquitted. The Local Government appealed to the High Court against the judgment of acquittal. After the admission of the appeal, the Junior Government Pleader applied for the arrest of the accused pending the appeal. The application was made to Straight, J., who referred the same to the Full Bench of the Court for disposal.

[341] The Junior Government Pleader (Babu *Dwarka Nath Banarji*), in support of his application, referred to *Queen* v. *Gobind Tewari* (1). He further contended that the arrest sought for was only as a means to compel the attendance of the persons accused before the Court. The admission of the appeal revives the charge.

(1) 1 C. 281.

1879 SEP. 2.

FULL BENCH.

2 A. 340 (F.B.).

JUDGMENTS.

The following judgments were delivered by the Full Bench :

STUART, C.J.—I concur in the opinion expressed by Mr. Justice Oldfield. I also agree with Mr. Justice Straight in holding that under s. 297 of the Criminal Procedure Code the re-arrest of the accused for the purpose of the appeal may be made.

SPANKIE, J.—On the point submitted to us, I accept the ruling in *Queen* v. *Gobind Tewari* (1), and approve the argument of the Legal Remembrancer in support of his contention that the Court had power to order the arrest of the accused. I observed at the hearing of argument in this case that if the contention quoted in the case referred to above could not be maintained, the High Court, under s. 297 of the Criminal Procedure Code, in any case coming to its knowledge, might, if it appeared that there had been a material error in any judicial proceeding of any Court subordinate to it, pass such judgment, sentence or order thereon, as it thought fit. It is not provided that the order passed should be final, and it might be one preliminary to a judgment in appeal. I do not, however, insist upon this view. I may observe that the draft Bill of the Criminal Code as amended —s. 427—expressly gives the power to the High Court to order the arrest of the accused person when an appeal is presented to it under s. 417, which corresponds with s. 272 of the current Code, except as to this power of arrest. The ruling, too, of the Calcutta Court referred to above (1) is cited as the marginal note to s. 427, and the proposed section is the same as para. 3 of s. 168 of Act IV of 1877, "The Presidency Magistrates Act," by which the High Court may order the accused person to be arrested, committed to prison, or held to bail, when the public prosecutor appeals on behalf of the Local Government against an acquittal, dismissal, or discharge.

OLDFIELD, J.—I concur in the view taken by the learned Judges of the Calcutta High Court in *Queen* v. *Gobind Tewari* and others (1).

[342] The admission of an appeal revives the proceedings against the accused person who has been acquitted, and the appellate Court, which has power, under s. 272 of the Criminal Procedure Code, to pass such judgment, sentence or order, as may be warranted by law, can, I apprehend, under the powers so conferred, compel the appearance of the accused person before it, and order his arrest.

STRAIGHT, J.—At the hearing of this reference I entertained some doubt as to the power of this Court, upon the admission of an appeal under s. 272 of the Criminal Procedure Code, to order the re-arrest of the person or persons who had been acquitted. I am not altogether clear upon this point now, despite the reasoning of the case (1) quoted by Mr. Justice Oldfield, but I may refrain from coming to any determinate opinion as to that, seeing that under the proposed new Code of Criminal Procedure such difficulty cannot recur. Moreover, I think, that under s. 297, it having come to the notice of this Court that the accused were improperly discharged, an order may be issued for their arrest. Let the Magistrate, therefore, arrest the accused, and keep them in custody till the appeal is disposed of.

Application allowed.

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(1) 1 C. 281.

2 A. 342.

APPELLATE CIVIL.

1879 JULY 8.

APPEL-LATE CIVIL.

2 A. 342.

Before Mr. Justice Oldfield and Mr. Justice Straight.

THAMMAN SINGH (*Plaintiff*) v. GANGA RAM AND OTHERS (*Defendants*).*
[8th July, 1879.]

Decree—What it is to contain—Act X of 1877 (*Civil Procedure Code*), s. 206.

The plaintiff sued on a bond in which real property was hypothecated. In his claim the property hypothecated was detailed, and the property itself was impleaded as a defendant, and he obtained, a decree in the following terms: "Decree for plaintiff in favour of his claim and costs against defendant." *Held* that the decree was to be regarded as simply for money and not for enforcement of lien.

[F., 2 A. 345; 3 A. 388 (392) (F.B.) = A.W.N. (1881), 43; D., 11 B. 177 (179.)]

THIS was a suit by the plaintiff for possession of one biswa zemindari share in mauza Kaili, in pargana Badaun, by setting aside [343] the auction-sale of the same in favour of the defendants. His claim was based on the following ground: That he had purchased the property in suit, and that after his purchase Ganga Ram, one of the defendants, caused the same to be sold by auction in execution of his decree against one Azim-ud-din, at which sale the other defendants, Ahmad Husain and others, purchased the same; that the decree in favour of Ganga Ram was a mere money-decree, and therefore the property was not liable to be sold in execution thereof, as previous to the sale it had passed to the plaintiff. The defendants, auction-purchasers, contended that the bond on which Ganga Ram obtained his decree was prior to the sale under which plaintiff claimed the property, and that in it the aforesaid zemindari share was hypothecated as security for the debt due on the bond; that, in his claim on the bond, Ganga Ram had detailed the property, and the property itself had been impleaded as defendant, and that the decree which was in the words following, "Decree for plaintiff in favour of his claim and costs against defendant," was both for the money and enforcement of lien.

The Munsif, holding that as in the claim both the property and the person of the defendant were impleaded as defendants, and that as the decree passed was in his favour and against the defendants, the decree was therefore one for the enforcement of the lien and not a mere money-decree, dismissed the plaintiff's claim. On appeal, the Subordinate Judge, agreeing with the Munsif in his construction of the decree, dismissed the appeal. The plaintiff, thereupon, appealed to the High Court, contending that the decree did not give the plaintiff in that case the relief he sought, *viz.*, the enforcement of his lien against the property.

Munshi *Sukh Ram*, for the appellant.

Pandit *Ajudhia Nath*, Mir *Zahur Husain*, and Maulvi *Obeidul Rahman*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

STRAIGHT, J.—The simple point in this case is whether the decree obtained by the defendant Ganga Ram against his judgment-debtor is to

*Second Appeal, No. 115 of 1879, from a decree of Maulvi Zain-ul-ab-din, Subordinate Judge of Shahjahanpur, dated the 14th November 1878 affirming a decree of Rai Raghu Nath Sahai, Munsif of Eastern Badaun, dated the 5th August 1878.

1879 JULY 8. — APPELLATE CIVIL. — 2 A. 342.

be regarded as one for enforcement of lien or simply for money. It is true that, in the claim itself, the hypothecated property is detailed and the property itself is impleaded as a [344] defendant, but the decree is quite silent about it and thus disposes of the suit: "Decree for plaintiff in favour of his claim, and costs against defendant." It was urged for the respondents, auction-purchasers, that a liberal construction should be placed upon the terms of the decree, and that it may reasonably be read as carrying relief against the property hypothecated. We think this argument should not be allowed to influence us and is inapplicable, where the Legislature has in the most specific terms directed how a decree should be shaped and what details it should contain.

(i)—The number of the suit.

(ii)—Names and description of parties.

(iii)—Particulars of the claim.

(iv)—*Shall specify clearly the relief granted or the determination of the suit.*

(v)—The amount of costs incurred in the suit, and by what parties and in what proportion they are to be paid.

It is admitted by the respondents that the decree in this case is vague and defective: but they urge that read by the light of the claim, its intention is obvious, and that it may fairly be interpreted as being one for the enforcement of lien. There are certain broad rules by which construction of Acts is guided, that are perfectly well known and recognised, but it does not appear to us that they could be applied here, nor do we think that we have any right to treat this as a question of construction at all. The s. 206 of Act X of 1877 has, in the details already set out, laid down in the most explicit way, what the contents of a decree are to be: "Shall specify clearly the relief granted," and if there be an omission in the decree so that the relief given by it does not in terms go to the extent asked, we do not think it is part of the duty of this Court, or, indeed, of any other, to import words for the purpose of stretching its operation. The Court making the decree must be presumed to have expressed the relief it was prepared to give, and the words "Decree for plaintiff in favour of his claim and costs against defendant" have, in our judgment, nothing about them specifning clearly, as required by the Act, any relief in the shape of enforcement of lien against property [345] hypothecated. The argument for elasticity in construction of the terms of a decree urged by the respondent would, if admitted, be productive of the greatest confusion and inconvenience, and involve a continued conflict of decisions. We must take the decrees as we find them, and not embark into speculation as to what was the intention of the Court passing the decree. Under these circumstances we decree the appeal and plaintiff's claim with costs.

Appeal allowed.

1879 JULY 8.

APPEL-LATE CIVIL.

2 A. 345.

2 A. 345.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

HARSUKH (*Defendant*) v. MEGHRAJ (*Plaintiff*).* [8th July, 1879.]

Decree—What is to contain—Act VIII of 1859 (*Civil Procedure Code*), *s.* 189—*Act X of* 1877 (*Civil Procedure Code*), *s.* 206.

Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought" without any specification in it as to the relief he sought by charging the property hypothecated, *held* that such a decree was a decree for money only, and did not enforce the charge on the property.

Muluk Fuqueer Bakhsh v. *Manohur Das* (1) followed.

[F., 3 A. 388 (392) (F.B.)=A.W.N. (1881) 43.]

THIS was an appeal from the decision of the Judge of Meerut reversing the decree of the Subordinate Judge of the District. The facts of the case and the grounds of contention before the High Court appear sufficiently from the following judgments of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Babu *Oprokash Chandar Mukarji*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

SPANKIE, J.—In this case the facts were admitted. The only question for decision is, whether the original decree obtained by appellant charged the property in suit for the satisfaction of the amount decreed.

The Subordinate Judge held that the property was so charged. The suit was one to enforce a lien. The judgment declared the [346] lien good and valid. The claim was decreed as brought. The Subordinate Judge allows that the decree was not properly prepared, but there can be no question as to what was granted by the decree. It was not a part but the whole of the claim which was decreed, and this included the enforcement of the lien against the property. The Subordinate Judge did not consider the precedent *Muluk Fuqueer Bakhsh* v. *Lala Manohur Das* (1), which was brought to his notice, to be applicable to the case. In appeal the Judge held that the words "decreed virtually" do not amount to a specific decree that the plaintiff may recover the amount of his claim by the sale of the property hypothecated. He therefore decreed the appeal and reversed the decision of the Subordinate Judge.

The defendant, appellant, relies upon the decision of the first Court.

The wording of the sections bearing upon decrees is the same both in Act VIII of 1859, and Act X of 1877, as regards the points which relate to the case before us. The particulars of the claim are stated in the body of the decree, the subject of dispute, but "the relief granted" is not specified clearly. The claim is "decreed virtually" is not a clear specification of the relief granted. In this respect I have no hesitation in agreeing with

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* Second Appeal. No. 146 of 1879, from a decree of R. M. King, Esq., Officiating Judge of Meerut, dated the 12th November 1878, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 11th July 1878.

(1) H.C.R, N.-W P. 1870, p. 29.

1879 JULY 8. — APPELLATE CIVIL. — 2 A. 345.

the Judge. The Subordinate Judge does not consider that the case cited (1) is applicable to the present case. But in the case the plaintiff in a former suit had not confined himself to asking for relief in the shape of of what is called a mere money-decree, he sought also to enforce his charge against the land. The decree which was passed *ex parte*, after reciting the substance of his plaint, was clearly confined to giving him a decree for the money against the person. The Court (Morgan, C.J., and Ross, J.) held that they were bound to give effect to the decree according to the plain meaning of the language used, and this clearly gave relief merely against the person for the debt. The Court added: "If the plaintiff, from negligence or other cause, omitted to prefer the portion of his claim which sought to charge the land, or, having preferred it, was content to accept an imperfect adjudication, or one which awarded him only a part of the relief claimed, he cannot now bring forward **[347]** in a fresh suit matter which might well have been disposed of. The decree made was not questioned either in appeal or by review."

The principle upon which the ruling proceeds appears to be very applicable to this case, and to the decree in which the particulars of the claim are stated, and the suit was one in which the plaintiff certainly desired to enforce his lien against the hypothecated property, but the decree is silent in respect to this particular relief. It states that the claim is virtually decreed against the defendant. There is no addition of the words by sale of the property hypothecated in the bond. The decree therefore was imperfect and did not give the relief asked for, and the plaintiff should have got it amended, or have applied for a review, or should have appealed against the decree in order to have it brought into agreement with the judgment.

A majority of the Court in Regular Appeal, No. 75 of 1873, decided by the Full Bench on the 30th June 1876 (2), held upon a reference to the Court at large that, in a case decided in accordance with a confession of judgment, in which the following words appear, "The whole of the property as entered in the deed will remain hypothecated and mortgaged till payment of the entire demand," but in which the operative part of the decree was one "for the amount claimed with costs and interest against the defendants, who have promised to pay the amount within two years, on their confession of judgment admitted by the plaintiff," the decree was merely a money-decree. One of the learned Judges who formed the majority observed: "It seems to me impossible to hold that it is more than a mere money-decree: the relief granted is money only, nor is it provided that the money may be realised by the sale of any particular property, by reason of its hypothecation for the purpose. No doubt it appears that the decree was passed in accordance with a confession of judgment, and does not include all the purport thereof. There is reason to believe that it was imperfectly drawn out, and that its imperfection is detrimental to the decree-holder. It was competent to him to have applied for its correction, but it is not competent to us to rule that it is other than a mere money-decree, in the terms in which it has been drawn."

[348] We are, I think, bound to follow the opinion of the majority of the Full Bench in 1876 (3). A judgment, however, of a Division Bench of this Court in *Azim-ul-lah Khan* v. *Kishen Lal* (4) was shown to us in which

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(1) H.C.R. N.-W.P 1870, p. 29. (2) Unreported.
(3) R. A. No. 75 of 1873, decided on the 30th June 1876—unreported.
(4) S. A. No. 155 of 1877, decided on the 19th December 1878—unreported.

1879 JULY 8. APPELLATE CIVIL. 2 A. 345.

the learned Judges took a different view, and one of them seems to have changed his opinion. In that case, according to the memorandum of appeal, the decree in words was to the effect that "the claim be decreed with costs and interest," and the Subordinate Judge held that in the decree there was no order respecting the enforcement of the lien, nor is there an order that the money would be realised by an auction-sale of the property. There was no order in the decree referring even in the most distant manner to the hypothecated property. The Subordinate Judge admitted that this might have been carelessness in preparing the decree, but considered that the decree-holder should have had it amended. In appeal the learned Judges held that the first Court "had rightly construed the decree to be not merely a money-decree, but a decree also for the enforcement of the lien, and the claim was for the recovery of the bond-debt, by the enforcement of the lien."

This decision is quite opposed to the opinion of the majority of the Court in 1876 (1) and it may have been that the Subordinate Judge misapprehended what the decree did recite. The Munsif, however, admitted in his judgment that the word "*kifalat*" (pledge) had been omitted in the decretal order owing to an error on the part of the decree-clerk. The former decisions refer to the time when Act VIII of 1859, was in force, but under the current Act X of 1877, the wording of s. 206 is still more stringent; now it says that the "decree must agree with the judgment," words not found in the corresponding section of Act VIII of 1859, and the section further provides means for the amendment of a decree, if it is found to be at variance with the judgment, so as to bring it into conformity with the judgment. Appeals also are admissible under the new Act not only from decisions but from any part of them, so that every facility is offered for the correction of decrees. This being so, I think that we should not in any way show tenderness to any indifference on the part of a decree-holder, who consents to take a decree loosely drawn out, or which grants him incomplete relief, and in doing so is [349] not in accordance with the judgment. It is not for us to construe the relief granted by the decree, by reference to the particulars of the claim. These are required to be set forth in the decree, but it is also obligatory to set out clearly the relief granted or other determination of the suit. The decree which gave rise to the present suit does not fulfil these conditions, and as it is expressed, it is in my opinion nothing more than a money-decree against the defendant. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—I entirely agree in the views of Mr. Justice Spankie, which are in accordance with the opinion I entertained in a case of a similar kind (2), involving like considerations, before Mr. Justice Oldfield and myself.

Appeal dismissed.

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(1) R. A. No. 75 of 1873, decided on the 30th June 1876—unreported.
(2) *Thamman Singh* v. *Ganga Ram*, 2 A. 342.

1879 AUG. 4.

APPELLATE CRIMINAL.

2 A. 349.

2 A. 349.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* BANNI. [4th August, 1879.]

Exposure of child—Culpable homicide—Act XLV of 1860 (*Indian Penal Code*), ss. 304, 317.

Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, *held* that she could not be convicted and punished under s. 304 and also under s. 317 of the Indian Penal Code, but under s. 304 only.

ONE Banni exposed her infant child, which was in her sole care, in a certain place, with the intention of wholly abandoning it, and knowing that her act was likely to cause its death. The child died in consequence of the exposure. Banni was convicted by Mr. W. Tyrrell, Sessions Judge of Bareilly, on the 18th June 1879, of an offence punishable under s. 317 of the Indian Penal Code, and also of an offence punishable under s. 304 of that Code, and was sentenced for the first-mentioned offence to rigorous imprisonment for two years, and for the last mentioned offence to rigorous [350] imprisonment for the same period, such last sentence to take effect on the expiry of the sentence under s. 317. She appealed to the High Court.

The appellant was not represented.

JUDGMENT.

STRAIGHT, J.—In disposing of this appeal, it is necessary I should correct a mistake of procedure into which, according to my judgment, the Sessions Judge has fallen, by making two convictions of the appellant for offences against ss. 304 and 317 of the Indian Penal Code, and passing sentence for each. As long as the child remained alive the charge under s. 317 of "exposure with intent to abandon" could have been properly sustained, and had Musammat Banni been tried before its death for this offence, she could rightly have been convicted, and as provided by the explanation at the end of s. 317 such conviction would have been no bar in the event of the child's death to a prosecution for culpable homicide. To give an analogous case, *A* commits an assault upon *B* and undergoes his trial for an assault before *B*'s death, which ultimately takes place in consequence of the injuries inflicted by *A*. *A's* conviction for the assault is no bar to an indictment for manslaughter. But if before *A's* trial *B* dies, then *A* must be tried for manslaughter, the lesser crime having merged into the greater, and the offence committed relating to one and the same transaction. In the present case when the child died the offence of Musammat Banni, under s. 317, became absorbed in the more serious charge of culpable homicide, and the unlawful act of exposure having directly caused the death, and being done with the knowledge it was likely to cause death, brought the accused within the operation of s. 304. It seems to me that the maxim "*nemo debet bis puniri pro uno delicto*" applies, and that in this case two separate sentences can no more be passed than they could for murder and wounding with intent to murder, where the death of the party attacked had taken place, and the death and the wounding involved one and the same transaction. The criminal exposure under s. 317 was the direct cause of the death of the child, and therefore

the crime, instead of stopping at s. 317, death being caused, took the more serious shape under s. 304. It was, of course, perfectly proper to frame a charge upon s. 317, because had any question arisen about the cause of death being the [351] exposure, the transaction would have resumed its character under s. 317. For the preceding reasons I therefore think it safer to quash the conviction and sentence upon s. 317, but agreeing as I do in the view taken as to the proper punishment for the conduct of the accused by the experienced Sessions Judge, I order that so far as the appeal against the conviction on s. 304 is concerned it be dismissed, and that the sentence in respect of the conviction on that section be increased to one of four years' rigorous imprisonment.

1879 AUG. 4.

APPELLATE CRIMINAL.

2 A. 349.

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2 A. 351.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. RAGHUBAR AND OTHERS. [9th August, 1879.]

Act X of 1872 (*Criminal Procedure Code*), *s.* 489—*Security for keeping the peace—Act XLV of* 1860 (*Penal Code*), *ss.* 503, 506—*Criminal intimidation.*

The words in s. 489 of the Criminal Procedure Code, "taking other unlawful measures with the evident intention of committing a breach of the peace," do not include the offence of intimidation by threatening to bring false charges.

Where, therefore, a person was convicted under ss. 503 and 506 of the Indian Penal Code of such offence, *held* that the Magistrate by whom such person was convicted could not, under s. 489 of the Criminal Procedure Code, require him to give a personal recognizance for keeping the peace.

THIS was a case referred to the High Court for orders under s. 296 of Act X of 1872 by Mr. R. G. Currie, Sessions Judge of Gorakhpur.

JUDGMENT.

STRAIGHT, J.—The point here is whether upon a conviction under ss. 503 and 506 of the Penal Code, the accused person can be called upon, under s. 489 of the Criminal Procedure Code, to find recognizances with or without sureties to keep the peace. The defendants in the present case were convicted by the Magistrate of intimidating the complainant by threatening to bring false charges against him, and the question seems to be whether the words "taking other unlawful measures with the evident intention of committing a breach of the peace" can be said to include an offence of this kind. I do not think that the operation of s. 489 is limited to riot, assault, actual breach of the peace, or abetting the same, or unlawful assembly, but that it is intended to comprehend a wider range of offences, and it must be for the Magistrate or Court to decide in each case whether, from the nature of the charge upon [352] which conviction takes place, there has been direct force or violence to the person, or conduct inducing an apprehension of force or violence, or a direct threat of force or violence, or a provocation to the commission of force or violence. Intimidation, for example, as in the present case, may have none of these elements about it. The threats used here are "to make charges,' against the complainant, and involve no suggestion of personal physical injury, but one can readily understand the possibility of a case of intimidation arising in which there might be the strongest indication of an evident intention to commit a breach of the peace. As far as I have been able to ascertain

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there are only three cases bearing upon the point, two of these decided by the Calcutta High Court (1) upholding the taking of recognizances, on conviction for criminal trespass, and a decision of the Full Bench of this Court in the matter of *Chamru*, decided 8th December 1876 (2). These bear out the view I have expressed, and though I think in the present instance that the Magistrate was wrong in requiring recognizances, because there is nothing about the conduct of the accused threatening the peace, the mistake he has fallen into, is perfectly excusable. The recognizances of the defendants must, therefore, be discharged.

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2 A. 352=4 Ind. Jur. 468.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

GOPAL SING (*Auction-purchaser*) *v.* DULAR KUAR (*Judgment-debtor*).*
[11th August, 1879.]

Execution of Decree—Application to set aside sale of immoveable property—Auction-purchaser—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 32, 311, 312, 588 (*m*), 647.

Where after a judgment-debtor has applied, under s. 311 of Act X of 1877, to have a sale set aside, the auction-purchaser is made a party to the proceedings, and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale. *Kanthi Ram* v. *Bankey Lal* (3), followed.

[Overruled, 13 C.L.J. 535=15 C.W.N. 685=10 Ind. Cas. 148.]

THE judgment-debtor in this case applied to the Court executing the decree under the provisions of s. 319 of Act X of 1877 to **[353]** set aside the sale of certain immoveable property. This application was opposed by the auction-purchaser. The Court allowed the application and set aside the sale, on the ground of a material irregularity in its publication which had substantially injured the judgment-debtor.

The auction-purchaser appealed to the High Court, contending that there had been no irregularity in publishing the sale, or if there had been any it was not a material one, nor had the judgment-debtor been injured by reason of it, and the sale should therefore not have been set aside.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Mr. *Leach* and Pandit *Bishambar Nath*, for the respondent.

The following judgments were delivered by the Court:

JUDGMENTS.

SPANKIE, J.—There was some preliminary argument, though the objection cannot be said to have been distinctly raised by respondent's pleader, as to whether the auction-purchaser was in a position to appeal. By s. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the

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* First Appeal, No. 47 of 1879, from an order of Babu Aubinash Chandar Banarji, Officiating Subordinate Judge of Farukhabad, dated the 12th March 1879.

(1) 7 W.R. Cr. 14, and 20 W.R. Cr. 37.

(2) Unreported. See two other cases, *Queen* v. *Bachu*, H.C.R., N.W.P., (1875), p. 328, and *Queen* v. *Kunhiya*, H.C.R.N.W.P., (1872), p. 154.

(3) Unreported (see 2 A. 396).

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APPELLATE CIVIL.

2 A. 352 = 4 Ind. Jur. 468.

sale on the ground of a material irregularity in publishing or conducting the sale. In this case the judgment-debtor objected, and notice was served upon the decree-holder and the auction-purchaser. Upon the judgment-debtor's objection the sale was set aside. An appeal against the order setting aside the sale is admissible under letter (*m*), s. 588 of the Civil Procedure Code. The auction-purchaser appeals. It is true that the auction-purchaser as such cannot apply under s. 311 to set aside a sale on the ground of irregularity. That application is confined to the decree-holder and the person whose immoveable property has been sold. But if the auction-purchaser has been made a party to the proceedings under ss. 32 and 647 of the Code, and if he has appeared on service of notice and has shown cause why the sale should not be set aside, then if the order be against him, I see no bar to his availing himself of the appeal allowed by law. I would say that the appeal is admissible, and in this view I follow a ruling to which I was a party in the case of *Kanthi Ram* v. *Bankey Lal* (1) decided on the 11th June 1879. If, however, [354] my hon'ble colleague has a doubt upon this point, I am willing that it should be referred for the consideration of the Court at large. On the merits this appeal should be decreed. (The learned Judge then proceeded to determine the appeal.)

STRAIGHT, J.—I am glad to have had an opportunity of carefully looking at the several sections of Act X of 1877 relating to the setting aside of sales in execution of decree, and to the title of the parties who may be heard upon the applications of that kind. In the present case the appellant is to be found in the person of the auction purchaser, and although in ss. 311 and 312 he is not specifically referred to as one of the persons who may go to the Court for relief, yet in the proceedings in the execution department he was made a defendant under s. 32, I presume upon the ground that his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved, so that he became to all intents and purposes a party to the proceedings, and as such I think entitled to all the rights that there were in the litigation either in the judgment-debtor or the decree-holder. Consequently, as they would both of them have a right of appeal against an order setting aside or confirming a sale under s. 588, I think that the auction-purchaser, having been made a party to the proceedings, may as in the present case lodge an appeal. Therefore agreeing with the views of Mr. Justice Spankie in this matter, and with those expressed by him and Mr. Justice Oldfield in a case decided by them on the 11th June 1879 of *Kanthi Ram* v. *Bankey Lal* (1), I see no reason for referring the point as to the right of appeal of an auction-purchaser to the Full Bench. (The learned Judge then proceeded to determine the appeal.)

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(1) Unreported (2 A. 396).

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APPELLATE CIVIL.

2 A. 354.

2 A. 354.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

BHAWANI KUAR AND ANOTHER (*Plaintiffs*) *v.* RIKHI RAM AND ANOTHER (*Defendants*).* [12th August, 1879.]

Suit for damages—Suit for money received to plaintiff's use—Act XV of 1877 (*Limitation Act*), *sch. ii, art.* 62.

The holder of a decree for money which had been sold in the execution of a decree against him sued the auction-purchaser, the sale having been set aside, [355] for the money he had recovered under the decree. *Held* that the suit was not one for damages but for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable was three years.

THE plaintiffs in this suit had obtained a decree for money against one Madho Singh and certain other persons on the 23rd August 1875. One Gulab and a certain other person caused this decree to be sold in the execution of a decree held by them against the plaintiffs, on the 11th April 1876, when the defendants in this suit purchased it. On the 7th June 1876 the defendants recovered Rs. 1,796 10-0 under the decree. On the 22nd August 1877 the sale of the decree was set aside by the appellate Court. The plaintiffs now sued the defendants for the sum recovered by them under the decree together with interest thereon, the suit being instituted on the 23rd August 1878. The defendants set up as a defence to the suit that it was barred by limitation. The Court of first instance disallowed this defence. On appeal by the defendants the lower appellate Court held, having regard to the case of *Debi Das* v. *Nur Ahmad* (1), that the suit was one for damages, to which the period of limitation applicable was one year, and such period running from the date the defendants received the money claimed, the suit was barred by limitation.

The plaintiffs appealed to the High Court.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the appellants.

Mr. *Conlan* and Babu *Jogindro Nath Chaudhri* for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—We are of opinion that the decision of the Judge is erroneous. The suit is not one for damages, but, under the circumstances, rather one for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. The later decisions of this Court, and notably the one marginally noted (2), take this view of the law. The limitation would be three years. We reverse the decision of the lower appellate Court, and remand the appeal for retrial on the merits; costs will abide the result.

Cause remanded.

* Second Appeal, No. 414 of 1879, from a decree of C.W. Moore, Esq., Officiating Judge of Aligarh, dated the 14th March 1879, reversing a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 21st September 1878.

(1) H. C. R., N.W.P., (1875). p. 174.

(2) *Ram Kishen* v. *Bhawani Das*, 1 A. 333.

2 A. 356 (F.B.).

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FULL BENCH.

2 A. 356 (F.B.).

[356] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

DARBO (*Plaintiff*) v. KESHO RAI (*Defendant*).* [12th August, 1879.]

Act VIII of 1859 (*Civil Procedure Code*), s. 7.

D, being able to sue for the possession of certain property, omitted to do so, and sued in the first instance only for a declaration of her right to such property. The Court refusing to make any such declaration on the ground that she could sue for possession, *D* then sued for possession. *Held* that the second suit was not barred by s. 7 of Act VIII of 1859 (1).

[F., 5 A. 345 (353) (F.B.); 34 A. 172=9 A.L.J. 111=13 Ind. Cas. 154; R., 14 B. 31 (50); 8 Ind. Cas. 9 (15)]

THE plaintiff in this suit had, on her husband's death, sued one Kesho Rai for a declaration of her title to succeed as her husband's heir to certain property, and for a declaration that the defendant was not the adopted son of her deceased husband. The Court of first instance dismissed this suit on the ground that the plaintiff was not in possession of a large portion of the property, and should therefore have sued for possession. On appeal by the plaintiff the High Court, on the 23rd July 1874, held that the plaintiff was entitled, for the protection of the property in her possession, to a decree that the defendant was not the adopted son of her deceased husband, and in respect of the property of which she was not in possession referred her to a suit for possession. The plaintiff subsequently brought the present suit against Kesho Rai for the possession of this latter property. The Court of first instance held that the claim was barred under the provisions of s. 7 of Act VIII of 1859.

The plaintiff appealed to the High Court contending that the claim was not barred under the provisions of s. 7 of Act VIII of 1859.

The Court (STUART, C.J., and OLDFIELD, J.) referred to the Full Bench the question whether the suit was or was not so barred.

Mr. *Chatterji*, Pandit *Ajudhia Nath*, and Babu *Oprokash Chandar Mukarji*, for the appellant.

[357] Mr. *Conlan*, Pandit *Bishambhar Nath*, and Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The judgment of the Full Bench, so far as it related to this question, was as follows:

In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is clearly not barred; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession.

* Regular Appeal, No. 96 of 1875, from a decree of Rae Shankar Das, Subordinate Judge of Saharanpur, dated the 5th August 1875.

(1) See also *Tulsi Ram* v. *Ganga Ram*, 1 A. 252.

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APPEL-
LATE
CIVIL.

2 A. 357 =
4 Ind. Jur.
469.

2 A. 357 = 4 Ind. Jur. 469.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

ABDUL SAMAD AND ANOTHER (*Plaintiffs*) *v.* RAJINDRO KISHOR SINGH (*Defendant*).* [15th August, 1879.]

Return of Plaint—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 57 (*c*) *and.* 588 (*c*)—*Act XII of* 1879, *s.* 2.

Although s. 57 of Act X of 1877 contemplates the return of the plaint, should error be patent, when it is first presented, yet there is nothing in the wording of that section which forbids the return of the plaint at a later stage in the suit.

Where, therefore, after the issues in a suit were framed, the Court decided that it had no jurisdiction and returned the plaint to be presented in the proper Court, *held* that in so doing the Court acted under s. 57 of Act X of 1877, and its decision, not coming within the definition of a "decree" in s. 2 of Act XII of 1879, was not appealable as such, but was appealable under s. 588 of Act X of 1877 as an order.

[R., 8 B. 313 (322) (F.B.).]

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The Court of first instance held on an issue which it added of itself at the hearing of the case, after the issues had been framed by a former Subordinate Judge, that it was not competent to try the suit, inasmuch as the cause of action did not arise, neither did the defendant reside within the local limits of its jurisdiction. The decision of the Court ended in these terms: "The plaintiffs' suit is therefore dismissed: the plaint is to be returned to the plaintiffs."

[358] The plaintiffs appealed to the High Court "from the order" of the Court of first instance. It was objected on behalf of the respondent that, as the suit had been dismissed, the appeal should have been preferred as an appeal from a decree.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellants.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the respondent.

JUDGMENT.

The judgment of the High Court, so far as it related to the above contention, was as follows:

SPANKIE, J.—A preliminary objection was taken that the Subordinate Judge had dismissed the suit, and that there should have been an appeal as from a decree in an original suit, whereas the present appeal had been entered as a first appeal from an order. The Subordinate Judge has certainly made use of the word "dismiss," but it is clear from his direction that the plaint was to be given back, that he stopped and intended to stop from further hearing of the suit, when he discovered that he had no jurisdiction. He, therefore, when he returned the plaint to be presented in the proper Court, was acting under s. 57, cl. (*c*), Act X of 1877. It may be that the section contemplates a return of the plaint, should error be patent, when it is first presented, but there is nothing in the wording of the section which forbids the return of the plaint at a later stage in the case, and it has been so held in former cases. An order returning a plaint

* First Appeal, No. 91 of 1879, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 27th June 1879.

under s. 57 of the Act is appealable under s. 588 of the Code, and it does not come within the definition of the decree in the amended Act, which appears to have come into force on the 29th July last. We see no reason to doubt that the appeal has been properly instituted as a first appeal from an order.

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2 A. 358.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

KIRATH CHAND AND OTHERS (*Defendants*) v. GANESH PRASAD (*Plaintiff*).* [21st August, 1879.]

Suit for "haqq-i-chaharam" based on custom—Act XV of 1877 (*Limitation Act*), *sch. ii, arts.* 62, 120, 132.

C, the proprietor of a certain "mohalla," sued *K*, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one-fourth of the purchase-money, founding his claim upon an ancient [359] custom obtaining in the mohalla, under which the proprietor thereof received one-fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held*, that the period of limitation applicable to such a suit was that prescribed by art. 120, sch. ii of Act XV of 1877, and not by art. 62 or by art. 132 of that schedule.

[Appr., 18 A. 430 (432) = A.W.N. (1896) 140.]

THE plaintiff in this suit, which was instituted on the 28th October 1878, and was one of three suits of a similar nature, stated in his plaint that he was the proprietor of a certain "mohalla" in the city of Gorakhpur; that an ancient custom obtained in the said mohalla under which when a house situated therein was sold whether privately or in the execution of a decree, the proprietor of the mohalla received one-fourth of the purchase-money; that on the 10th July 1875, a certain house situated in the said mohalla was put up for sale in the execution of a decree held by the defendants, and was purchased by the defendants themselves for Rs. 150; that on the same day the defendants, as decree-holders, acknowledged the receipt in full of the purchase-money, thereby appropriating the one-fourth thereof to which the plaintiff was entitled as the proprietor of the said mohalla. The plaintiff claimed to recover from the defendants Rs. 37-8-0 being one-fourth of Rs. 150 together with interest, stating that his cause of action arose on the 10th July, 1875. The Court of first instance gave the plaintiff a decree. On appeal by the defendants the lower appellate Court held, with reference to the question of limitation raised by the defendants, that the suit was within time, being governed by art. 120, sch. ii of Act XV of 1877. The defendants appealed to the High Court.

The Senior Government Pleader (Lala *Juala Prasad*), and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellants.

Pandit *Bishambhar Nath*, Munshi *Sukh Ram*, and Maulvi *Mehdi Hasan*, for the respondent.

JUDGMENTS.

The judgments of the Court, so far as they related to the question of limitation, were as follows:

SPANKIE, J.—The Judge remarks that the cause of action in respect

* Second Appeal, No. 195 of 1879, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 22nd November 1878, affirming a decree of Maulvi Ahmad-ullah, Munsif of Gorakhpur, dated the 21st September 1878.

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APPELLATE CIVIL.

2 A. 358.

of two of the houses arose in 1873, and of one in 1875. But he holds, on the authority of a decision of this Court (1), that the period of limitation is governed by art. 120, sch. ii of Act XV of 1877. Art. 120 provides a limitation of six years in suit for which [360] no period of limitation is to be found in sch. ii of the Act. It is contended by Babu Dwarka Nath Banerjee, the Junior Government Pleader, on behalf of appellants, that art. 62, sch. ii of the Act, applies. He urges that the claim must be viewed as one for money payable by the defendant to the plaintiff for money received by defendant for the plaintiff's use. On the other hand, Pandit Bishambhar Nath, for the respondent, contends that art. 132 is strictly in point, and that the plaintiff has a charge on the property for the amount claimed; and he refers to the explanation below that article that the allowance and fees respectively called "*malikana*" and "*haqqs*" shall, for the purpose of the clause, be deemed to be money charged upon immoveable property, in support of his contention. If the appellants. pleader be right, the limitation would be three years from the date of the receipt of the money by defendants, whereas if the pleader for the respondent has applied the proper article, the limitation would be twelve years from the date when the money sued for became due.

I am not prepared to accept as correct the contention of either of the learned pleaders. If we apply art. 62, then this claim would take the English form of an action for breach of contract, and if this be so, as between the proprietor of the mohalla and the vendor and the vendee, the component parts of a contract appear to be wanting, both as regards consideration and promise to pay money to the proprietor of the mohalla, express or implied. If this were a suit for money had and received, the sum claimed being under Rs. 500, the claim was one for a Small Cause Court. But this Court in Full Bench has decided (2) that suits of this nature are not cognizable by a Court of Small Causes. The Court observed that such a claim as one for "*haqq-i-chaharam*" "is for a zamindari due customarily payable, it is not a claim for money due on contract, nor for personal property or the value thereof, nor for damages," and the Court adds that they must not be understood to impugn the ruling that where "*chaharam*" is payable in virtue of a contract, the claim would be triable by a Court of Small Causes. The claim in the present instance is one expressly founded on ancient custom, and it cannot be maintained that the record of this ancient custom in the administration-paper is a contract, express or implied, as between the owner of the mohalla [361] and the mohalladar. The record of the custom is some evidence of its existence, and doubtless it was entered in the administration papers of 1833, and 1867, because the settlement officer was bound to prepare a complete record of the mahal, and to include in it all village-customs, and extra cesses and collections. As the claims in these suits are based upon ancient usage and not upon contract, the Full Bench ruling clearly applies, and this being so, one cannot say that art. 62, sch. ii of the Limitation Act governs them, still less does art. 132 apply to these cases. The "*haqqs*" referred to in the explanation and described as fees are fixed charges upon immoveable property, of which payment could be enforced by the sale of the property so charged. It is not contended here that a zamindar could recover his one-fourth share of the sale-proceeds of a

(1) S. A. No. 1681 of 1874, decided the 23rd August 1875, unreported.
(2) 1 A. 444.

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house when sold by a suit to bring the house to sale by enforcement of any lien upon it. I need not, however, dwell at length upon the question of limitation, inasmuch as I am quite ready to accept the ruling of a Division Bench of this Court on the point in *Sheo Dehal* v. *Thakur Mathura Prasad* (1). The learned Judges in that case applied art. 118, sch. ii of Act IX of 1871, to a case of this nature, holding that there was no limitation expressly provided for such suits. I would therefore say that art. 120, sch. ii of Act XV of 1877, which represents art. 118 of the former Act, governs the limitation in these suits, and if so, all these are within time, as the limitation is six years from the time when the right to sue accrues.

STRAIGHT, J.—I concur in Mr. Justice Spankie's judgment. I was in some doubt at one time upon the question of limitation, and was disposed to think the case within art. 62, though I never had any doubt that art. 132 was inapplicable. But, upon further consideration of the matter and the decision of this Court already referred to, I think art. 120 properly applies.

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2 A. 361.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

DURGA PRASAD (*Defendant*) *v.* ASA RAM (*Plaintiff*).*
[25th August, 1879.]

Constructive Trust—Limitation.

B and *D*, father and son, were jointly entitled to the moiety of certain property, *B*'s brother, *E*, and *K*, *E*'s son, being jointly entitled to the other [362] moiety. *B* and *D* were transported for life. Thirty years afterwards (*B* having meantime died) *D* returned from transportation, and asserted his right to a moiety against a person deriving his title from *E* and *K*, who had taken possession of the whole. *Held*, looking to all the circumstances of the case, that *E* and *K* had taken possession subject to a constructive trust in favour of *B* and *D*, and that accordingly *D* was entitled to assert his right, and no limitation could affect it.

[Obs., 5 A. 608 (613); D., 3 A. 458 (465).]

ONE Bhawani Prasad and his adopted son, Kannu Lal, were jointly entitled by inheritance from one Lachi Ram, deceased, to a moiety of a certain building used as a shop. Bhawani Prasad's brother, Balkishen, and Balkishen's son, Durga Prasad, were in like manner jointly entitled to the remaining moiety. In the year 1840 Balkishen and Durga Prasad were transported for life, their wives being alive at the time. On the death of Durga Prasad's wife, Balkishen's wife having already died, Kannu Lal mortgaged the entire shop to one Asa Ram, such mortgage being dated the 30th May 1873. Asa Ram sued on his mortgage and obtained a decree for the sale of the property on the 8th November 1876. The shop was sold in the execution of this decree on the 23rd April 1879, and was purchased by Asa Ram himself. Asa Ram not being able to obtain possession of the entire shop his title to it being disputed by Durga Prasad, who had in the end of 1877 returned from transportation under a free pardon, he brought

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* Second Appeal, No. 425 of 1879, from a decree of Babu Abinash Chandar Banarji, Officiating Subordinate Judge of Farukhabad, dated the 14th February 1879, modifying a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 30th November 1878.

(1) S.A. No. 1681 of 1874, decided the 23rd August 1875, unreported.

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the present suit in the year 1878 to establish his title and for possession of the entire shop. Durga Prasad alleged in his written statement that he and his father had, on being sentenced to transportation for life, transferred their moiety of the shop to Bhawani Prasad, in trust to pay the income thereof to their respective wives or the survivor of them, and that Bhawani Prasad or his son Kannu Lal had so paid such income up to the date of his (Durga Prasad's) wife's death, which occurred some nine or ten years before the suit. The plaintiff in his written statement admitted the defendant's original right to the moiety in dispute, but contended that such right was extinguished, as since the defendant's transportation Bhawani Prasad and after him Kannu Lal had held the moiety adversely to the defendant. The Court of first instance held that Bhawani and after him Kannu Lal had acquired the property in dispute as trustees, and that they had so held it, paying Durga Prasad's wife the income up to her death, and that as twelve years had not elapsed from the death of his wife, the defendant's right was not extinguished. On appeal by the plaintiff the lower appellate Court, finding that no express trust had been created, that [363] the defendant's wife had not received the income of the property, and that she had died in 1860 or 1861, held that the defendant's right was extinguished.

The defendant appealed to the High Court, contending that the property had been held by Bhawani Prasad and Kannu Lal in constructive trust for him, and his right was therefore not extinguished.

Mr. *Amir-ud-din*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Harkishen Das*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

OLDFIELD, J.—The plaintiff claims to obtain possession of the property which is the subject of this suit as having belonged to one Kannu Lal, whom he represents by purchase of his interests in execution of a decree. The particular portion to which this appeal has reference is the half of a shop called in the proceedings the western shop. This is claimed by the appellant, Durga Prasad, in his own right. It appears that he and his father Balkishen were transported for life thirty-seven years ago, and the former has returned under a pardon granted at the time of the Delhi Darbar; and he avers that when he and his father left the country, they made over the property to Bhawani Prasad and Kannu Lal, his adopted son, in trust, and they collected and gave the rents to their wives, and the wife of Durga Prasad received them till her death, nine or ten years ago. It is admitted that the property belonged to Durga Prasad and his father up to the time of transportation. The lower appellate Court has found, however, that there is no poof of any express trust being made of it to Bhawani Prasad and Kannu Lal when they left, or of the appellant's wife receiving the rents, and that she died seventeen or eighteen years ago, and that Bhawani Prasad and Kannu Lal have held the property adversely to the appellant, and have acquired a title by length of possession.

This finding cannot be sustained. If the facts be as found by the lower appellate Court that Bhawani Prasad and Kannu Lal never made over the rents to the wives of Durga Prasad or his father, and themselves took possession of the property on transportation of [364] the owners, although there may have been no actual and express trust, yet there

are circumstances which the lower appellate Court has overlooked which amount to fraudulent conduct on their part, such as would by equitable construction convert their holding into that of trustees. The parties were nearly related to each other, living in what may be assumed to be terms of close intimacy and mutual confidence, and the appropriation of the absent relations' property could only have been carried out by a shameful abuse of the friendly and confidential terms on which they had lived, and by taking advantage of the enforced absence of the owners, who had no means of asserting their right. But the Subordinate Judge has failed to notice some evidence which shows that the wives of Durga Prasad and his father were in possession until their deaths, and that Bhawani Prasad and Kannu Lal never disputed their title; nor that of the appellant, and only asserted their right when they believed appellant to have died in transportation. This appears by proceedings taken in 1867 by Bhawani Prasad, when he claimed the property, admitting that Durga Prasad's wife had succeeded Durga Prasad, and claiming to succeed her at her death, and it is clear from a perusal of the judgment in that case that the claim proceeded on an assumption that Durga Prasad was dead. Thus Bhawani Prasad and Kannu Lal appear never to have asserted or intended to assert any title adverse to Durga Prasad. The appeal must be allowed with costs in both Coutrs, and the decree of the lower appellate Court, modified by exempting the half of the western shop from the decree in plaintiff's favour.

STRAIGHT, J.—It appears to me that in this case the Court is properly called upon to exercise its powers of equitable interference to the fullest extent. The appellant, Durga Prasad, was, at the time of his conviction and sentence, some 30 years ago, admittedly entitled, jointly with his father Balkishen, to a half share of the western shop, part of the property now in suit. Both the wife and mother of Durga Prasad were then alive, and so long as they lived it is beyond dispute that they enjoyed the income derived from this half share, which, so I gather from the findings, was paid over to them, first by Bhawani and afterwards by Kannu Lal. I do not think it is in the least material to the view I hold as to the mode in which this case should be treated, whether the wife of Durga Prasad did [365] or did not die within the twelve years preceding the institution of this suit. According to my judgment the whole point is, whether from all the circumstances and the relationship between them, the Court is justified in holding that a constructive trust existed in Bhawani and Kannu Lal for and on behalf of Durga Prasad and Balkishen, from the day their imprisonment commenced. A person may declare a trust either directly or indirectly: indirectly by evincing an intention, which the Court will effectuate through the medium of an implied trust, Lewin, 6th ed., p. 95. Again, "Constructive trusts are those which the Court elicits by a construction put on certain acts of parties." Is the Court then, looking to the whole of the facts of this present case, entitled to come to the conclusion that a constructive trust is established? I am very clearly of opinion that it is, and that we are bound so to hold upon the plainest principles of equity, which in my view should be most liberally applied in a case where otherwise grave hardship and injustice would arise. By his imprisonment Durga Prasad was placed under a disability, just as much as a person "beyond the seas," or "lunatic," or "under age" and was thus deprived of the power of looking after his own interests, or asserting his rights, and during such time as it lasted it is obvious that Bhawani Prasad first and Kannu Lal, so far as his share in the property

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was concerned, occupied towards him a fiduciary position, of which the latter seems to have taken advantage in fraud of his "*cestui que trust.*" Till Durga Prasad obtained his release it would have been impossible for him to know what had happened, his wife was dead and he does not seem to have had any children to complain of the misappropriation of Kannu Lal or any means of gathering information of his misconduct. "No time will cover fraud so long as it remains concealed, for until discovery (or at all events until the fraud might with reasonable diligence have been discovered) the title to avoid the transaction does not properly arise." Lewin, 6th ed., p. 710. No limitation therefore can affect the rights of Durga Prasad, and he is entirely justified in setting them up against the plaintiff's claim to the extent of his own interest. I therefore agree in Mr. Justice Oldfield's order both as to the shape in which this appeal is to be allowed and as to his order on the question of costs.

Appeal allowed.

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2 A. 366.

[366] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

SUKHBASI LAL (*Plaintiff*) *v.* GUMAN SINGH (*Defendant*).*

[29th August, 1879.]

Hindu Law—Adoption.

Held that, when an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father.

[R., 26 A. 40 (45); 30 A. 549=5 A.L.J. 568=A.W.N. (1908) 231=4 M.L.T. 385 (390); 23 B. 327 (333); 24 B. 367 (380) (F.B.).]

THIS was a suit in which the plaintiff claimed a declaration that the defendant was not his adopted son, firstly, because he had not been adopted in the manner and according to the ceremonies required by Hindu law; secondly, because the defendant was not a fit and proper person to perform the plaintiff's obsequies, or to make offerings for the benefit of the souls of the plaintiff's ancestors, being devoid of education and religious knowledge and principles, and the associate of thieves, gamblers, and women of immoral character; and thirdly, because the defendant had failed to perform his part of an agreement, or compromise, in writing entered into by him with the plaintiff dated the 10th January 1873. In this agreement the plaintiff, amongst other things, agreed on his part to consider the defendant as his adopted son. The defendant set up as a defence to the suit that the plaintiff could not be allowed to deny the validity under Hindu law of the adoption, as in a petition presented by him to the Revenue Court on the 27th April 1860 he had declared that he had adopted the defendant, and that all the ceremonies of adoption required by the Hindu law had been performed, and that the defendant would succeed to his property on his death, and had confirmed such declaration by his subsequent conduct, and the defendant had been excluded from

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* First Appeal, No. 99 of 1878, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated 2nd May 1878.

inheriting his natural father's property; and further that an adoption made according to the Hindu law could not become or be declared invalid for any reason whatsoever. The Court of first instance held that the plaintiff could not be allowed to deny the validity of the defendant's adoption under Hindu law, in the face of the petition dated the 27th April 1860 and the agreement dated the 10th January 1873, and that the adoption could not be set aside, whatever misconduct the defendant might have been guilty of towards his father, as, under Hindu law, no adoptive father had authority to set aside the [367] adoption of a son. The Court of first instance therefore dismissed the plaintiff's suit.

The plaintiff appealed to the High Court, contending that the petition dated the 27th April, 1860, and the agreement dated the 10th January, 1873, did not estop him from denying the validity of the adoption under Hindu law, and the question of its validity should have been determined, and that a father was entitled under that law to exclude an adopted son from inheriting, and could therefore set aside an adoption.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—The plaintiff, appellant, presented a petition in the Revenue Court on the 27th April, 1860, and personally attested it. In this petition he most distinctly states that he had adopted defendant, and that all the requisite ceremonies had been performed, and that defendant would be the owner and heir of all the petitioner's property at his death. Thirteen years afterwards, the adoptive father and the adopted son being engaged in litigation, the plaintiff filed a compromise in which he says that he will consider the defendant as his adopted son. On the 14th April, 1877, he instituted this suit to invalidate the adoption as having been informal, and to annul the agreement or compromise of the 10th January, 1873.

The plaintiff, having himself affirmed the adoption as having been fully and formally made after the performance of all the ceremonies required by the Hindu law, cannot now disaffirm it and sue for a declaration that it is invalid. Indeed, when the adoption has once been absolutely made and acted on for years, it cannot be cancelled. It is certain that an adoptive child cannot renounce the family of his adopted father. He is entirely separated from his own family when his natural father disposes of him. The adoptive father in accepting an adopted son is bound by his act, which secures to the adopted son all the rights of a son born to the family. He is as much a son as if he had been begotten by his adoptive father.

[368] We are not called upon to consider the point urged in the second place, that a father can, under the principles of the Hindu law, exclude his adopted son, if such son is no longer in a position and fit to perform the religious ceremonies and rites which are the chief objects of adoption. We must adhere to the claim as it stands in the plaint

The compromise of the 10th January, 1873, was filed in a suit which was determined on the terms of the compromise. If the plaintiff has suffered any wrong in consequence of defendant's omission to carry out the terms, and a new cause of action has arisen, he has a remedy, but he

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cannot renounce an adoption made prior to the compromise and acknowledged by himself as altogether complete and formal in 1860, by pleading now that owing to the refusal of defendant to act up to the terms of the compromise in 1873, he (plaintiff) is at liberty to consider the adoption at an end. The adoption subsists and must do so until the adopted son is dead. We dismiss the appeal and affirm the judgment with costs.

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2 A. 368.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

SHEEN AND ANOTHER (*Defendants*) v. JOHNSON (*Plaintiff*).*
[29th April, 1879.]

Suit for infringement of patent—Act XV of 1859, *ss.* 19, 23, 34—*Public or actual user—Measure of damages—Particulars.*

Held, by the Court, in a suit under Act XV of 1859, for the infringement of a patent, where the plaintiff had been in the habit of licensing the use of his invention, that the loss of the amount paid for such license was the measure of damages.

Per SPANKIE, J.—The meaning of the words "publicly or actually used" in s. 23 of Act XV of 1859 discussed.

Held per SPANKIE, J.—That, where the defendant did not allege in his written statement that the invention was publicly used at certain places prior to the date of the petition for leave to file the specification, but was allowed to give evidence that the invention was so used at such places, the plaintiff was not bound before trial to have called upon the defendant to supply the particulars as to such places, and such evidence was not admissible.

The plaintiff in this suit stated in his plaint that Richard Johnson was the inventor of a new thermantidote, and had, under the provisions of Act XV of 1859, acquired the exclusive privilege of [369] making, selling, and using such invention in India for the term of fourteen years from the 18th June, 1870; that on the 1st September, 1875, Richard Johnson had granted and assigned to him the exclusive privilege of making, selling, and using such invention for such term; that the defendants had since such grant and assignment infringed such exclusive privilege by having, without his license, at divers times, between the 1st September, 1875, and the 24th April, 1878, at Allahabad, made and sold such thermantidotes as the plaintiff had acquired the exclusive privilege of making, selling, and using under the invention of Richard Johnson, and the plaintiff claimed Rs. 1,000 as compensation for the breach of such exclusive privilege. The defendants set up as a defence to the suit, with reference to s. 23 of Act XV of 1859, that the invention was not new, inasmuch as the defendant Sheen had actually used in India a thermantidote similar to the thermantidote which the plaintiff claimed as the invention of Richard Johnson before Richard Johnson had filed his petition under Act XV of 1859 for leave to file a specification of such invention, that is to say, before 1870. At the trial of the cause the defendant gave evidence to show that thermantidotes constructed on the principle and design of which plaintiff's assignor claimed the exclusive privilege had been known and used in India

* First Appeal, No. 7 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 12th December 1878.

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long before Richard Johnson had filed his petition for leave to file a specification of his invention, but particulars of the places where the same had been used were not supplied to the plaintiff, nor did the plaintiff previous to going to trial call upon the defendant to supply such particulars. The Court of first instance found that the defendant Sheen had in April or May, 1869, at Allahabad, made a thermantidote similar to the one which the plaintiff claimed to be Richard Johnson's invention, but held that such thermantidote had not been "publicly or actually used," within the meaning of s. 23 of Act XV of 1859, before Richard Johnson had applied for leave to file the specification of his invention, and gave the plaintiff a decree.

The facts of the case will be found fully set forth in the judgments of the High Court to which the defendants appealed.

Mr. *Colvin* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellants.

[370] Messrs. *Howard* and *Hill*, for the respondent.

Mr. *Colvin*—The lower Court has found the facts in favour of the defendants, appellants, but has held that there was no public user such as s. 23 of Act XV of 1859 contemplates. There was, however, a public user as proved by the witnesses for the defendants, appellants. Besides the words used in s. 23 of Act XV of 1859 are "publicly or actually used." In this case actual user has been undoubtedly established.

Mr. *Howard*.—The Judge has failed to appreciate the evidence, and has assumed that a thermantidote on Johnson's patented principle was made by Sheen and presented to the Masonic Lodge prior to the date of Johnson's patent. The evidence recorded as to "general user" is inadmissible under s. 23 of Act XV of 1859 until the particular user alleged has been established. It is further inadmissible under the terms of s. 34 which requires that the particulars of the grounds on which defendants rely shall contain full information of the user alleged, and that no evidence shall be allowed at the trial which shall not be contained in such particulars. In the defendants' particulars there was no mention of the place where general user is alleged. We submit that plaintiff is entitled to a decree on different grounds from those on which the Judge has proceeded.

Mr. *Colvin* in reply.—The defendants, appellants, were quite entitled to support their case by the evidence of the witnesses who deposed to having made thermantidotes of a construction similar to that of the plaintiff's patented one. After the establishment of a prior user as required by s. 23 of Act XV of 1859 by Sheen, this evidence was clearly relevant, nor was it necessary for the defendants, appellants, to make specific mention of the witnesses cited on the point in their particulars of defence. If the plaintiff, respondent, thought the particulars of defence unsatisfactory, he should have applied for further particulars. He could not lie by and spring the objection on the defendant, appellant, at the last moment. Section 34 of Act XV of 1859 is analogous to s. 41 of 15 and 16 Vict., c. 83. Under this section in a similar case to the present it was held that such evidence could be given,—*Hull* v. *Bollard* (1). *Daw* v. [371] *Eley* (2) does not overrule the authority of *Hull* v. *Bollard* (1), the two cases are clearly distinguishable. In *Daw* v. *Eley* (2), the plea of want of novelty was sought to be established by evidence of user in another country.

(1) 25 L.J. Exch. 304. (2) L.R. 1 Eq. 38.

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ORDER.

STUART, C.J.—In this case the plaintiff, Percy Bilton Johnson of Allahabad, the assignee of Richard Johnson's patent for making thermantidotes taken out in 1870 under Act XV of 1859, instituted a suit in the Court of the District Judge of Allahabad in which he alleged that the defendants, Bradley and Sheen, had at divers times since the lst September, 1875, infringed his patent, and that they, or one of them, had, without plaintiff's license, at Allahabad and elsewhere, publicly advertised for sale under the name of "Sheen's new improved self-working patent thermantidotes" which, it was complained, were dishonest infringements of the plaintiff's patent rights, and he claimed Rs. 1,000 as compensation for such infringement with interest to date of decree. The plaintiff further prayed for an injunction to restrain the defendants or either of them from thereafter making, selling, or advertising, under any name whatever, thermantidotes of the kind described and known as "Johnson's patent thermantidotes," and from otherwise infringing the plaintiff's exclusive rights and privileges under his patent.

The peculiarity of the thermantidote covered by the patent was shown chiefly by the manner in which the frame-work of the machine and the wheel used in its operation were made. There were other peculiarities, one a telescopic slide for, if necessary, diverting the breeze, and there was also attached to the machine a self-watering apparatus. The defendants, in their written statement, denied the alleged infringement of the plaintiff's patent, and they pleaded that the parts of the patented machine in respect of which infringement by them was alleged were not new, inasmuch as the defendant Sheen had actually used in India a thermantidote with the same frame-work and driving (or wheel) arrangement as that for which Richard Johnson had obtained his patent, "before the said Richard Johnson filed his petition or leave to file a specification thereof," *i e.*, before 1870. In 1875, shortly before the infringement of the plaintiff's patent, which was alleged to have commenced in September of that year, the defendant Sheen had filed a specification [372] for an "improved method of wetting and working *khas* taties on thermantidotes and other apparatus for cooling houses, dwellings, offices, &c.," and he obtained a patent for this invention. The plaintiff's case suggests that the defendants took advantage of their bringing out Sheen's patent, which related solely to a watering apparatus, by connecting it with their construction of the thermantidotes which they then began to make, and which in all other respects were alleged by the plaintiff to have been infringements of his patent; and this appears to me to be fairly shown by the evidence. The plea or excuse that the defendants had previous to 1870 constructed and sold thermantidotes identical in form and contrivance with that for which the plaintiff had obtained his patent in the same year is wholly unsupported, if not disproved, by the evidence on the record. It appears to rest entirely upon the statement that in 1869 the defendants had supplied the Masonic Lodge in Allahabad with a thermantidote, but which evidently had been of a totally different kind from that made under the plaintiff's patent, for it was evidently of an old-fashioned and very clumsy pattern. One of the carpenters who assisted in making it in 1869, by name Sukhdan, states that he had never made one before nor since, and that it was of mango wood, and another witness, Mr. R. F. Castellari, describes it as a common bazar one. He says: "When the Lodge was moved in 1874, there were two thermantidotes, one

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a common bazar one of mango wood, and the other one of Johnson's patent thermantidotes: the bazar one was of the old pattern in which the frame and wheel were separate from the body of the thermantidote:" and he goes on to describe it as "very old, in fact it was nearly in pieces * * * had been thrown aside as useless." It is clear that there is no evidence of user by the defendants other than their making or getting made for them this clumsy and old-fashioned thermantidote which they supplied to the Masonic Lodge in 1869. The transaction, or gift, or whatever it was, was in truth a merely isolated affair, being in fact neither preceded nor followed by anything of a similar kind. The attempt, therefore, to show any user by it on the part of the defendant is simply absurd. Of the fact of the infringement by the defendants of the plaintiff's patent rights there can be no doubt whatever, in fact it is not seriously disputed. Mr. Johnson, the original patentee, appears [373] to have acted in a very straightforward manner towards the defendants, after having satisfied himself that they were manufacturing machines covered by the patent which he had obtained in 1870, and with much consideration for them, as the following letter addressed by him to Mr. Sheen on the 16th March, 1877, shows: "I must ask you to make such arrangements in your thermantidote this year as do not infringe on my patent, same as the ones you manufactured last year do: should you desire to use any portion of my patent in your machine, I shall be glad to arrange with you for the royalty to be paid for its use: you will see by reference to my specification and drawings in the patent office, or with me any time you may call, when I shall be glad to see you, that yours of last year infringes upon my patent rights: it is not only the watering apparatus but the general arrangement of the frame-work and fly-wheel, with other improvements, that are included: if you call in for a few minutes some morning, I am sure we can amicably arrange all." In reply he received the following most evasive letter from Sheen: "I beg to acknowledge receipt of your letter of the 16th ultimo, and in reply can only refer you to the provisions of Act XV of 1859, under which my patent was registered, entitled "An Act for granting exclusive privileges to inventors," which you apppear to have overlooked in addressing me on the subject of my thermantidotes: I should have sent you a reply earlier, but domestic and other matters fully occupied my time." It will be remembered that Sheen's patent related exclusively to the watering apparatus and had nothing whatever to do with his thermantidotes in any particular. Indeed, I consider it my duty to state that in my judgment the defendants' conduct throughout has been most disingenuous and fully deserves the consequences they must now face. There is on the facts no escape from the conclusion that they have deliberately infringed the plaintiff's patent, and the plaintiff is entitled to a decree accordingly, and so far I approve the Judge's order. The plaintiff is also entitled to damages and to the injunction he seeks against the defendants.

In regard to damages we do not understand what the Judge means when he says that the amount of damages will be more conveniently ascertained at the time of the execution of the decree. The Judge holds, and we agree with him, that the plaintiff was entitled [374] to damages. These must be in the first instance assessed, and when so determined they will form part of the decree and will be recoverable in course of execution, if not otherwise and previously settled. The damages might be assessed in this Court, but we think it more convenient that this should be done by the Judge, and we therefore remand the case to him for that purpose,

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with directions that he will make an immediate and peremptory appointment for hearing the parties and for his finding on that question, and that he will return the record to this Court with such finding within a week from the date of this order. In assessing the damages the Judge will be guided by the royalty which the plaintiff has been accustomed to be allowed on sales of his patent thermantidotes ; and in order to ascertain that, he should examine the plaintiff and any other witnesses who may be named to the Judge as having knowledge on the subject. On receipt of the Judge's findings assessing the damages three days will be allowed for objections.

SPANKIE, J.—P.B. Johnson, the plaintiff, respondent, as assignee of a patent granted to Richard Johnson under s. 4 of Act XV of 1859, whereby he acquired the sole and exclusive privileges of making and using and selling an invention for the improvement of thermantidotes for a period of fourteen years, sues the defendants, Sheen and Bradley, for damages to the amount of Rs. 1,000, as compensation for an infringement of the patent so granted to Richard Johnson, in making and selling thermantidotes constructed with the same frame-work and driving arrangement as that for which the patent was given to the said Richard Johnson. The plaintiff also prayed that defendants might be restrained in future from making, selling, or advertising, under any name whatever thermantidotes of the kind described and known as Johnson's patent thermantidotes and from all infringement of the patent of any kind whatsoever.

The defendants contended that Richard Johnson's invention was not a new one, the improvements patented having been in use in different parts of the country, and having been used by Sheen himself, who made in 1869, prior to the filing of any specification, a thermantidote on the same principle as that patented by Richard Johnson, and presented the same to the Masonic Brotherhood of the Lodge of Independence and Philanthropy, No. 391, in Allahabad. [375] The defendants, Bradley and Sheen, were in partnership together in 1875, and it is not denied that they made thermantidotes, which the partnership lasted, on the same principle with regard to frame-work and driving arrangement as that which Sheen says that he used in 1869. Bradley contends that when the partnership was dissolved in August 1877, he had the right to make such thermantidotes, because Sheen had transferred to him all his (Sheen's) rights and interests in the manufacture of thermantidotes. The Judge has held that there cannot be any doubt that defendant Sheen had made a thermantidote on the plaintiff's patented principle in April or May, 1869, which thermantidote he (defendant) presented to the Free Masons' Lodge. "It is impossible," the lower Court observes, "to reject the testimony of such a witness as Mr. Shircore on this point : swears that he distinctly recollects a vote of thanks having been accorded on the occasion to Sheen at a banquet held in the Lodge : I attach little weight to the fact of presentation by Sheen not being found recorded in the proceedings of the Lodge : the evidence shows that if it was presented to the banquet-room the fact could" (or could not) "be recorded" : Mr. Shircore says that the thermantidote was presented immediately after Sheen had been made a member of the Lodge, and this is proved to have been in March, 1869 : there is no reason, moreover, for rejecting the evidence of the witnesses who swear that they made the thermantidote and took it to the Lodge." But the real point in the case, as it occurred to the Judge, was whether the making of the thermantidote and its presentation to the Lodge amounted to a "public or actual" user such as that

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contemplated by s. 23 of Act XV of 1859, so as to entitle the defendants to plead that the invention was not a new one. Citing the case noted (1), he (the Judge) had to determine whether the user was of a kind which made the invention known to the public at large, the word "known" being used in that particular sense as being part of what is called the common or public knowledge of the country. If the user has not been of that kind, the person using, although in reality he may have been the actual inventor, will not be the legal inventor as against the patentee. With this principle before his mind the Judge came to the conclusion that [376] the presentation of the thermantidote on a certain improved principle to a private body of people like the Free Masons' Lodge for private user did not constitute a "public or actual" user of the kind the law contemplates. The lower Court remarks that with the verandah of the Free Masons' Lodge the invention stopped probably nobody but Sheen himself knew of the existence of the invention. The public had no opportunity afforded them of knowing that there was an useful invention in the thermantidote in the Free Masons' Lodge of which they could avail themselves if they like. This point the Judge proceeds to insist on with various arguments, which it is unnecessary to reproduce here, coming to the conclusion that Sheen adopted a new invention and then kept it to himself. He did not even impart the invention to the persons to whom he presented the thermantidote, and as far as the public were concerned they were kept in profound ignorance of the invention. Such a party, remarks the Judge, has no right to plead to an action for infringement of patent that the invention of the patentee was not a new invention. As far as the party pleading to the action is concerned, the patentee is the real and actual inventor, for the party pleading does not say that he himself was the inventor. With this view of the case the lower Court decreed the claim but reserved the amount of damages to be ascertained at the time of execution of the decree.

The defendants appeal the whole case, and plaintiff objects that the judgment is silent regarding costs, and he is also entitled to the cost of the injunction proceedings. The defendants urge (i) that on the evidence on the record the Judge should have found that C. J. Sheen had "publicly used" in India, in Allahabad, the invention which plaintiff claims to have been his assignor's, and, therefore, plaintiff was not entitled to a decree: (ii) that on the evidence on the record the lower Court should have found that defendant C.J. Sheen has "actually used" in India, in Allahabad, the same invention; (iii) that the mode and the manner in which C.J. Sheen had used the thermantidote proved to have been made and constructed by him in March, 1869, *i.e.*, previous to the date of plaintiff's assignor's petition for leave to file the specification, was such as is contemplated by Act XV of 1859, and the Court [377] below has erred in its interpretation of the words "publicly or actually used" mentioned in the Act.

Under s. 19 of Act XV of 1859, an Act for granting exclusive privileges to inventors, an invention shall be deemed a new invention, within the meaning of the Act, if it shall not before the time of applying for leave to file the specification have been *publicly used* in India, or in any part of the United Kingdom of Great Britain and Ireland, or *been made publicly known* in any part of India, or in any part of the United Kingdom, by means of a publication, either printed or written, or partly printed or partly written.

(1) *Plimpton* v. *Malcolmson*, L.R. 3 Ch. 531.

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It is not necessary to quote the remaining portion of the section. All that is required for the purpose of this case has been cited.

The lower Court appears to have somewhat misapprehended the bearing of the precedent quoted by him (1). In that case the Master of the Rolls pointed out the legal sense and meaning of a first and last inventor, if the invention being in other respects novel and useful was not previously known in the United Kingdom, "known" being used in that particular sense as being part of what had been called the common or public knowledge of the country, and by this common knowledge it was not meant that every individual member of the public knew of the invention. What is meant is that if it is a manufacture connected with a particular trade, the people in the trade shall know something about it: if it is a thing connected with a chemical invention, people conversant with chemistry shall know something about it, and he (the M. R.) adds that it need not go so far. It needed not to show that the bulk or even a large number of those people knew it. If a sufficient number knew it, or if the communication is such that a sufficient number may be presumed, or assumed to know it, that will do. It may be shown that the trade had commonly used it. That is the best evidence. It may be shown that it was published and made known to the public. It had been held in a modern specification which had been enrolled in the Patent Office and not published besides, that will do. It had also been held that, as a common rule, if the description has been printed in England and published in England in a book which circulates in England, that will do. But after all it is a question of fact. The Judge must decide from the evidence [378] brought before him whether it has, in fact, been sufficiently published to come within the definition of being made known within the realm.

We, however, are bound by the terms of our Act, and an invention by that Act is new, as we have seen, if it shall not before the time of applying for leave to file the specification have been "publicly used" in India, &c., or "been made publicly known" by means of a publication either printed or written, or partly printed and partly written, &c. This definition answers the question how the invention is "to be made publicly known" to people, and on this point no question arises here, and, therefore, the authority quoted has no bearing upon this case. Under s. 23 of the Act no action shall be defended upon the ground of any defect or insufficiency of the specification of the invention, nor upon the ground that the original or any subsequent petition relating to the invention, or the original or any amended specification, contains a wilful or fraudulent mis-statement, nor upon the ground that the invention is not useful, nor shall any such action be defended upon the ground that the plaintiff was not the inventor, unless the defendant shall show that he is the inventor or has obtained a right from him to use the invention, either wholly or in part. Any such action may be defended upon the ground that the invention was not new, if the person making the defence, or some person through whom he claims, shall before the date of the petition have publicly or actually used in India, or in some part of the United Kingdom, the invention or that part of it of which the infringement shall be proved, but not otherwise. This action has been defended under the last part of the section.

Now, the meaning of "public use" is that a man shall not by his own private invention, which he keeps locked up in his own breast, or in his own desk, and never communicates, take away the right that another man

(1) *Plimpton* v. *Malcolmson*, L R. 3 Ch. 531.

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has to a patent for the same invention. The prior use of an invention need not be general. It has been held that a single instance of use would be sufficient, but it must be public. In the case of *Carpenter* v. *Smith* (1), Baron Alderson said that "public use" means a use in public, so as to come to the knowledge [379] of others than the inventor, as contra-distinguished from the use of it by himself in his chamber, and Lord Abinger said the public use and exercise of an invention means a use and invention *in* public, not *by* the public. Thus the Judge appears to have taken an erroneous view of the words "publicly used" as applied to an invention. It does not at all follow that because the thermantidote was presented to the Free Masons' Lodge there was no public use of it. The Masonic brethren are alleged to have used it, and even on the assumption that the lower Court's interpretation of the words could be correct, inasmuch as the public had no opportunity of knowing that there was a useful invention in thermantidotes in the Free Masons' Lodge, of which they could avail themselves if they liked, the assumption itself is hardly borne out. There is certainly no evidence in favour of it, and I am unaware that the brethren of a Masonic Lodge are bound by any rule to be silent as to benefits they may have derived from a new and useful thermantidote, or that they could not, if they pleased, freely communicate to their neighbours, friends, and families a new invention that was entirely unconnected with the secrets and mysteries of Masonry. But the Judge has misconceived the meaning of use in public as distinct from use by a man of his own invention in private.

I do not, however, think it necessary to dwell further on this point. The particulars of grounds on which defendants contended that plaintiff was not entitled to exclusive privileges, which they were bound to put in, are in effect that Sheen had himself manufactured and actually used in Allahabad in March and April, 1869, a thermantidote with the same frame-work and driving arrangement, for which a patent was given to Richard Johnson, before the specification was filed for the purpose of obtaining the patent; and further, that the principle on which the driving wheel was attached to the body was commonly known throughout the country. The terms of the Act (s. 23) are "shall have publicly or actually used" the invention. If, therefore, it can be established that Sheen made and presented the thermantidote of the kind and with the arrangements described in the defence, he may be said both by himself and by the Masonic body to have actually used that thermantidote. When, however, we come to analyze the evidence, there does not appear sufficient proof of this defence. (After commenting on the [380] evidence the learned Judge proceeded:) I hold, therefore, that it is very doubtful whether any thermantidote was presented to the Lodge by Sheen in 1869, and that, if any thermantidote was sent there by him, it was probably an old one which he had repaired, and further there is no reliable evidence to show that when repaired it worked on the principle of Johnson's patent, or that if it did, it was ever used or at work in the banquet room of the Lodge, or anywhere else.

There is ample evidence to show, and, indeed, it is not denied, that defendants have since the 1st September, 1875, and at the time of instituting the action, made and sold thermantidotes made on Johnson's patent in regard to their frame-work and driving arrangement, and that they have thereby infringed the exclusive privileges granted by the patent. I might,

(1) 9 M. and W. 300.

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perhaps, close the case here as against the defendants. But it is right to mention that the defendants had desired to take the evidence of Ram Tahal, a blacksmith of Benares, of Shib Charan of Benares, of Mr. Smyth of Benares, and of Madho, a carpenter of Agra. The plaintiff's counsel objected to the record of this evidence because its admission was opposed to ss. 34 and 23 of the Patent Act. Section 34 requires that plaintiff shall deliver with his plaint particulars of the breaches complained of in his action, and the defendant shall deliver a written statement of the particulars of the grounds (if any) upon which he means to contend that the plaintiff is not entitled to any exclusive privilege on the invention. At the trial of any such action no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such exclusive privilege, which shall not be contained in the particulars delivered as aforesaid. It is also specifically declared that "if it be alleged that the invention was publicly known or used prior to the date of the petition for leave to file such specification, the place where and manner in which the invention was so publicly known or used shall be stated in such particulars: provided always that it shall be lawful for any Court in which the action or proceeding is pending, or in which the issue is tried, to allow the plaintiff or defendant respectively to amend the particulars delivered as aforesaid upon such terms as shall seem fit." The Judge took the depositions of these witnesses, though at first he was disposed to **[381]** reject them, as is clear from his rough notes of the proceedings. But he does not refer to the evidence in his judgment. Nor do I think that we should use it. The terms of the section are peremptory. Instances were cited to us showing from English cases that the plaintiff before trial should have called upon defendants to supply the particulars required as to those places and the manner in which the invention was publicly known or used. But the Act, though founded on the English Statute, is accompanied by a different procedure; and though I do not mean to say that an application might not, perhaps, have been made on the subject to the Judge below, by what is called a miscellaneous application before the trial came on before him, I cannot say that it was incumbent on the plaintiff to make the application. The defendants might have done so, and perhaps, ought to have done so, as in the particulars filed by them they simply say that at the time the thermantidote was manufactured, the principle on which the driving wheel was attached to the body was commonly known throughout the country, which was a very vague statement, and it does not in any way indicate that they relied on evidence in any particular place for corroboration of such a vague statement. Moreover, the defendants should have applied to the Judge at the trial if they wished to amend the particulars. This would have allowed the Judge to adjourn the case, and to enable the plaintiff to rebut the proposed evidence. Under the proviso the Judge certainly could have acted, but he was not asked to do so. I would not, therefore, interfere; nor do I think it necessary. The main defence is that Sheen himself made the thermantidote and used the same principles as Johnson did in 1869, and then presented the machine to the Lodge, which points he has failed to establish. Had the fact been so well known, and the use of the same principles so common throughout the country, the circumstances would have been stated in Sheen's letter and in the proceedings before Mr. Quinton, or surely in the grounds set out on the 10th June, 1878.

I may, however, remark that I do not admit that there is anything in s. 23 which would forbid the record of the desired evidence. The

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defendant, by that section, must show that he himself had used the invention, but there is nothing which stays him, after that, from proving that it was in common use in particular places. There is [382] one other point. The Judge refused to take Mr. Bradley's evidence, though he was present in Court. He ought to have taken it, if the defendants wished it. But their case was in no way prejudiced by his not having done so, and they do not refer to the matter in their memorandum of appeal.

As to damages, the Judge should not have left the amount to be determined at the time of execution of the decree. The defendants did not contend that plaintiff had not suffered damages, if there had been an infringement of his rights. They simply denied that there had been any such infringement as that complained of, nor did they question the amount of damages sought to be recovered.

It appears from the proceeding in the Court of Mr. Quinton, late Officiating Judge, dated 8th May 1878, that Johnson applied under s. 493 of the Civil Procedure Code for a temporary injunction to restrain defendants from manufacturing, selling, or advertising thermantidotes, which he asserted were built in such a way as to infringe his patent. At this time the present suit had been filed. But the Court refused to issue the injunction, because so far back as March 1877, Johnson was aware that defendants had infringed his patent, and correspondence had ensued, which closed abruptly in May with a curt letter from Sheen, and Johnson had taken no legal steps to vindicate his alleged rights. He lay back until the 24th April, 1878, and then brings his suit, and filed an application for an injunction. The Judge accepting the rule laid down in the case of *Bovill* v. *Crate* (1) held that a patentee who lies by and allows a person to continue doing what he says is an infringement of his patent cannot claim an interlocutory injunction to restrain this person. Mr. Colvin for the defendants had then stated that the defendants were quite ready to keep an account, and, therefore, the Judge issued an injunction to the defendants, ordering them to prepare an account of the manufacture and sale of the thermantidotes which are said to infringe the patent, from the date of the institution of the suit. Plaintiff was directed to pay the cost of the application. The order was appealable under s. 588 of the Code, but Johnson did not appeal it. Ordinarily the rule in Courts of Equity, as now in those of Common Law, is, when no interlocutory order has been given, to order as part of the final judgment, an account of all the profits made [383] by defendants since the commencement of the action, and after notice that an account would be required. Mr. Quinton appears to have given such a notice. If here damages are assessed the plaintiff would not be entitled to an account prior to the suit, for the damages would be compensation for his loss of profits up to the date of suit. The plaintiff has not asked in this suit, nor did he ask in his petition dated the 24th April, for an injunction that an account should be taken. He has simply sought to recover Rs. 1,000 damages. Under these circumstances he may not be entitled to profits. The plaintiff is assignee to a manufacturer himself, and if he has been in the habit of licensing other persons to use his patent at a fixed royalty, then it may be that the loss of that royalty would be the proper measure of the damages sustained by him from the 18th September 1875, to date of decree (2). It does not appear what fixed royalty Johnson has charged, but he says in his letter of the 16th March 1877,

(1) L.R. 1 Eq. 388.
(2) *Penn* v. *Jack*, L.R. 5 Eq. 81; Galloway's Patent 7 Jur. 453.

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to Sheen that he would be glad to arrange with him for the royalty to be paid for the use of his invention. Perhaps the best course to adopt would be to remand the case to the lower Court for further inquiry, and to ascertain what sum Johnson or his father have been in the habit of taking as a royalty, and whether this royalty has been taken on each machine made, or a lump sum has been paid for the use of the patent. Having ascertained this point, the lower Court should take an account of the machines made by defendants between the 1st September, 1875, and the date of the institution of the suit. If many machines have been made since, they should be taken into account, and the damages should be assessed according as it may be found what has been the royalty charged. On a return of the lower Court's finding on these points, we can dispose of the appeal and the objections of the plaintiff under s. 561. One week might be allowed for objections to the finding of the lower Court from the date of its return of the record. Or if the parties prefer it, we might ourselves make the inquiry suggested, and determine the point, though it would be more convenient for the Judge to do it.

I have, since writing as above, seen the Hon'ble Chief Justice's proposed order of remand, and I quite agree in the propriety of it. It will enable us to dispose of the appeal on receipt of the Judge's finding.

[384] On receipt of the Judge's finding on the issue remitted, the Court delivered the following

JUDGMENT.

We have now received the finding of the Judge on the remand directed to him by our order of the 26th March, and there are no objections to the finding on either side. The Judge finds that the defendants made six of the plaintiff's thermantidotes in 1876, fifteen in 1877, and five in 1878, in all twenty-six. He is also of opinion upon the evidence taken before him, that where the thermantidotes manufactured by defendants exceed twenty in number, a royalty of Rs. 40 on each machine would be a fair charge. It would thus appear that that royalty charged on the twenty-six thermantidotes made by the defendants would produce a sum of Rs. 1,040. But as that is larger by Rs. 40 than the amount claimed, we reduce the sum accordingly, and assess the damages to be paid by the defendants to the plaintiff at Rs. 1,000, and we decree that amount to the plaintiff and dismiss the appeal with costs in both Courts, but excepting the costs relating to the plaintiff's petition of objection, which petition we overrule, and we order that the plaintiff shall bear the costs thereof. Under the circumstances it is unnecessary to make any order respecting the injunction asked for in the plaint.

2 A. 384.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SADIK ALI KHAN (*Decree-holder*) *v.* MUHAMMAD HUSAIN KHAN (*Judgment-debtor*).* [4th June, 1879.]

Execution of Decree—Transfer of Decree—Due Diligence—Act X of 1877 (*Civil Procedure Code*), *ss.* 230, 232.

The transferee of a decree applied, while an application by the original holder of such decree to execute it was pending, to be allowed to execute it. The Court, in accordance with s. 232 of Act X of 1877, directed notice of the transferee's application to be given to the transferor and the judgment-debtor. The transferee failed to pay the Court-fee leviable for the issue of such notice, and the Court dismissed his application. The transferee subsequently made a second application to be allowed to execute the decree. *Held*, that such application could not be rejected, with reference to s. 230 of Act X of 1877, on the ground that due diligence had not been used on the former application to procure complete satisfaction of the decree, because such application had not been granted, and, therefore, the question whether "on the last preceding application" due diligence was used to procure such satisfaction did not arise.

[385] THE facts of this case were as follows: The holder of a decree for money applied to the Court which had passed it for its execution against the judgment-debtor. The Court, under s. 248 of Act X of 1877, issued a notice to the judgment-debtor requiring him to show cause, on the 20th September, 1878, why the decree should not be executed against him. Meanwhile, on the 17th September, 1878, one Sadik Ali, to whom the decree had been transferred by assignment in writing, applied to the Court to be allowed to execute it. The Court, in accordance with the provisions of s. 232 of Act X of 1877, directed notice of this application to be given to the transferor and the judgment-debtor. Sadik Ali failed to pay the Court-fee leviable for the service of such notice, and the Court in consequence dismissed his application. On the 24th January, 1879, Sadik Ali again applied to the Court for the execution of the decree. The Court, with reference to s. 230 of Act X of 1877, refused to grant this application on the ground that on his former application Sadik Ali had not used due diligence to obtain satisfaction of the decree.

Sadik Ali appealed to the High Court, contending that the provisions of s. 230 of Act X of 1877 were not applicable under the circumstances of the case.

Munshi *Hanuman Prasad* and Munshi *Sukh Ram*, for the appellant.

Mir *Akbar Husain*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—It appears that the original decree-holder had made an application to execute his decree, and notice having issued under s. 248 of Act X of 1877, the 20th September, 1878, was fixed for the hearing. In the meantime, on the 17th, appellant petitioned to have his name registered as purchaser of the decree, and to be allowed to execute the decree. An order for notice on the decree-holder and judgment-debtor was made in accordance with s. 232 of the Act. But "talabana" not having been paid, the case was struck off.

* Appeal No. 61 of 1879, from an order of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 5th February, 1879.

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An application for execution, the subject of the present contention, was made on the 24th January, 1879, and refused by the Subordinate Judge under s. 230, because owing to his not having lodged the service money on the former application, due diligence had not [386] been shown in executing the decree. It is contended that s. 230 does not apply to this case.

It is true that if a decree has been transferred by assignment in writing to any other person, the transferee may apply for its execution to the Court which passed it, and if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder. Then s. 230 of Act X of 1877 would of course apply. But there is a proviso, the conditions of which must be fulfilled before the Court could allow the execution. The proviso attached to s. 232 is that notice in writing of the application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution. Until, therefore, this notice has been issued, and until the objections (if any) had been heard, the Court would not be in a position to grant execution. Up to the date of the present application, and though a former application had been made both under ss. 230 and 232, and in each case an order for serving the notice required by law had been made, the application for execution had not been granted. In the one case the decree-holder ceased to have any interest in the decree, and in the other, as we have seen, *talabana* had not been paid, and no execution was ordered. Therefore it would seem that the present application cannot be rejected on the grounds set forth in the Subordinate Judge's order, because no former application for execution had been granted, and, therefore, the question did not arise whether "on the last preceding application due diligence was used to procure complete satisfaction of decree."

We, therefore, decree the appeal with costs, and reverse the order of the Subordinate Judge and direct him to proceed to dispose of the application for execution.

Cause remanded.

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APPELLATE CRIMINAL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* KARIM BAKHSH. [6th June, 1879.]

Act X of 1872 *(Criminal Procedure Code)*, ss. 149, 272—*Arrest pending appeal—Admissibility of the evidence of the respondent against another person concerned in the same offence—Accomplice—Act 1 of* 1872 *(Evidence Act)*, s. 118.

[387] *K* and *B* were accused of being concerned in the same offence. *K* was first apprehended, and the Magistrate inquired into the charge against him, and committed him for trial, but the Court of Session acquitted *K*. The Local Government preferred an appeal against his acquittal, and the Magistrate arrested him with a view to his detention in custody until such appeal was determined. While *K* was so detained, the Magistrate inquired into the charge against *B*, who had meanwhile been arrested, and made *K* a witness for the prosecution, and committed *B* for trial. *K*'s evidence was taken on *B*'s trial.

Held per STUART, C.J. (SPANKIE, J., *doubting*), that *K*'s arrest was lawful, and that this evidence was admissible against *B*.

Held per SPANKIE, J., that, assuming that the Magistrate looked on *K* as an accused person and his arrest was lawful, the Magistrate should not have examined him as a witness against *B*, and that, assuming that *K's* arrest was unlawful and that when he made his statement he was a free man, his evidence, if admissible, was not evidence on which a Court should place much reliance.

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THE facts of this case, so far as they are material for the purposes of this report, were as follows: On the 3rd July, 1878, one Kamal was tried for an offence punishable under s. 328 of the Indian Penal Code by Mr. H. D. Willock, Sessions Judge of Azamgarh and was acquitted. The Local Government appealed to the High Court against his acquittal. Before the appeal was admitted, Kamal was arrested by the order of the Magistrate of the District. While the appeal was pending and Kamal was in custody, he was made by the Magistrate a witness for the prosecution in the case of one Karim Bakhsh, who was charged with being concerned in the same offence as that for which Kamal was tried and acquitted by the Sessions Judge. While the appeal was still pending, Karim Bakhsh was committed to the Sessions Judge for trial on charges under ss. 328 and 392 of the Indian Penal Code, and on the 24th October, 1878, was tried and acquitted. The Sessions Judge observed with reference to the evidence of Kamal which was taken at the trial as follows: "His evidence is worthless: it affords no proof of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth."

The Local Government appealed to the High Court against the acquittal of Karim Bakhsh, contending, among other things, that the evidence of Kamal should not have been rejected by the Sessions Judge.

[388] The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

The respondent did not appear.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—Karim Bakhsh, the accused, respondent, in the present case, was one of three men, Kamal and Ilahi Bakhsh being the other two, who were believed to be accomplices in the drugging of a man named Akbar Shah with whom they fell in on their travels between Ghazipur and a place called Birmi, and whom, when under the influence of the poisonous drug they had administered to him, they robbed of a large sum of money which, as the fruits of some business of his master, he was carrying home to the latter. Kamal was the first to be apprehended on the charge, and he after being duly committed by the Magistrate was tried before the Judge of Azamgarh and acquitted by that officer. But on appeal by the Government to this Court the acquittal was set aside and Kamal, the accused, was convicted and sentenced to rigorous imprisonment for three years. The evidence in the present case is substantially the same as that adduced against Kamal, the Judge taking the same view that he had done before, and also acquitting Karim Bakhsh, and the Government again appealing to us against that acquittal. I have again carefully considered all the evidence, and am clearly of opinion that the Judge has gone as far wrong in this case as he had done in the case of Kamal, and we must set aside his order. For, even irrespective of Kamal's deposition, I agree with Mr. Justice Spankie that the evidence given by the other witnesses, and in view of which I entirely concur, is

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quite sufficient for the conviction of Karim Bakhsh. With respect to Kamal's evidence the Judge is of opinion that it is worthless, seeing that he considers that " it affords no proof in support of the charge, and. under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." This allusion to Kamal's evidence was remarked on at the hearing, and we have to consider, first, whether the Magistrate was justified in re-arresting Kamal after his discharge by the Judge, and, second, whether, while so in custody again, his statement could be received in evidence against Karim Bakhsh, I am clearly of opinion that these two questions must both [389] be answered in the affirmative. Kamal's re-arrest was not only legal, but absolutely necessary in the interests of justice. The Government appealed, as it was by law entitled to do, against Kamal's acquittal ; and the effect of that proceeding was to keep him still in peril, and it may even be said on his trial, and his re-arrest was simply a measure necessary for his safe custody pending and for the purposes of the appeal, and also to secure his personal presence and his punishment should he be, as he eventually was by the decision of this Court, convicted. Such a precaution was in the highest degree reasonable, and was in my opinion fully warranted by s. 92 of the Criminal Procedure Code, which provides that a police officer may, even without orders from, a Magistrate and without a warrant, arrest " any person against whom a reasonable complaint has been made or a reasonable suspicion exists of his having been concerned in a cognizable offence." For there can be no doubt that the effect of the appeal against Kamal's acquittal was to place, or replace, him in the position described in s. 92. And in this opinion I find I am supported by the ruling of a Division Bench of the Calcutta Court (Macpherson and Morris, JJ.), who in the case of *The Queen* v. *Gobind Tewari* (1) ordered the re-arrest of two acquitted persons under s. 92, directing them to be kept in custody till the hearing of the appeal. The reported argument addressed to the Court by the learned Legal Remembrancer, Mr. H. Bell, was extremely forcible, showing, as it did, that the power to re-arrest under such circumstances was by necessary implication vested in all Courts and officers with proper authority and jurisdiction, and that " where a Court had jurisdiction over an offence, it had of necessity power to bring the persons accused of the offence before it," quoting in support of this proposition an English case (2). Mr. Bell further successfully contended that " the admission of the appeal revived the charge against the accused, and it was absurd to treat persons accused of murder or of any other criminal offence as mere respondents in an appeal. Before the appeal was heard the accused ought to be in the custody of the law." And again " under s. 297 when the Court ordered that an accused person who had been improperly discharged be tried, it was not disputed that the Court could order the re-arrest of the accused person, though there was no express provision on [390] the point in the section : and in the same way the Court had equal authority to re-direct the re-arrest of the accused on the admission of an appeal." These views appear to me to be eminently sensible and just, and I strongly approve them, affording as they appear to do a sound rule to guide us in the present case. On this point of the validity of Kamal's re-arrest I may add that it appears to be warranted by the spirit and principle of s. 149 of the Criminal Procedure Code, which provides that " when a complaint is made before any Magistrate empowered to commit

(1) 1 C. 281.

(2) *Bane* v. *Methuen*, 2 Bing. 63.

persons for trial before the Court of Session, that any person has committed, or is suspected of having committed, any offence triable exclusively by the Court of Session, or which in the opinion of such Magistrate ought to be tried by the Court of Session, such Magistrate may issue his warrant to arrest such person, or, if he thinks fit, his summons requiring him to appear to answer such complaint," an appeal being virtually a re-trial on the same facts.

The next question is, whether the statement made by Kamal after his re-arrest and pending his appeal was admissible in evidence. I am clearly of opinion that it was, and that it ought to have been considered by the Judge, and to be considered by us now, along with the other evidence in the case. Such evidence would be admissible in an English Court—6 and 7 Vict., c. 85, s. 1, and 16 and 17 Vict., c. 30, s. 9—and I know of no law, regulation, or ruling in India excluding it. In one case the English law appears to have been followed by the Calcutta Court, *Queen* v. *Ashrof Shaikh* (1), and in the present instance there is the less reason for excluding such evidence, seeing that a precisely similar statement by Kamal was deliberately made by him in his own case, the facts of which were identical with the present case, which resulted in his conviction by this Court, and which statement very naturally influenced our decision.

I have only to add that I do not see that Kamal's statement can be said to have been given under duress, meaning, as that expression does, under illegal restraint or arrest: Kamal was simply by means of his arrest in safe custody for the purposes of the Government's appeal, and he was legally so. (The learned Chief Justice then proceeded to dispose of the appeal).

[391] SPANKIE, J.—We have already had this case before us on the appeal of the *Queen-Empress* v. *Kamal* (2). The latter was tried separately for the same offence as that for which Karim Bakhsh was committed to the Sessions Court. The Sessions Judge acquitted Kamal. But the Magisterial authorities obtained leave to appeal to this Court from the order of acquittal. When this Court tried the appeal, the order of the Sessions Judge was reversed and Kamal was convicted and sentenced to imprisonment for three years under ss. 107 and 238 of the Penal Code.

We accepted the evidence as good against Kamal which was adduced on the present trial of Karim Bakhsh, who has also been acquitted by the Sessions Judge.

There, however, is one feature in the case which presents some difficulty. After Kamal had been acquitted by the Sessions Judge, he was re-arrested by the Magistrate, and though under duress and awaiting the result of the appeal made on the part of the Crown against the order of acquittal, the Magistrate examined him as a witness against Karim Bakhsh. If the Magistrate regarded Kamal as still in the position of an accused person, though he had been acquitted, he should not have made him a witness against Karim Bakhsh. It may be that the apprehension of Kamal on the same charge after his acquittal by the Sessions Judge was unlawful. The appeal of the Crown had not been admitted when the arrest was made, at least this would appear to be the case. S. 118 of the Indian Evidence Act makes all persons competent to testify who are able to understand the questions put to them, and can give rational

(1) 6 W.R. Cr. 91.

(2) Unreported.

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answers to those questions. But if the Magistrate looked upon Kamal as still in the position of an accused person under trial, he should not have made him a witness against Karim Bakhsh, against whom the inquiry preliminary to commitment for the same offence for which Kamal had been committed was proceeding. The position of Kamal was not that of an accused person admitted to give evidence under pardon, nor was it that of a person who had been separately tried and convicted of an offence, and who was afterwards made a witness against another person charged with the same offence. Nor was this a case where several persons were [392] jointly accused, and where any one of them was called as a witness either for or against his co-defendants. Assuming, however, that the re-apprehension of Kamal after an acquittal and on the same charge was unlawful, and that when he made his statement he was a free man, it may be that under s. 118 of the Act already referred to his evidence was admissible, but it is not evidence on which a Court would place much reliance, and the Sessions Judge, perhaps, has not overstated the case respecting it, when he remarks that "it affords no proof in support of the charge, and, under the circumstances in which he is placed, being yet on his trial, it is extremely unreasonable to suppose that he would speak the truth." There is however other evidence, which in Karim Bakhsh's case has already been accepted by this Court, and which in my opinion is sufficient to establish a very strong presumption of the guilt of the respondent which his defence failed to rebut. (The learned Judge then proceeded to consider this other evidence).

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KANAHIA LAL AND ANOTHER (*Plaintiffs*) *v.* KALI DIN (*Defendant.*)*
[9th June, 1879.]

Registration—Certificate of sale—Mortgage.

Where the Subordinate Judge of Dehra Dun made and signed the following endorsement on a deed of mortgage of immoveable property:—"This deed was purchased on the 1st December, 1875, at a public sale in the Court of Dehra Dun, by *N* and *K*, plaintiffs, for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of *N* and *K*, plaintiffs, against *R*, for self, and as guardian of the heir in possession of the estate left by *M*"—*held per* SPANKIE, J. that this instrument operated as a sale-certificate, and consequently, as it related to immoveable property of the value of Rs. 100 and upwards, it required to be registered.

Held per OLDFIELD, J.—That as the instrument operated to assign the deed of mortgage to the auction-purchasers, it for the same reason required to be registered.

THIS was a suit for the possession of a plot of land appertaining to the premises of the Victoria Hotel at Dehra Dun. The facts [393] of the case, so far as they are material for the purposes of this report, were as follows:—The plaintiffs claimed the land in virtue of a

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* Second Appeal, No. 1354 of 1878, from a decree of W. C. Turner, Esq., Judge of Saharanpur, dated the 16th September, 1878, affirming a decree of F. S. Bullock, Esq., Subordinate Judge of Dehra Dun, dated the 30th May, 1878.

transfer to them by sale in the execution of a decree a certain deed of mortgage of the Victoria Hotel and premises, dated the 26th September, 1866. They relied on an endorsement on this deed as the proof of their title. That endorsement was in the following terms :—" This deed was purchased on the 10th December, 1875, at a public sale held in the Court of Dehra Dun, by Narain Das and Kanahia Lal (plaintiffs) for Rs. 2,400, under special orders passed by the Court on the 23rd November, 1875, in the case of Narain Das and Kanahia Lal against Richard Powell for self and as guardian of the heir in possession of the estate left by Matilda Powell." This endorsement was signed by the Subordinate Judge of Dehra Dun. The defendant contended that the endorsement should have been registered as it was an instrument operating to assign an interest in immoveable property of the value of upwards of Rs. 100. The plaintiffs contended that the endorsement was the order of a Court only and did not require registration. The Subordinate Judge held that the endorsement operated as a certificate of sale, and, with reference to s. 17 of the Registration Act of 1871, should have been registered, and dismissed the suit. On appeal by the plaintiffs the District Judge also held that the endorsement operated as a certificate of sale and should have been registered and dismissed the appeal.

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The plaintiffs appealed to the High Court.

Pandit *Bishambhar Nath*, for appellants.

Mr. *Howard*, for the respondent.

JUDGMENTS.

The judgments of the Court, so far as they are material to the above contention, were as follows :

SPANKIE, J.—I have myself been a party to a ruling in this Court that an instrument of the nature of the endorsement on the deed of mortgage dated 26th September, 1866, would require registration, that is, I have held that a sale certificate in regard to immoveable property of above Rs. 100 in value would require registration. The endorsement on the back of this deed of mortgage, which was sold at auction and purchased by the plaintiffs, [394] is, I think, and operates as a certificate of sale, and I cannot regard it is an order of Court, simply because it is signed by the Subordinate Judge. The signature may authenticate the endorsement, but the endorsement itself is a certificate of sale and a transaction that confers upon the purchasers the rights of the mortgagee and gives them an interest in immoveable property exceeding Rs. 100 in value.

OLDFIELD, J.— I concur in the proposed order for dismissing the appeal with costs. The endorsement by which the deed of mortgage was assigned to the plaintiffs as purchasers of it at auction sale is an instrument which required registration, and cannot be admitted in evidence.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

PIAREY LAL (*Defendant*) *v.* SALIGA AND ANOTHER (*Plaintiffs*).*
[11th June, 1879.]

Wajib-ul-arz—*Absconding co-sharers—Trustee—Act IX of* 1871 (*Limitation Act*) *s.* 10—*Limitation.*

Where a clause of the *wajib-ul-arz* of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such *wajib-ul-arz* was framed, sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such *wajib-ul-arz*, alleging that their property had vested in such co-sharer in trust for them, *held* that before such co sharer could be taken to have held their property as a trustee there must be evidence that he accepted such trust, and this fact could not be taken as proved by the *wajib-ul-arz*.

Held also that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of s. 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation.

[**R.**, 3 A. 458 (464) ; **D.**, 9 A. 97 (101)=A.W.N. (1886), 303.]

THIS was a suit for the possession of a certain share in a village. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendant appealed from the decree of the lower appellate Court in favour of the plaintiffs. The defendant contended that the terms of the **[395]** administration-paper did not create his vendors trustees for the plaintiffs, and that, assuming that his vendors had held the property in suit as trustees for the plaintiffs, the suit should have been instituted within twelve years from the date of the purchase, as he did not represent his vendors and had purchased *bona fide* for valuable consideration and without notice of any trust.

Babu *Jogindro Nath Chaudhri*, for the appellant.
Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court was delivered by

OLDFIELD, J.—The plaintiffs bring the suit on the ground that they are sons of Gobinda and Gopal, who many years ago absconded from the village, leaving their property in the hands of their co-sharers as trustees, and they rest the proof of the trust on an entry in the administration-paper of 1864. The defendant pleaded in effect that the plaintiffs are not the persons they represent themselves to be, and that there was no such trust created as they assert, and that the property in suit was for years possessed by Sahib Ram, Param Sukh, and others, whose rights and interests therein were bought in 1912 Sambat, or 22 years ago, by the defendant at public auction, and the claim has become barred by adverse possession on the defendant's part. The Court of first instance found in favor of the several pleas advanced by defendant and dismissed the suit.

* Second Appeal, No. 1217 of 1878, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Agra, dated the 6th September, 1878, reversing a decree of Maulvi Mubarak-ul-lah, Munsif of Muttra, dated the 27th March, 1878.

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The lower appellate Court has decreed the claim, holding that the plaintiffs are the persons they represent themselves to be; but it is silent as to when and how those whom plaintiffs represent deserted their village; it holds that under the entry in the administration-paper Sahib Ram must be considered to have become trustee for the absconders, and no period of limitation will bar the suit against him, or against his representative, the defendant, who purchased at auction-sale his rights and interests.

This decision is clearly open to the objections taken in appeal. Accepting the finding that plaintiffs are representatives of Gobinda and Gopal, who at some time or other deserted their villages, in order to establish the fact that Sahib Ram and the others held their [396] property as their trustees, there must be evidence that they accepted such a trust, and this fact cannot be taken as proved by a vague and general entry made in an administration-paper of a date subsequent to the relinquishment of the property by the absconders, and which refers to future years, to which Sahib Ram and the others were no parties, and which merely states in general terms that absconders from the village shall receive back their property on their return; and further, could such trust to Sahib Ram and the others be established, the claim is clearly barred by the limitation of twelve years, since the defendant is a purchaser in good faith for value from Sahib Ram and the others, and is not his representative within the meaning of s. 10, Act IX of 1871, and it is not shown that he bought with any notice of the trust.

We decree the appeal and reverse the decree of the lower appellate Court and dismiss the suit with all costs.

Appeal decreed.

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CIVIL JURISDICTION.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KANTHI RAM (*Judgment-debtor*) v. BANKEY LAL AND OTHERS (*Decree-holders*).* [11th June, 1879.]

Execution of Decree—Application to set aside sale of Immoveable property—Auction-purchaser—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 311, 312, 313, 588 (*m*).

Held that, although the auction-purchaser may not apply under s. 311 of Act X of 1877 to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such order under s. 588 (*m*) of Act X of 1877.

[F., 2 A. 352 (353); R., 13 C.L.J. 535 = 15 C.W.N. 685 = 10 Ind. Cas. 148.]

THE facts of this case, so far as they are material for the purposes of this report, were as follows: Certain property was sold on the 23rd August, 1878, in the execution of a decree against one Kanthi Ram and other persons. On the 6th September, 1878, the judgment-debtors applied to the Court of first instance to set aside the sale on the ground of material irregularities in publishing and conducting it. This application was opposed by Mangni Ram, the [397] auction-purchaser, who contended that there had been no

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* Application, No. 16-B of 1879, for revision of an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 10th January, 1879.

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such irregularities in publishing and conducting the sale as alleged by the judgment-debtors. The Court of first instance found on the issue raised by this contention that the sale had been irregularly published, and made an order setting it aside. The auction-purchaser, appealed to the District Judge, who, finding that the sale had not been improperly published or conducted, reversed the order of the Court of first instance.

The judgment-debtor Kanthi Ram applied to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877, contending that the District Judge had exercised an appellate jurisdiction not vested in him by law, and that his order should be set aside.

Munshi *Sukh Ram*, for the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the opposite party.

JUDGMENT.

The judgment of the Court was delivered by

SPANKIE, J.—At first sight it appears as if the first plea had force, and that the auction-purchaser was not competent to appeal to the Judge. By s. 311 of Act X of 1877 the decree-holder or any person whose immoveable property has been sold may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting the sale. By s. 312 if no such application be made, or if it be made and the objection should be disallowed, the Court shall confirm the sale as regards the parties and the purchaser. If such application be made, and if it be allowed, the Court shall set aside the sale. Now it is clear that the decree-holder or any person whose immoveable property has been sold alone may make the application to set aside the sale. The purchaser cannot *apply* under this section. Section 313 provides for the occasion on which he may apply, *viz.*, on the ground that the person whose property purported to be sold had no saleable interest in it. Section 588 (*m*) gives an appeal under s. 312 for confirming or setting aside a sale. But suppose that the sale in favour of the purchaser has been confirmed, after objection has been disallowed under s. 312, and the judgment-debtor appeals to the [398] Judge, cannot the purchaser appear in appeal and defend the order made in his favour? It would be very hard if he could not appear. Again, if it is part of the Court's duty where an objection has been disallowed to confirm the sale as regards the parties to the suit and the purchaser, it is surely a part of the Court's duty to hear the purchaser if he appear to answer the judgment-debtor or decree-holder's objection to the sale, and if he be heard in the first Court, may he not be heard in the second, and, if so, why not as appellant as well as respondent?

In this case the judgment-debtor made the objection. The auction-purchaser put in a statement refuting the grounds upon which the objection was made. The statement was admitted by the Court, and he was allowed to examine four witnesses. The order of the Court was against him. An appeal is allowed by law, and he appeared before the Judge as appellant. We can find no illegality in the Court's entertainment of this appeal on the merits, in that we hold that, though the auction-purchaser may not be the *applicant* under s. 311, he yet may be a party to the proceedings after the application has been made, and then if there is an order against him he can appeal under letter *m*, s. 588 of the Code.

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CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* LACHMAN SINGH. [11th June, 1879.]

Court of Sesssion, powers of—High Court, powers of revision of—Act X of 1872 (*Criminal Procedure Code*), ss. 297, 472.

L made a complaint against *S* by petition, in which he only charged *S* of having committed offences punishable under ss. 193 and 218 of the Indian Penal Code but in which he also accused *S* of acts, which, if the accusation had been true, would have amounted to an offence punishable under s. 466 of that Code with seven years imprisonment. The Magistrate inquired into the charges against *S* under ss. 193 and 218 of the Indian Penal Code and directed his discharge. *L* then applied to the Court of Session to direct *S* to be committed for trial on the ground that he had been improperly discharged, which the Court of Session did, and *S* was committed for trial charged under s. 218 of the Code, and was acquitted by the Court of Session The Court of Session then, under s. 472 of Act X of 1872, charged *L* with offences punishable under ss. 193, 195, 211 and 211 and 109 of the Indian Penal Code, and committed him for trial.

[399] *Held* that such commitment was not bad by reason that an offence under s. 193 of the Indian Penal Code is not exclusively triable by a Court of Session.

Held also, *per* STUART, C.J. (SPANKIE, J., *doubting*), that the High Court is competent in the exercise of its power of revision under s. 297 of Act X of 1872, to quash a commitment made by a Court of Session under the provisions of s. 472 of that Act.

Held also, *per* SPANKIE, J., that the Court of Session was competent, notwithstanding that *L*, had only charged *S* with offences under ss. 193 and 218 of the Indian Penal Code, to charge *L*, with offences under ss. 195 and 211, if such offences had come under its cognizance.

[R., 8 Ind. Cas. 1161=33 P.R. 1910 (Cr.)=57 P.L.R. 1911.]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Conlan* and Mr. *Colvin*, for the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—In this case the accused Lachman Singh was by an order of the Sessions Judge of Aligarh, directed to be committed, under s. 472 of the Criminal Procedure Code, for trial before the Sessions Court on charges under s. 193, as well as under ss. 195 and 211 of the Indian Penal Code, and as an abettor under s. 109. In revision it is objected before us, on behalf of the accuser that this commitment is bad, because it includes the charge under s. 193, such an offence, although triable by, not being exclusively triable by the Court of Session, and that thereby the whole commitment was vitiated and rendered invalid. It is further contended on behalf of the accused that the commitment being bad it can be quashed by this Court under the powers of revision given to it by s. 297 of the Criminal Procedure Code.

On the other hand it is argued for the prosecution that such a commitment by order of the Sessions Judge was regular and valid, but that whether it be so or not, this Court has no power to interfere

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with the Sessions Judge's order as the only section of the Criminal Procedure Code which provides for the quashing of a commitment is that in the case of one made by a "competent Magistrate." It [400] would appear that there was some mistake in stating that the petitioner had been expressly committed under s. 193, an examination of the record showing that even if the Judge had ordered it, no such commitment was actually made, for the record shows no charge against Lachman Singh under s. 193, and the case, therefore, against Lachman Singh, rests on his commitment and charge under ss. 195 and 211, and contingently as an abettor under s. 109.

I am, however, clearly of opinion, against the contention of the accused's counsel, that even if the commitment by the Sessions Judge had included s. 193, it was perfectly regular and according to law. If the charge on which the order of commitment was made related, exclusively to that section, the objection might have been allowed, seeing that an offence under s. 193, although triable by, is not one exclusively triable by a Court of Session. But in the present case the order of the Sessions Judge for the commitment of Lachman Singh, not only directed a charge under s. 193, but also two other charges of greater magnitude under ss. 195 and 211, the offences defined in which, being exclusively triable by a Court of Session, a commitment on them necessarily carried with it and involved the right to inquire into and try the offence under s. 193. From the nature of the case there is one set of facts relating to all the charges, and it cannot be anticipated under which of them a conviction may take place. That will be ascertained when the trial is over, and either the innocence of the accused or the nature and extent of his guilt has been determined. But for the purposes of the accused's commitment it is perfectly competent to the Sessions Judge, while committing on the graver charges, to include the less, and, indeed, if the latter offence was excluded, the sentence on either of the other more serious offence might not be greater than that allowed under s. 193.

As to the power of this Court to interfere in such a case in revision, I have no doubt whatever. It was argued on behalf of the prosecution that the only section of the Code which provides for the quashing of a commitment by the High Court is that relating to a commitment by a "competent Magistrate," and no doubt such a power is provided for by s. 197. But we are not to understand that this was done and intended in any exclusive sense, and it cannot be [401] read as depriving the High Court of its large powers of revision under s. 297, and which powers in my judgment clearly cover such a case as the present.

The present application, therefore, for revision and quashing of the Sessions Judge's order of commitment must be refused, and the record will be returned to the Sessions Court for trial of the accused according to law.

SPANKIE, J.—Sundar Lal, patwari, was tried on the 2nd May, 1879, by the Sessions Judge of Aligarh, under s. 218 (1) of the Indian Penal

(1) Whoever, being a public servant and being as such public servant charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows is incorrect with intent to cause or knowing it to be likely that he will thereby cause loss or injury to the public or any person, or with intent thereby to save or knowing it to be likely that he will thereby save any person from legal punishment, or with intent to save or knowing that he is likely thereby to save any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

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Code, and acquitted under the following circumstances: On the 1st October, 1877, Baldeo Singh, karinda and agent of Lachman Singh, zemindar, accused Sundar Lal of making alterations in his diary and khata regarding certain sums received from cultivators. The entries in the diary on the 27th April showed the payment of the sums marginally noted (*a*) by the tenants whose names are given. These figures were said by the karinda to have been altered, and to have been originally entered as they appear in the margin (*b*). Sundar Lal at this time was patwari of Lalpur, but was about to be transferred to another village, of which Ratan Lal was patwari, both villages belonging to the same zemindar. On the 8th May Sundar Lal complained to the Collector that the zemindars of Lalpur would not sign his diary, which was sent to the Tahsildar, and reached him on the 10th May. The diary had thus passed out of the patwari's possession. On the 11th May Sundar Lal and Ratan Lal exchanged papers, and Ratan Lal gave Sundar Lal a receipt for his, stating that he had compared and found them all correct. On the 13th May Ratan Lal wrote a petition informing the Tahsildar that he had received the papers on the 12th, and that he had found erasures in them. Inquiry followed, and finally there was the complaint of the 1st October, and the patwari Sundar [402] Lal was discharged in December 1877. Then an application was made to the Sessions Judge to direct a commitment, on the ground that Sundar Lal had been improperly discharged. This application was made by Baldeo Singh, karinda and agent of Lachman Singh, aforesaid, and was granted by the Sessions Judge on the 8th April, 1879. After the case had been gone into in the Sessions, and Sundar Lal had been acquitted, the Sessions Judge, under s. 472 of Act X of 1872, committed Lachman Singh, Baldeo Singh, Ratan Lal, and Dip Chand, witnesses, to the Sessions Court on various charges.

(*a*) Bijay Ram, Rs. 184,
Dip Chand, Rs. 200.
Murli, Rs. 200.
(*b*) Bijay Ram, Rs. 104.
Dip Chand, Rs. 240.
Murli, Rs. 240.

Lachman Singh, the petitioner now before us, was charged in the calendar in that he on the 1st October, 1877, "with intent to cause injury to Sundar Lal, instituted, or caused to be instituted, a criminal proceeding against him, knowing that there was no just or lawful ground for such proceeding against him, and that such criminal proceeding was instituted on a false charge of an offence punishable with imprisonment for seven years *viz.*, forgery of a document purporting to be kept by a public servant as such; and thereby committed an offence punishable under s. 211 of the Indian Penal Code." He was also charged with abetment of the offence. In the order for the commitment of Lachman Singh, dated 17th May, it is stated that Lachman Singh and Baldeo Singh are charged under ss. 193, 195, 211, and 211 and 109. Baldeo Singh was charged in a similar way, Ratan Lal under s. 195, and Dip Chand under ss. 193 and 195 of the Indian Penal Code.

It is contended that the Sessions Judge exceeded his powers; a charge under s 193 is not exclusively triable by the Sessions Judge, nor had Lachman Singh ever given any deposition in the case; a charge under s. 211 was not exclusively triable by the Court of Session; any charge under s. 195 is groundless as regards petitioner, inasmuch as the charge in support of which the offence under s. 195 is alleged to have been committed was a charge made under s. 218 of the Indian Penal Code, in which the punishment prescribed does not exceed three years' imprisonment; these are the main contentions into which we can go. We cannot enter into the merits of the case which involve either the guilt

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of Sundar Lal, or rather the truth of the charges preferred against him by Lachman [403] Singh and Baldeo Singh, or the guilt or innocence of these persons on the charges upon which they are to be tried. The minor objections may be good or bad, they might be properly pleaded on the trial.

I entertain doubts myself whether we are at liberty to cancel a commitment made by a Sessions Judge under s. 472 of Act X of 1872. No provision has been made in the Code which expressly gives us power to do so, whereas there is a provision by which a commitment once made by a competent Magistrate can, under s. 197, be quashed by the High Court only, and only on a point of law. On the other hand if a Court of Session which is competent under s. 472, to charge a person for certain offences committed before it, or under its own cognizance, if the offence be triable by the Court of Session exclusively, charges a person for offences not triable by itself exclusively, the commitment might, perhaps, be regarded as " a material error in a judicial proceeding " and be set aside under the first paragraph of s. 297 of Act X of 1872. We are told in the statement of objects and reasons of the draft bill as now prepared for the amendment of Act X of 1872, that s. 477 has been framed so as to allow a Court of Session to charge a person for giving false evidence before itself,—" a power of which such Courts were unintentionally deprived by s. 472 of the present Code." If the commitment had been made solely on a charge of giving false evidence, the charge would not have been one exclusively triable by the Court of Session and I should have then felt a very pressing difficulty as to my power of cancelling the commitment before trial, though I should have found no difficulty in doing so *after* trial, if the case had come before the Court in any shape of appeal or revision. Happily it is not necessary now to consider whether I have power under s. 297 before trial to set aside the commitment made by a Sessions Judge under s. 472 of the Court.

I have already noticed the charge actually preferred against the petitioner Lachman Singh. It is a charge under s. 211, and the offence charged was one punishable with imprisonment for seven years and upwards. Such an offence is exclusively triable by a Court of Session—s. 211, column 7, sch. IV, Act X of 1872. The complaint of the 1st October, 1877, disclosed what, [404] if true, would have been forgeries on the part of the patwari Sundar Lal and would have amounted to an offence under s. 466 of the Indian Penal Code, which is an offence punishable with imprisonment for seven years. It is true that the complaint of the 1st October, 1877, was headed under ss. 193, 218 of the Indian Penal Code. But the offence disclosed in the body of the complaint went beyond these sections, and, as observed above, placed the patwari in a position which might have resulted in his commitment and conviction under a charge punishable with imprisonment for seven years. It is also true that the patwari was committed under s. 218, and that the Sessions Judge had directed the commitment. But the Sessions Judge was not bound to go so minutely into the case, under s. 296, as to order an inquiry into other offences of which the accused might have been guilty. He had to see whether he had been improperly discharged on the charge preferred against him. When the case was tried under s. 218, and what appeared to the Sessions Judge to be the true facts came under his notice, and very serious offences, exclusively triable by himself, appeared to have been committed by the original complainants and others, he had, under the terms of s. 472, the power to charge them with these offences. They were not committed

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before the Court of Session but came under its cognizance. The words adopted in the amended Act are "committed before it or brought under its notice in the course of a judicial proceeding." But the words in s. 472 "committed before it or under its own cognizance" will bear the same interpretation as "brought under its notice in the course of a judicial proceeding," and in point of fact these words appear to have been adopted in consequence of the ruling of the Calcutta High Court in *Reg* v. *Nomal* (1), and which is also marginally cited opposite s. 477 of the proposed amended Act. In this way Mr. Justice Norman's remarks refer to s. 172 of Act XXV of 1861, but the same words are used in that Code as in s. 472 of Act X of 1872.

I now pass on to the actual wording of the order of commitment, dated 17th May. I would say that as s. 211 involves an offence which in the latter part of the wording of the section is exclusively triable by the Court of Session, and which from the proposed charge was evidently the offence which the petitioner was considered by [405] the Court of Session to have committed, the Sessions Judge was not acting illegally in adding other charges for offences which, had they stood alone, would not have been exclusively triable by him. The graver charge carried the others into Court with it. But the offence under s. 195 is also triable exclusively by the Court of Session, and if this was an offence which came under the notice of the Court of Session when trying the charge under s. 218, he was at liberty under s. 472 to charge the petitioner with it. Whether the charge can be supported on the trial is not for us to determine before trial.

The offence under s. 193 is not exclusively triable by a Court of Session, but, as already insisted on, when the Court of Session had already ordered the commitment under s. 211 (the latter part of the section) and s. 195 for offences which were exclusively triable by him, there was no illegality in adding the other charge under s. 193. He might have omitted to do so in the order of commitment, and have added the charge after the commitment had been actually made and during trial.

If the petitioner, as he alleges, never committed this offence, he can obtain a good deliverance for himself by proving his innocence. I would dismiss the petition.

Petition dismissed.

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2 A. 405.

CRIMINAL JURISDICTION.

Before Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* SUKHARI. [13th June, 1879.]

Contempt of Court—Act XLV of 1860 (*Penal Code*), *s.* 174—*Act X of* 1872 (*Criminal Procedure Code*), ss. 471, 473.

Where a settlement officer, who was also a Magistrate, summoned, as a settlement officer, a person to attend his Court, and such person neglected to attend, and such officer, as a Magistrate, charged him with an offence under s. 174 of the Indian Penal Code, and tried and convicted him on his own charge, *held* that such conviction was, with reference to ss. 471 and 473 of Act X of 1872, illegal.

[F., 9 C.P.L.R. 26 (Cr.); R., 27 P.R. 1903 (Cr.)=21 P.L.R. 1904.]

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(1) 4 B.L.R.A.Cr. 9.

1879 JUNE 13. — CRIMINAL JURISDICTION. — 2 A. 405.

THIS was a reference to the High Court by the Sessions Judge of Azamgarh under s. 296 of Act X of 1872. Mr. J. Vaughan, who was a settlement officer appointed under Act XIX of 1873, [406] and who was at the same time a Magistrate of the first class, in the exercise of the powers conferred upon him by Act XIX of 1873, summoned to his Court one Sukhari, whose attendance he considered necessary for the purpose of certain business before him. Sukhari neglected to attend on the day specified in the summons, whereupon Mr. Vaughan, acting as a Magistrate of the first class, issued a warrant for his arrest, and on his appearance proceeded to try him for the offence of disobeying the lawful order of a public servant, an offence punishable under s. 174 of the Indian Penal Code, and convicted him of that offence. The Sessions Judge considered that the proceedings of Mr. Vaughan were contrary to law, and referred the case to the High Court for orders.

ORDER.

The High Court made the following order:

OLDFIELD, J.—I am of opinion that the conviction is illegal with reference to the provisions of ss. 473 and 471 of the Criminal Procedure Code.

By the former section no Court shall try any person for an offence committed in contempt of its own authority, and an offence under s. 174 of the Indian Penal Code is such an offence, and the procedure prescribed in s. 471 shows that it was not intended that an officer should try such an offence in his capacity as Magistrate when committed before him in his capacity as a settlement officer. It is enacted that the Court may, after making such preliminary inquiry as may be necessary, either commit the case itself or send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged.

When the officer presiding over the Court exercises revenue as well as Magistrate's jurisdiction, it will not be a proper compliance with these provisions for the officer presiding to make the case over to himself as Magistrate; that will not be sending the case to any Magistrate within the meaning of the section. The obvious intention of the law is that the officer before whom the offence was committed shall not charge and try the accused person on his own charge.

Conviction quashed.

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2 A. 407.

[407] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Straight.

NARHAR SINGH AND ANOTHER (*Defendants*) v. DIRGNATH KUAR (*Plaintiff*).* [16th June, 1879.]

Hindu Widow—Maintenance.

Held, in a suit by a Hindu widow for maintenance, that the circumstance that she was not a childless widow but had had a son who had died a minor subsequently to his father, was not a ground for reducing the allowance she would have been reasonably entitled to had she been a childless widow.

[R., 12 A. 558 (581); 24 B. 386 (392); 1 N.L.R. 33 (37).]

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* First Appeal, No. 178 of 1878, from a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 24th August, 1878.

1879 JUNE 16.

APPELLATE CIVIL.

2 A. 407.

THIS was a suit in which the plaintiff, a Hindu widow, claimed a declaration of her right to an allowance of Rs. 150 per mensem for her maintenance. A five annas four pies share in each of certain villages formed the joint and undivided estate of three brothers, Darshan Singh, Narhar Singh, and Harihar Singh; Darshan Singh died leaving a widow Dirgnath Kuar, the plaintiff in the present suit, and a minor son, Rudr Mani Singh, who died in December, 1876. While Rudr Mani Singh was alive, the defendants had maintained his mother, but they ceased to do so after his death. Dirgnath Kuar accordingly instituted the present suit for maintenance, alleging that as the widow of Darshan Singh and mother of Rudr Mani Singh, she was entitled to maintenance, that the defendants were in possession of the family estate, that they refused to maintain her, and that regard being had to the position of the family she was entitled to an allowance of Rs. 150 per mensem. The defendants contended, *inter alia*, that the share of the annual profits of the family estate received by her husband amounted to Rs. 2,558-4-0 only, and that Rs. 10 per mensem was a sufficient allowance for the plaintiff as she was a childless widow. The plaintiff alleged that that share amounted to Rs. 2,747-14-4. The rent-rolls relating to the estate showed that that share amounted to Rs. 3,141-1-10. The Court of first instance observing that one-third of the profits received by a husband had often been fixed by the Courts as a proper maintenance for his widow, that in some cases no regard had been had to the amount of profits received by him, that the rents entered in the rent-rolls of an estate were for different reasons never realised, and that an estate incurred other expenses than the usual expenses, [408] considered that, regard being had to the position of the family, and the food, dress, and servants, &c., required, by a widow in the family, Rs. 60 and not less was a proper monthly allowance for the plaintiff, and it gave the plaintiff a decree accordingly.

The defendants appealed to the High Court, contending that the sum allowed to the plaintiff as maintenance was in excess of what she was entitled to with reference to the principle on which maintenance to Hindu widows is allowed.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Lala *Ram Prasad*, for the appellants.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

STRAIGHT, J.—This case resolves itself into a mere question of what is a reasonable amount to fix as the allowance for maintenance to the respondent. It must be taken that, with the exception of the first, all the other grounds of appeal are abandoned, in fact while admitting the liability of his clients to the payment of maintenance to the respondent, the whole of the argument and observations of the pleader for the appellants were adduced to the question of amount and to the extravagance of the sum fixed by the Subordinate Judge. It being conceded, therefore, that the respondent is entitled to maintenance at the hands of the appellants, the duty cast upon this Court is to determine, as a matter of equity, whether, having regard to all the circumstances of the case, the amount decreed in the Court below is unreasonable. It was urged on the part of the appellants, that the position of a "Hindu mother" of a child deceased since her husband's death is, so far as concerns the principle upon

1879 June 16. — Appellate Civil. — 2 A. 407.

which allowance of maintenance has to be computed, a very inferior one to that of a "Hindu widow" without a child or children. As a childless widow, it is said, many ceremonial duties devolve upon her, entailing expenses which ought to be taken into account, whereas if she bear a son, most if not all of those pass over to him or to his representatives. In plain terms it amounts to this, that a "childless widow" is entitled to allowance on a higher scale than a "widowed mother." There was nothing either in the argument addressed to us nor in [409] the circumstances of this case itself to induce us to draw such a distinction here, and it is impossible to avoid remarking that if matters of feeling can be admitted, and we are not sure they should not in arriving at the amount of what is a reasonable allowance, the case of a "widowed mother" deprived of her only son and the contingent advantages that might have accrued to her had he survived seems the more deserving of sympathy and consideration. It is a fact not to be lost sight of in this case that, down to the death of the respondent's son, Rudr Mani Singh, on the 2nd December, 1876, the appellants made due provision for her and her child according to their position and the family custom, but immediately after the latter's decease they stop the allowance not only for the one but as to both. Such a proceeding appears indefensible and altogether inconsistent with the position they now take up. They are actually in enjoyment of the profits of the share of the villages to which, had the respondent's husband lived, he would have been entitled, and it is relatively to the amount of these profits that the sum to be allowed here should be calculated. No precedents were quoted to us fixing any principle of computation to apply to a case like the present, and it may well be that there are none, for the question that now arises involves equitable considerations that must of necessity be affected by the peculiar circumstances of each individual case. In our opinion this appeal should be dismissed and the order of the Subordinate Judge be affirmed with costs.

Appeal dismissed.

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2 A. 409.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

LACHMI NARAIN LAL AND ANOTHER (*Defendants*) *v.* SHEOAMBAR LAL AND OTHERS (*Plaintiffs*).* [20th June, 1879.]

Pre-emption—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii*, *art.* 10.

Held, in a suit for pre-emption, where the property had been purchased by the mortgagee in possession, that the purchaser obtained physical possession of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed.

Held, therefore, that the contract of sale having become completed on the payment of the purchase-money, the suit being brought within one year from the date of such payment, was within time.

[410] THIS was a suit for pre-emption founded upon a contract contained in a village administration-paper. The facts of the case are

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* Second Appeal, No. 1371 of 1878, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 17th September, 1878, modifying a decree of Munshi Mata Din, Munsif of Nagra, dated the 15th May, 1878.

sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendants appealed from the decree of the lower appellate Court in the favour of the plaintiffs The defendants contended that the suit was beyond time, not having been instituted within one year from the date of the sale.

1879 JUNE 20. — APPELLATE CIVIL. — 2 A. 409.

Lala *Lalta Prasad*, for the appellants.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court, so far as it related to the above contention, was as follows:—

OLDFIELD, J.—The plaintiffs sue to obtain possession of a certain share in property sold under a deed of sale dated 15th October 1873, to the defendants by right of pre emption under the conditions of the administration-paper of the mauza. It appears that the vendees are mortgagees in possession of the property, and, under the terms of sale, Rs. 200 were to be paid in cash to the vendor (mortgagor), and Rs. 98 to go in redemption of the mortgage. The plaintiffs brought a suit asserting their right to recover the property sold by pre-emption, but it was dismissed on 31st March, 1875, by the Court of first instance, on the ground that the sale contract had not become complete so as to give a right of pre-emption by reason of the vendor not having received the purchase-money, and this decision was affirmed in appeal. The vendor subsequently sued to recover the purchase-money with interest from the vendees, and obtained a decree on the 13th March, 1877, for Rs. 298, the consideration of the sale, and Rs. 70 interest. The plaintiffs have now brought the present suit, and the lower appellate Court has decreed their claim, subject to their depositing in Court, within thirty days of the decree becoming final, Rs. 200 payable as purchase-money, and Rs. 98 for redemption of the mortgage. The objections taken in second appeal are invalid. The limitation law which governs this case is Act XV of 1877, and the period will run from the date on which the purchaser takes under the sale sought to be impeached physical pos-
[411] session of the property sold. As the purchaser in the case before us was also the mortgagee in possession, he must be held to have taken physical possession under the sale from the date when the contract of sale became complete; his possession as mortgagee became then possession as proprietor under the sale, and with reference to the former decision between the parties, the contract only became completed on the payment to the vendor of his purchase-money, and it is not urged that a year has elapsed from that date so as to bar the suit. There is nothing to show that the lower appellate Court has mis-construed the terms on the administration paper which support the plaintiff's preferential right of pre-emption: The second objection fails, as we cannot re-open a question decided between the parties in the former suit. The fourth and fifth pleas have no force. The plaintiffs cannot be liable to pay to defendants the interest decreed against them in the suit brought by the vendor to recover his purchase-money; it was no part of the purchase-money, which is all the plaintiffs can be called on to pay, and the former suit brought by the plaintiffs will be no bar to the present suit, as with reference to the decision in the former suit, the plaintiffs have now obtained a new cause of action.

The appeal is dismissed with costs.

Appeal dismissed.

1879
JUNE 26.

FULL
BENCH.

2 A. 411
(F.B.).

2 A. 411 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

GAURI SHANKAR AND ANOTHER (*Plaintiffs*) *v.* MUMTAZ ALI KHAN (*Defendant*).* [26th June, 1879.]

Government Ferry—Lease—Regulation VI of 1819—*Illegality of Contract—Act IX of* 1872, *s.* 23.

M took a lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease not to underlet or assign the lease without the leave or license of the Magistrate. *M* subsequently admitted *B* as his partner to share with him equally in the profits to be derived from the lease. *Held* that such partnership was not void by reason of the covenant not to underlet or assign the lease.

Special Appeal No. 119 of 1872, decided on the 1st August, 1872, (1) overruled.

[**F.**, 14 C.P.L.R. 67 (69); **Appl.**, 26 M. 156 (157); **Appr.**, 24 B. 622 (627); **R.**, 35 M. 582=10 Ind. Cas. 126=21 M.L.J. 425=9 M.L.T. 459=(1911) 1 M.W.N. 371; **D.**, 10 A. 577 (579)=A.W.N. (1888), 215.]

[412] THE facts of this case appear sufficiently for the purposes of this report from the order of the High Court (SPANKIE, J., and OLDFIELD, J.) referring the case to the Full Bench.

OLDFIELD, J.—Mumtaz Ali, the defendant and respondent, held a farming lease of certain ferries from Government, from 1st October, 1875, to 30th September, 1878, and by agreement dated 13th October, 1875, admitted one Badal to partnership in the said lease. It is asserted by the appellant that one Khushali Ram obtained a decree against Badal, and caused his share in the farm to be attached, and that a sazawal was appointed to make collections, the income remaining in the hands of defendant, respondent. Subsequently defendant, respondent, bought in the name of Khwaja Hasan, the said decree, and advertised for sale Badal's interest in the farm, and on 29th September, 1877, Badal sold his interest to plaintiff, who satisfied the decree. Plaintiff now seeks to have his right declared to receive profits under the terms of the agreement dated 13th October, 1875, and to superintend and keep an account, as before, of the income: also to recover his share of the profits, under the terms of the agreement, from 1st October, 1876, to September, 1877, a period of one year, with interest. The defendant, respondent, does not dispute that he admitted plaintiff to partnership in the farm under the deed dated 13th October, 1875, but pleads that the contract is absolutely void with reference to the provisions of section 23 of Act IX of 1872, as it was illegal to admit a *shikmi* partner in the ferry farm, or to sub-lease it, under the provisions of s. 2, Regulation VI of 1819, and paragraphs 11 and 12, Circular Order No. 22 of 1874, and paragraph 11 of the conditions of the ferry farm granted by the Magistrate.

There were other pleas to the effect that, under the deed of 13th October, 1875, Badal obtained no right of possession or power of superintendence, &c.; that, during the first year of the partnership, the boats and other things belonging to Badal were sold in execution of the decree, and during the second year he could not collect the said materials for the

* First Appeal, No. 111 of 1878, from a decree of Maulvi Nasar-ul-lah Khan, Subordinate Judge of Banda, dated the 22nd July, 1878.

(1) Unreported.

1879 JUNE 26. — FULL BENCH. — 2 A. 411 (F.B.).

bridge, and committed a breach of contract; and on defendant's petition the Magistrate, on 16th October, 1876, declared the *shikmi* partnership and sub-farm to be invalid, and disallowed it, and held defendant, respondent, respon-[413]sible for everything; and in consequence of the Magistrate's order defendant, respondent, cancelled the contract with Badal from October, 1876. There are also pleas to the effect that the account of profits is wrong; that defendant, respondent, did not realise the profits as alleged, and a considerable sum of money is due to defendant, respondent, from Badal and his representatives on account of profits, expenses, and losses relating to the first year of Badal's partnership. The above are the principal pleas taken by defendant, respondent, in the Court below. The lower Court dismissed the suit, holding that the contract on the part of Mumtaz Ali, defendant, and Badal is absolutely void, upon the grounds taken by the defendant, which have been referred to above, and a decision of this Court (1) has been cited in support. In my view the decree of the lower Court cannot be maintained. There is nothing in Regulation VI of 1819 which makes a contract of the nature of that between defendant and Badal illegal, nor has the Circular Order No. 22 of 1874 of the Executive Engineer, Allahabad Division, the force of law, assuming that the contract is forbidden by that Circular; so we cannot say that this contract is void under the two first grounds in s. 23 of the Contract Act, and we cannot hold it to be void under any of the other grounds which render a contract absolutely void. Its object is not fraudulent. We cannot say that it involves or implies injury to the person or property of another, or that the Court can regard its object as immoral or opposed to public policy. There will be nothing, therefore, to render this contract void absolutely under the Contract Act; and though Mumtaz Ali, in making it, may have transgressed the terms of his lease from Government, the contract as between him and Badal will be valid and an action on it maintainable, which may be enforced for damages, if not for specific performance. But if the lease is perused, it is not clear that a partnership contract of the kind was contrary to the conditions of the lease. The only section pointed out as disallowing it is s. 11; but that would appear to refer to a sub-lease or a transfer and not to a co-partnership, and the remedy is, under it, in the Magistrate's own hands, by cancelling the original lease and fining the farmer; and when this has not been done and there is knowledge of the lease, it may be presumed the authorities did not object.

[414] The grounds, therefore, on which the lower Court has dismissed this suit cannot be sustained, and the suit should be tried on the merits. It may be noticed that it is asserted that the Magistrate on defendant's (respondent's) petition of the 16th October, 1876, disallowed the partnership, and defendant, respondent, in consequence cancelled it: whether or not it ceased to have effect validly is a point which must be tried with the other points raised in the pleadings. Since the lease to defendant, respondent, Mumtaz Ali, has come to an end, so much of the relief sought as asks for supervision of the farm cannot be granted, assuming this relief was otherwise allowable.

I would reverse the decree and remand the suit for trial on the merits; costs to follow the result.

SPANKIE, J.—I am quite of the same opinion, and would make the order proposed. But before doing so, as the judgment of this Court (1) appears to support the judgment of the lower appellate Court, it, would,

(1) Special Appeal, No. 119 of 1872, decided on the 1st August, 1872, unreported.

1879 JUNE 26. — FULL BENCH. — 2 A. 411 (F.B.).

perhaps, be better to refer the case to the Full Bench in order that the point may be considered, whether or not the agreement made with the plaintiff in this case is null and void for the reasons assigned by the lower appellate Court.

OLDFIELD, J.—I concur in making the proposed reference.

Pandit *Ajudhia Nath*, Babu *Oprokash Chandar Mukarji*, and Lala *Ram Prasad*, for the appellant.

Mr. *Conlan*, Shah *Asad Ali* and Mir *Akbar Husain*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C.J.—The opinions expressed in the order of reference in this case appear to me to be substantially sound. Badal's claim under his agreement with Mumtaz Ali could not be made good against the Government or in any way against the profits of the ferry, but only against Mumtaz Ali himself personally, and in that light could only be measured in damages, and a contract between him and Mumtaz Ali to any other effect could not be enforced. I am clear, therefore, that Badal had no claim for specific performance, [415] so far as the subject-matter of the Government lease to Mumtaz Ali Khan was concerned. This, however, does not exclude Badal's claim against Mumtaz Ali for damages. As to the case decided by this Court in 1872 (1), I am not prepared at this distance of time to say that it is exactly in point. I observed that the judgment in that case states that it was admitted by the appellant's pleader that the claim for possession of a share of the ferry in suit was unmaintainable, and it clearly was so; but if so the claim there was different from that pleaded in the present case, which is that of a *shikmi* partner suing for his rights under his personal sub-contract. I cannot say more about the judgment of 1872 (1), as the record has long since gone back to the district, Banda, from whence it came. I would answer in accordance with the referring order.

PEARSON, J.—The view taken by the learned Judges who have made this reference appears to me on consideration to be more correct than that taken in the former decision of 1872 (1).

OLDFIELD, J. (SPANKIE, J., concurring).—We adhere to the view already expressed in our order of remand.

The Division Bench, following the judgment of the Full Bench, decreed the appeal, and remanded the case to the Court below for trial on the merits.

Cause remanded.

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(1) Special Appeal, No. 119 of 1872, decided on the 1st August, 1872, unreported.

2 A. 415.

1879 JULY 10.

APPELLATE CIVIL.

2 A. 415.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

HIRA LALL (*Plaintiff*) *v.* GANESH PRASAD AND OTHERS (*Defendants*). [10th July, 1879.]

Act XIX of 1873 (*N.W.P. Land Revenue Act*), ss. 43, 83, 241, *cl.* (*b*)—*Vendor and Purchaser—Agreement—Jurisdiction of Civil Court—Cause of Action—Assessment of Revenue.*

The purchaser of a certain estate paying revenue to Government agreed with the vendors, shortly after the sale that they should retain a certain portion of such estate free of rent and that he would pay the revenue payable in respect of such portion. In 1853, in a suit by the vendors against the purchaser to enforce this agreement, the Sudder Court held that the revenue payable in respect of such portion of the estate was payable by the purchaser. In 1875, on a fresh settlement of the estate, the representatives in title of the [416] purchaser applied to the settlement officer to settle such portion of the estate with the representative in title of the vendors. The settlement officer refused this application, but it was subsequently allowed by the superior revenue authorities. The representative in title of the vendors then sued the representatives in title of the purchaser in the Civil Court, claiming "that he might, in accordance with the agreement between the vendor and the purchaser, be exempted from paying revenue in respect of such portion, as against the defendants, without any injury to the Government: that the defendants, might be ordered to pay, as heretofore, such revenue and that the defendants might be ordered never to claim or demand from him any revenue they might be compelled to pay in respect of such portion."

Held per SPANKIE, J., that assuming that the agreement between the vendors and the purchaser was enforceable, the act of the defendants in moving the settlement officer to settle such portion of the estate with the plaintiff gave the plaintiff a cause of action. Also that the object of the plaintiff's suit being to obtain a declaration that, as between him and the defendants, the latter were bound to pay revenue in respect of such portion, the suit was not barred by cl. (*b*), s. 241 of Act XIX of 1873. Also that, although the revenue authorities might regard the decision of the Sudder Court as binding on the parties then before the Court, for the currency of the then settlement, that decision, that settlement having expired and s. 83 of Act XIX of 1873 having come into force, could not control the power of the revenue authorities to settle the land in question with the plaintiff who was its proprietor.

Held per OLDFIELD, J., that, with reference to ss. 43 and 83 of Act XIX of 1873, the Civil Courts could not relieve the plaintiff of his liability to pay revenue.

Held, by the Court, that, in the absence of proof that the agreement by the purchaser was intended to extend beyond the period of the settlement then current, and that it was binding upon his representatives in title, the plaintiff could not obtain the declaration which he sought.

THIS was an appeal to the High Court from an original decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 29th February, 1879, dismissing the plaintiff's suits. The facts of the case are stated in the judgment of Spankie, J.

Mr. Conlan, Mr. *Howard*, and Lala *Ram Prasad*, for the appellant.

The Senior Government Pleader (Lala *Juala Prashad*), Munshi *Hanuman Prasad*, and Babu *Oprokash Chandar Mukarji*, for the respondents.

JUDGMENT.

SPANKIE, J.—The plaintiff, appellant, alleges that Sheo Ghulam Singh, Beni Singh, and Maidan Singh were the owners of a six-annas share in taluka Mawaiya in the district of Allahabad: they, [417] joining with the owners of a five-annas share in the same estate, sold,

1879 JULY 10. — APPELLATE CIVIL. — 2 A. 415.

under a deed of sale of which the correct date is not known, their zamindari rights to one Ghulam Muhammad, on condition that the vendors should remain, in perpetuity, in possession of 1,845 bighas of land as their "*malikana*," without payment of rent, and the rateable Government demand, the latter being payable by the vendees, along with the revenue of the remaining portion of the estate sold: Ghulam Muhammad sold his right to Ghulam Ali, who again sold it to Dulhin Begam, the wife of Ghulam Ahmad, and she transferred it to the defendants: the original vendors sold, on the 7th January, 1851, one-half share of the resumed *malikana*, also called "*nankar*," land to Lala Madho Prasad: in the course of time after his death this share passed into the hands of Lala Makhan Lal by auction, in execution of a decree, held on the 20th January, 1873: Makhan Lal died on the 15th June, 1877, and the present plaintiff is his brother, and the proprietor and in possession of the lands in dispute: in the recent settlement the defendants prayed the Settlement Officer to exempt them from the payment of the rateable revenue of these lands, and to make the plaintiff responsible for it: the Settlement Officer on the 28th January, 1875, rejected their prayer: on appeal to the Commissioner, that officer, on the 15th August, 1875, held the plaintiff responsible in future for the rateable revenue payable on the land: the Board of Revenue, on the 1st September, 1875, and again in review on the 23rd December, 1875, affirmed the Commissioner's order.

The plaintiff desires to enforce the original contract between the vendors and vendees, whose representatives the parties to the suit are, as against the defendants, and he avers that on the 14th March, 1853, a similar claim regarding this "*nankar*" land was decided by the late Sudder Dewany Adalat in appeal (1): that decision was final in the case, and is binding upon the present defendants. The relief sought by the plaintiff is as follows: (i) That in accordance with the original contract entered into between the contracting parties, the plaintiff be exempted from paying the rateable revenue as against the defendants without any injury to Government: (ii) That the defendants be ordered to pay, as hereto-[418]fore, the revenue of those lands: (iii) That the defendants be ordered never to claim and demand from the plaintiff the revenue they may have to pay for those lands.

The defendants contended that the suit was not cognizable by the Civil Court, and the Settlement Courts had full power to assess the revenue upon the plaintiff, the revenue being payable by the person in proprietary possession of the land, whether or not it has been held as "*nankar*" and rent-free. They also contend that the plaint discloses no cause of action against them: the settlement orders are not an award of right in favour of defendants with respect to the land: the Commissioner and Sudder Board of Revenue simply declare the Government right. They further urge that the original vendees never remitted the rent in perpetuity (*naslan bad naslan*), and if they did, the remission could only be legally in force as against the grantor personally, it cannot be enforced against his heirs and representatives: the decree of the Sudder Dewany Adalat (1) referred to by plaintiff cannot control the authority and powers of Settlement Officers whose orders are final and conclusive. They also state that the extent of the "*nankar*" land has been wrongly given in the plaint.

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(1) *Sheo Ghulam Singh* v. *Dulhin Begam*, 8 S.D.A.R., N.W.P., 138.

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The Subordinate Judge laid down two issues: (i) Whether the settlement order holding the plaintiff liable to pay the Government revenue gives rise to a cause of action against the defendants or not, and whether a suit for a cancelment of such a settlement proceeding is cognizable by the Civil Court or not: (ii) Whether the defendants' predecessors, having remitted in perpetuity the rent of the land in suit, had taken on themselves the payment of it, and whether that act can be enforced in the plaintiff's favour as against the defendants or not. On the first issue the Subordinate Judge held that, if the plaintiff claims to have been originally in possession of the land as "*lakheraj*" without payment of revenue, and that the Settlement Officer had assessed it with revenue, the Settlement Officer's order might be the ground of an action, but the suit should be instituted against Government; but if the plaintiff means that the original vendees had taken upon themselves to pay the revenue of the land in dispute, the cause of action would accrue on the date on [419] which the plaintiff was compelled to pay the revenue for defendants: it might be assumed that when the defendants presented this petition that the plaintiff should be made to pay the revenue, their proceeding gave a cause of action to plaintiff: but the Settlement Officer was competent to cancel the maafi grant by a zemindar, and to make the settlement with any one, and although the plaintiff does not ask that his land should continue free of rent, yet his prayer, that the liability for payment of the rent of the land in suit which has been imposed on him by the Settlement Officer may be removed from him and transferred to the defendants, is one opposed to the terms of s. 241 of Act XIX of 1873. On the second issue the Subordinate Judge's decision is not quite clear. He appears to think that the plea of defendants was based on s. 81 of Act XIX of 1873, and he cites it as in the margin: the defendants had stated that the agreement was entered into in 1830, when the term of settlement expired: none of the parties to the contract were alive, and the performance of the contract could not be enforced against the defendants. This plea, however, the Subordinate Judge considers that he is not called upon to determine, because he finds that the suit in the shape in which it has been brought is not cognizable. He, therefore, dismissed the plaintiff's claim with costs. It is now urged in appeal that the order of the superior settlement authorities declaring that the plaintiff was liable to pay rent on his holding having been made at the instance of the defendants, the lower Court is wrong in finding that there was no cause of action at the date of the suit. The second plea urges that the land being held rent-free under a valid and subsisting contract, and the defendants having ignored that contract in their petition to the Settlement Officer, plaintiff was compelled to sue them in order to establish their liability to himself to continue to pay to the Government the rent due on the holding under the terms of the contract. The third plea insists that as the land had been held rent-free for years prior to the passing of Act XIX of 1873, under a judicial decision, the Settlement Officer had no power to assess the [420] said land with revenue: the lower Court had applied s. 241 erroneously to this suit: the plaint raises no question in or by which the interests of Government are concerned or prejudiced: the purpose of the

Grants of land held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, shall be held valid as against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate, which was current at the date of the grant.

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suit is to have it declared that, as between plaintiff and defendants, the latter are liable for the payment of the rent of the former's holding: the present claim in no way tends to weaken the security for the payment of the Government revenue: it is not denied that the land is liable for the Government demand.

On the assumption that the plaintiff can sue to enforce the original contract of sale, as made between the original vendors and vendees, it must, I think, be held that the act of defendants in moving the Settlement Officer to assess the revenue of the land against the plaintiff, and to relieve them of all the liability on account of it, did give a cause of action to the plaintiff. I would, therefore, determine the first plea in his favour. I would also say that the object of the suit appears to be one for the purpose of obtaining a declaration that, as between plaintiff and defendants, the latter are bound to pay the rateable revenue assessed upon the land, and, therefore, it is not one which is barred by s. 241, cl. (*b*), Act XIX of 1873. The plaintiff does not sue to set aside the order of the Revenue Courts. Nor does he deny that the Government is entitled to its revenue upon the land. But he prays that the defendants may be ordered for the future to pay the amount themselves in accordance with the terms of the contract. With such an order in his favour plaintiff believes that he would be able to recover annually from the defendants whatever he may have been obliged to pay to the Collector as Government revenue. The circumstances of this case are not those of a grant of rent-free land by a proprietor. The vendors sold all their rights and interest in their property to the vendees, reserving to themselves the possession of 1,845 bighas of land to be held by them rent-free as "*nankar*," and the vendees bound themselves to pay the *malguzari* of these lands to the Government. It appears to have been part of the sale consideration or of an "*ikrar-nama*" or deed of agreement dated the 26th April, 1831, executed after the sale-deed. I fail, therefore, to see that these lands can be regarded as rent or revenue-free grants by the proprietor or any other unauthorised person to which the provisions of the Bengal Regulation XIX of 1793, Act X of 1859, or of Act XIX of 1873 could apply. There was no application made by a **[421]** proprietor to resume a rent-free grant, or to assess rent, as payable to the proprietor, on land held rent-free previous to the passing of Act XIX of 1873 under a judicial decision. Nor was there any claim to hold land free of revenue not recorded as revenue-free. The lands were held rent-free by a private arrangement between the original vendors and vendees, and by the same private arrangement, or one executed shortly afterwards, the vendees bound themselves to pay the revenue rate on the lands to the Government. This, therefore, is not a case in bar of which it might be pleaded that s. 79, and other sections of Act XIX of 1873, applied. The payment of the Government revenue has always been made, and the arrangement made in 1831 did not endanger it. These remarks dispose of the fourth and fifth pleas in appeal.

With regard to the third plea, I cannot say that the Revenue Courts were bound by the decision of the late Sudder Dewany Adawlat (1), dated the 14th March, 1853. The Commissioner, whose order of the 15th April, 1875, was affirmed by the Sudder Board of Revenue, states in his order that the decree was not with the papers in the record before him, but he did not think that it could have been intended to extend beyond the time of the then existing settlement, and irrespective of all the proprietary

(1) *Sheo Ghulam Singh* v. *Dulhin Begam*, 8 S.D.A. Rep. (N.W.P.) 138.

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changes that might take place in these particular lands. But with reference to the terms of s. 83 of Act XIX of 1873 he considered that the land was chargeable with the payment of the Government revenue. This section provides that no length of rent-free occupancy of any land, nor any grant of land by the proprietor, shall release such land from its liability to be charged with the payment of Government revenue. The defendants moved the Settlement Officer to make it so chargeable as they were not the proprietors, whereas the plaintiff was the proprietor. Indeed, he now mentions that he is so. It is the rule of the Settlement Department to make under s. 43 of Act XIX of 1873, the settlement with the proprietor of the land. In this instance, the defendants did not deny the plaintiff's title to the land, and the judicial decision on which so much stress is laid is, as will be presently seen, not one declaring the land revenue free as against the Government, but one that declares the defendants then could neither claim rent nor revenue from the plaintiff in [422] that suit. I cannot, therefore, hold that the Commissioner and Sudder Board of Revenue were debarred by that decision from assessing the proprietor in possession of the lands with the Government revenue charged upon it, and in exempting the defendants who were not the proprietors of the land, and were not so recorded in the new settlement record, from all liability with respect to it. In the suit before the Sudder Dewany Adawlat in 1853, the Settlement Officer had enhanced the jama of the taluka, and had been induced by the defendants to charge the rateable rent of the increase upon the plaintiff's predecessors. The Settlement Officer by an order dated the 15th January, 1839, did so. The Judges of the Sudder Dewany Adawlat certainly do find that the conditions of the sale deed were that the vendors should be allowed to retain possession of 1,845 bighas of *sir*-land free of either rent or revenue. But the Court also held that the Settlement Officer was of course justified in assessing the jama of the taluka with reference to the produce of every bigha which was not held rent-free under a recognised Government grant, but he was not at liberty to demand payment from those who had been by private contract exempted from payment of either rent or revenue, contrary to the agreement entered into between the parties. The Court's judgment goes on to show that in 1831 the Benares Court of Appeal, by order dated the 6th May, distinctly ordered the *malguzari* of the 1,450 bighas should be taken from the purchasers, Shah Muhammad Khan and others, and *not* from the old zemindars. But this Ghulam Muhammad was one of the original vendees whose names were recorded in the sale-deed, though the real purchaser was Ghulam Ahmad, whose dependents they were, and as the Judges of the Sudder Dewany Adawlat found that these vendees had admitted their liability to pay the revenue, and in fact had paid it after the sale had fully operated, they very reasonably would and did hold that the defendant in that suit was not at liberty to take rent in any shape from the then plaintiffs, for the defendant was Dulhin Begam, the widow of Ghulam Ahmad, referred to above as the real purchaser. During the current settlement at least she could not divest herself of the liability to continue to pay the Government revenue on these lands. When the settlement had expired and Act XIX of 1873 came into operation, s. 83 of which declares that [423] no length of rent-free occupancy, nor any grant of land made by the proprietor, shall relieve such land from its liability to be charged with the payment of Government revenue, the judicial decision of the Sudder Dewany Adalat in 1853 might readily be regarded by the Revenue Courts as binding on the parties then before the Court,

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and for the term of the current settlement, and as not in any way controlling their power to assess the land and settle it with the admitted proprietor. So far then as the third plea contends that the superior Revenue Courts had no power to assess the land in dispute with revenue, and if it is meant to urge that they exceeded their jurisdiction in doing so, it fails altogether.

I am now brought to the consideration of the most important plea in the case, and that is the second. If the alleged contract is valid and still subsisting between the parties, it may be that the plaintiff is entitled to the declaration for which he prays. There is no doubt that there was a deed of sale, and that there was subsequently on the 26th April an "*ikrar-nama*" or agreement between the original vendors and vendees, which latter instrument the Judges of the Sudder Dewany Adawlat believed to have been executed because the vendors doubted the good faith of the vendees. The Court also has held that this "*nankar*" land was included in the sale. The judgment states that "in a proceeding of the Benares Court of Appeal under date 6th May, 1831, the Court find it stated that Shah Muhammad Khan and others, petitioners, had represented to the Court that Medhu Singh and other zemindars had sold their eleven-anna share to them with the reservation (ba istasnai) of 1,450 bighas *sir do biswe nankar malikana haqi-khud*, and that as the *malguzari* of this excepted land was payable by them (the petitioners) and not by the sellers, they prayed that the revenue might be demanded from the petitioners, and not from the sellers and that the *dastaks* which had been issued against the latter might be recalled, and an order to the above effect was passed accordingly: the obvious meaning of the passage in the vernacular above quoted is that the old zemindars had stipulated that they should be allowed the 1,450 bighas *free of rent*, and the Court cannot accept the construction which the respondent would put upon the words, *viz.*, that the land was altogether excepted from the sale, nor that suggested by the Principal Sudder Amin, *viz.*, that all the [424] petitioners meant was that the revenue of the 1,450 bighas should be paid by the old zemindars through them, and not direct into the Government treasury."

We must, therefore, accept the Court's judgment as final as to the fact that the land in suit was included in the sale in 1831, and this, indeed, is not denied by the defendants. We must also admit that the vendees remitted the rent of 1,450 bighas, and also that they bound themselves to pay the Government revenue on the land.

But the Court's judgment is by no means clear as to the exact conditions of the deed and *ikrar-nama* on certain very material points, and if the decision is obscure on these points, the decree is not clearer. The Court decreed in favour of the appellants (before the Court) for possession of the land exempt from the payment of revenue and *wasilat* to the amount claimed by them. But the decree is silent as to the duration of this exemption from paying revenue. Neither the sale-deed nor the *ikrar-nama* were before the Court; the latter instrument, indeed, was filed in appeal, but was not produced in the Court of first instance. The Court, therefore, would not admit it in evidence, considering that it would be improper and opposed to judicial usage to do so. At the same time, however, they state that they "are enabled to form an opinion regarding its contents and purport from the secondary evidence adduced by the appellants." This admission of secondary evidence to prove the contents of a document which they might have allowed to be filed, if they pleased, would now be regarded as equally opposed to judicial usage and

practice. It is most unfortunate that the document was not considered, as the excuse assigned by the appellants for not producing it before the Subordinate Judge was not to my mind at all satisfactory. They said that the opposite party had by a ruse contrived to get temporary possession of it, and that while it was thus in their custody they fraudulently made certain alterations in it, which rendered its production in a Court of Justice impossible. Yet they did produce it before the Sudder Dewany Adawlat and they do not explain how they again got possession of it. The other side might have said with some show of reason that it was not produced in the first Court, because it bore marks of fraudulent alteration, and that its production before the appellate Court was with a view to prejudice the case against respondent.

[425] However, the Court accepting the secondary evidence has not gone further in declaring the nature and conditions of the deed of sale, or after-agreement, than this that the sellers were to be allowed to retain possession of 1,450 bighas of *sir*-land free from either rent or revenue. The decision does not say whether the arrangement is one solely between the parties and to have force during the current settlement, or whether it is binding for ever on the parties or their heirs and successors. I cannot find in the judgment any trace of a condition making the arrangement one that was to last for ever. I can understand the vendors receiving for their own support a certain extent of *sir*-lands, but no plausible reason is assigned why the vendee should pay the rateable revenue on the land beyond the term of settlement, apparently then about to commence and lasting for thirty years. We meet with cases where indulgence is shown for a term of settlement, but I have not found it usual in my experience that vendees, in leasing a plot of land to the vendors and remitting the rent, have also undertaken to pay the rateable Government demand on the land for ever.

I would also add that there seems to have been contention from the very first regarding the transaction. We have the authority of the Sudder Dewany Adawlat for the fact that a deed of agreement was executed in April, 1831, to make matters clearer, because the vendors had commenced to doubt the good faith of the vendees. If this were so, the conditions could not have been very fully stated in the deed of sale. It may be urged that the circumstance that the defendants and their predecessors have continued to pay the revenue for so many years is in favour of the assumption that they were bound by the contract, and must do so for ever, as long as they were simply transferees by private sale. But I would answer to this, that so far back as 1831 litigation commenced in regard to the plot, that it re-commenced in 1853, when the opportunity presented itself, and that when the settlement had expired, and a new settlement and record were in progress, the defendants at once endeavoured to relieve themselves of any liability for the revenue of this land. These circumstances show that the liability was not at first readily accepted, and has not been admitted subsequently. There was little expectation after the judicial decisions in 1831 and 1853 that any attempt to impose rent upon the land would be successful, and since 1853 [426] and during the currency of the settlement any attempt to make the plaintiff responsible for the revenue would have been hopeless. But when Act XIX of 1873 had come into force, a new settlement was in progress, an opportunity was offered whereby when the proprietary nature of the plaintiff was admitted and recorded, the latter should be treated as proprietor and made responsible for the revenue. If the defendants

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are to be made liable to plaintiff for the revenue assessed upon his holding, it must be shown that they are so liable under the terms of the contract and deed of agreement. These instruments are not before us. The decision of 1853 was binding on the parties then before the Court, one of whom was the widow of the real purchaser of the zemindari rights of the vendors. That decision binds those parties, but as pointed out it nowhere declares the extent of the liability of the successors of the original vendors. In the absence of the deed of sale and of agreement I cannot say whether or not the arrangement was to go beyond the current settlement, and whether or not the contract bound the present defendant. I have advanced reasons for believing that the arrangement was not one that bound the parties "*naslan bad naslan,*" and in the absence of the original documents and of any evidence of a conclusive character that the arrangement was intended to be something more than a personal liability attaching to the vendors during the current settlement, and that it was to be regarded as imposing a charge on the property of the vendors in future, I could not decree the present claim, which is one of unusual character, unsupported by the evidence, which a Court ought to have before it when declaring any liability under a contract, and resting solely upon a decision passed more than twenty years ago, and which appears to be conclusive solely as between the parties then litigating.

Entertaining this view of the case, I would dismiss the appeal and affirm, though for different reasons, the decision of the lower Court with costs.

OLDFIELD, J.—Upon the questions which arise in this appeal, I am of opinion that the plaintiff, who is proprietor of the land, cannot escape his liability to the Government for the revenue assessed on this land, with reference to the provisions of ss. 83 and 43, Act XIX of 1873, since by s. 83 no length of rent-free occupancy of any land, nor any grant of land made by the proprietor, [427] shall release such land from its liability to be charged with the payment of Government revenue, and by s. 43 it is obligatory on the Settlement Officer to make the settlement with the proprietor of the land. The effect of these sections appears to me to be to render the plaintiff liable to pay revenue to the State upon this land, and the Court cannot give the relief sought, as it would in effect annul the settlement and relieve the plaintiff of a liability for revenue to the State, which the law imposes, nor could it be granted in this suit to which the Government is no party.

The plaintiff further seeks substantially to have it declared that as between him and defendants the latter are bound to make good to the plaintiff the rateable amount of revenue assessed on the land and payable by plaintiff to the State; and he seeks to impose this liability with reference to a breach of the terms of the original contract by which the original vendors, now represented by plaintiff, sold their property to the original vendees, from whom it has passed to the defendants; one of the conditions of the sale being that the original vendors should not be liable to pay revenue on a certain quantity of land, exempted from the sale, and which is part of that now in suit. But I am not of opinion that this liability for breach of the original contract is shown to be incurred by defendants. There is nothing to show that that liability was other than one personal to the parties to the original contract. The defendants are some of a series of purchasers of the property sold, and the circumstance of their purchasing the property will not suffice to saddle them with a liability for breach of the conditions of the original contract.

The decision of the Sudder Dewany Adawlat on which plaintiff relies was one in which Dulhin Begam from whom the defendants have obtained the property was defendant, but it cannot be said to have gone so far as to fix this liability on these defendants, by determining that the possession and ownership of the property sold under the original contract, carries with it a liability on the part of whoever is owner to make good loss to the original vendors or their representatives incurred by a breach of the original contract. I therefore concur in dismissing the appeal with costs.

Appeal dismissed.

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2 A. 428.

[428] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HUSAIN SHAH AND OTHERS (*Plaintiffs*) v. GOPAL RAI AND ANOTHER (*Defendants.*)* [14th July, 1879.]

Land-holder and Tenant—Determination of title under a lease by a Revenue Court on an application under s. 39 *of Act XVIII of* 1873 (*N.W.P. Rent Act*)—Res judicata.

The plaintiffs in this suit, land-holders, had caused a notice of ejectment to be served on the defendants, their tenants under a lease, on the ground that the tenancy had expired. The defendants applied to the Revenue Court, under s. 39 of Act XVIII of 1873, contesting their liability to be ejected on the ground that the lease was a perpetual lease. The Revenue Court held, with reference to the "*istimrar*" contained in the lease that the lease was perpetual, and the defendants were not liable to be ejected. The plaintiffs thereupon sued in the Civil Court for the cancelment of the word "*istimrari*" in the lease, on the ground that it had been inserted fraudulently. *Held*, on appeal from the decree of the lower appellate Court dismissing the suit as barred by the decision of the Revenue Court, that it was not so barred, the matter in dispute being peculiarly within the jurisdiction of the Civil Court, and not one which a Revenue Court was competent finally to determine on an application under s. 39 of Act XVIII of 1873.

[F., 20 A. 241 (245)=A.W.N. (1898) 29 ; R., 18 A. 270 (272) (F.B.) ; 26 A. 468 (471)=A.W.N. (1904) 109 ; 17 O.C. 86=24 Ind. Cas. 223.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs appealed from the decree of the lower appellate Court dismissing their suit.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the High Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

OLDFIELD, J.—The relief sought by the plaintiffs is to have the word "*istimrari*," or perpetual, cancelled in a deed of lease executed on the 19th July, 1864, on the ground that this word was fraudulently entered in the deed by the defendants in collusion with the writer of the deed. It appears that the lessees, who are the defendants, respondents, before us,

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* Second Appeal, No. 75 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 8th November, 1878, affirming a decree of Muhammad Mir Badshah, Munsif of Bulandshahr, dated the 6th December 1877.

1879 JULY 14. — APPELLATE CIVIL. — 2 A. 428.

applied in the Revenue Court, under s. 39 of Act XVIII of 1873, to contest a notice of ejectment which the plaintiffs, appellants, had served on them, and in that matter they pleaded that they had a right of occupancy and held under a perpetual lease. [429] The Revenue Court decided that no right of occupancy had accrued, since twelve years had not expired since the expiration of the ten years which was the term of the lease, *i.e.*, from 1864 to 1874, but it went on to decide that, with reference to the entry of the word *istimrari*, the lease must be held to have been given in perpetuity. There is clearly some inconsistency in the finding, which makes the lease out to be at the same time for a term of ten years and in perpetuity, but we are not concerned with the point now. The lower appellate Court has dismissed the suit on the ground that it is barred with reference to the decision of the Revenue Court. The decision of the lower appellate Court cannot be maintained. The question in this suit is the fraudulent insertion in a deed of a word by which the intended character of the deed is altered, and the object of the suit is to have the terms of the deed corrected. This is a matter peculiarly within the jurisdiction of a Civil Court, and was not one of those which a Revenue Court was competent finally to decide in the matter of an application made under s. 39, Act XVIII of 1873, however sufficient the decision may have been for the purpose of disposing of the application. We reverse the decree of the lower appellate Court and remand the case for trial on the merits. Costs to follow the result.

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2 A. 429.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KANAHIA AND ANOTHER (*Plaintiffs*) *v.* RAM KISHEN AND OTHERS (*Defendants*).* [15th July, 1879.]

Jurisdiction of Civil and Revenue Courts—Act XVIII of 1873 (*N.W.P. Rent Act*), ss. 93, 95.

The plaintiffs in this suit claimed a declaration of their proprietary right in respect of certain lands and possession of the lands, alleging that the defendants were their tenants, and liable to pay rent for the lands. The defendants, while admitting the proprietary right of the plaintiffs, alleged that they paid the revenue assessed on the lands, that they paid no rent, and that the plaintiffs were not entitled to rent, and they styled themselves tenants at fixed rates. *Held*, on appeal, that, as the defendants substantially denied the proprietary title of the plaintiffs, and set up a title of their own, the claim of the plaintiffs for a declaration of their proprietary right and of their right to demand rent was a matter which the Civil Court must decide, leaving the plaintiffs to sue in the Revenue Court to eject the defendants, and to recover rent, if the position of the defendants as tenants were established.

[**Appl.**, A. W. N. (1882) 58; **R.**, 18 A. 270 (272) (**F.B.**); **D.**, 7 A. 148.]

[430] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs appealed from the decree of the lower appellate Court dismissing the suit as cognizable by a Court of Revenue and not by a Civil Court.

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* Second Appeal, No. 207 of 1879, from a decree of Moulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 11th January, 1879, reversing a decree of Babu Ishri Prasad, Munsif of Deoband, dated the 13th September 1878.

Munshi *Hanuman Prasad*, for the appellants. 1879
Pandit *Nand Lal*, for the respondents. JULY 15.

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2 A. 429.

JUDGMENT.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The plaintiffs sue to obtain possession and a declaration of their proprietary right in respect of 37 bighas, 13 biswas of land, alleging that defendants are their tenants and liable to pay rent for the land. The defendants, while professing to admit the plaintiffs' title to be owners, say that they pay the revenue on this land, pay no rent, and deny the plaintiffs' right to rent, and they call themselves tenants at fixed rates, and they aver that the case is not one cognizable by the Civil Court. The Munsif has disallowed this objection: he holds that their defence substantially amounts to a denial of the proprietary title of the plaintiffs and sets up their own title, and he proceeds to decide in favour of the plaintiffs' title and right to demand rent from the defendants, while he refers the plaintiffs to the Revenue Court to eject the defendants and to recover rent from them. The lower appellate Court has reversed the decree and dismissed the suit on the ground that the Civil Court has no jurisdiction to try it. We are of opinion that the view taken by the Munsif is correct. The defendants do in substance deny the plaintiffs' title as owner and set up their own, when they aver that they have a right to pay the revenue on the land to the Government, and are not liable to pay rent to the plaintiffs. The latter have clearly a cause of action for obtaining a declaration of their right to be owners and to demand rent from the defendants, and this matter is one which the Civil Court must decide, leaving the plaintiffs to have recourse to the Revenue Court to eject the defendants, and to recover rent from them, supposing their position as tenants is established. We reverse the decree of the Subordinate Judge, and remand the case for trial on the merits. Costs to follow the result.

Cause remanded.

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2 A. 431=4 Ind. Jur. 524.

APPELLATE CIVIL.

[431] *Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.*

GANGA RAM, GUARDIAN OF KUAR GIR PRASAD, A MINOR (*Defendant*) v. BANSI AND ANOTHER (*Plaintiffs*).* [5th August, 1879.]

Effect of Registration and Non-Registration—Optional and Compulsory Registration—Act VIII of 1871 (*Registration Act*)—*Act III of* 1877, *Registration Act, s.* 50.

Held, that under s. 50 of Act III of 1877 a document of which the registration was compulsory under that Act, and which was registered thereunder, took effect, as regards the property comprised in the document, as against another document of a prior date, relating to the same property, executed while Act VIII of 1871 was in force, and which did not require, under that Act, to be registered, and was not registered under it.

[F., 7 C. 570 (573); R., 6 B. 168 (192) (F.B.); 20 B. 158 (164); 14 Ind. Cas 685=8 N.L.R. 44; 1 N.L.R. 158 (163); Cons., 6 A. 164 (167)= A.W.N. (1884) 29.]

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* Second Appeal, No. 1196 of 1878, from a decree of Maulvi Farid-ud-din Ahmed, Subordinate Judge of Aligarh, dated the 10th June 1878, modifying a decree of Babu Ganga Saran, Munsiff of Khair, dated the 30th January 1878.

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THIS was a suit for money charged upon certain immoveable property, the claim being based upon a bond dated the 20th August, 1875, given by the owners of the property to the plaintiffs. Under Act VIII of 1871, the Registration Act in force at the time of the execution of this bond, the registration of the bond was optional. The bond was not registered. On the 27th September, 1877, the property in suit was purchased from the obligors of the bond by one Ganga Ram on behalf of the defendant Kuar Gir Prasad, a minor. The deed of sale required under the provisions of Act III of 1877, to be registered, and it was duly registered. It was contended on behalf of the defendant that the plaintiffs' bond being unregistered could not, under the provisions of s. 50 of Act III of 1877, take effect, as regards the property in suit, as against the deed of sale which, although of a later date, was duly registered under that Act. The Court of first instance allowed this contention, but for reasons which it is not necessary to state, *held* that the property was liable irrespective of the bond for a portion of the money sought to be charged on it, and gave the plaintiffs a decree to that amount in respect of the property. On appeal by the defendant, the lower appellate Court held that the provisions of s. 50 of Act III of 1877 were not applicable in this case, and consequently the deed of sale, being of a later date than the bond, did not take effect as against the latter document, and gave the plaintiffs a decree enforcing the entire charge they claimed.

[432] The defendant appealed to the High Court, raising the same contention as he had raised in the lower Courts.

Babus *Oprokash Chandar Mukarji* and *Jogindra Nath Chaudhri*, for the appellant.

Pandit *Ajudhia Nath* and *Lala Harkishen Das*, for the respondents.

STUART, C.J.—The Munsiff was clearly right in holding that the registered sale-deed, although subsequent in date, had preference over the unregistered bond, and the Subordinate Judge was clearly wrong in deciding to the contrary. In stating this conclusion it is at the same time difficult to resist a certain feeling of its injustice, for it seems unreasonable to allow a discretion, and at the same time to impose a penalty or disability on its exercise. That is plainly what has been brought about. The last Registration Act III of 1877, not less than its predecessors, allows a discretion as to the registering or not registering certain documents of which the bond in this case is one, and if such an instrument has been legally and validly prepared and executed, and is effectual for its purpose, it might be justly contended it should be so as from its date. Yet one can appreciate the policy, and, in a real sense, the convenience, of compelling, as far as may be, the registration of the contracts of the people of this country. The Subordinate Judge's remarks that "agreeably to the principle of the law, no law can have retrospective effect," is generally correct, and a right once conferred by law cannot be taken away by implication, and if we had nothing but s. 50 itself, we might possibly have applied these principles of law to the present case, and have held that the sale-deed of 1877, although registered, had no priority over the mortgage of 1875. But the "explanation" appended to s. 50 removes all doubt, and may be said to have a repealing effect by expressly negativing the application of the principles of law referred to. On the other hand, Act III of 1877 does not affect, in the sense of invalidating, the class of instruments mentioned in s. 18. It simply says that such instruments, if registered, shall have preference over any other unregistered document relating to the same property, and such a law it was quite competent to the Legislature

to pass. The meaning, however, of s. 50 of Act III of [433] 1877, together, with the explanation appended to it respecting the three preceding Registration Acts, is too clear, and as that section provides the law to be applied to the present case, we cannot do otherwise than hold that the sale-deed of the 27th September, 1877, has preference over the previous mortgage-bond of the 20th August, 1875. We must, therefore, reverse the judgment of the Subordinate Judge on this point, and, with this decision, send back the case to him for disposal on the merits, costs to abide the result.

SPANKIE, J.—The ruling of the Subordinate Judge appears to be wrong. Under the provisions of s. 50, Act III of 1877, the defendant's instrument, which is registered, would take effect as against the plaintiffs', which might have been, but was not registered under Act VIII of 1871. The defendant's instrument was executed after Act III of 1877 came into operation. The plaintiffs' deed was executed after the 1st day of July, 1871, and was not registered under Act VIII of 1871. It is therefore "unregistered" within the meaning of the explanation appended to s. 50 of the new Act III of 1877. The appeal on the part of the defendant was not decided by the lower appellate Court on the merits. I feel, therefore, the necessity of reversing the decision of the Subordinate Judge on the point of law and would remand the case to him for trial on the points regarding which the parties are at issue. Costs to abide the result of a new trial.

Cause remanded.

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2 A. 433=4 Ind. Jur. 525.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

LACHMINARAIN (*Plaintiff*) v. WILAYTI BEGAM AND OTHERS (*Defendants*).* [27th August, 1879.]

Gift—Illegal consideration—Immoral consideration.

In the year 1870 *H* made a gift of certain immoveable property to *W*, who was his mistress but lived with him as his wife, "on condition of her continuing to be his wife and remaining obedient to him, her husband." *W* acquired possession of the property in virtue of the gift, and had held it for eight years, when a creditor of *H*, under a decree enforcing a debt created by *H* subsequently to the gift, sued, amongst other things, for a declaration that the gift was invalid, as it had been made for an illegal consideration, *viz.*, the future immoral co-habitation of *W* with *H*. *Held* that, assuming that, the consideration for the gift was illegal, in the absence of fraud, the gift could not be set aside so many years after *W* had acquired possession thereunder *Ayerst* v. *Jenkins* (1) followed.

[434] THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiff appealed from the decree of the Court of first instance dismissing his suit.

Mr. *Conlan*, the Junior Government Pleader (Babu *Dwarka Nath Banarji*), Pandit *Bishambar Nath*, and Mir *Zahur Husain*, for the appellant.

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* First Appeal, No. 9 of 1879, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Bareilly, dated the 13th September, 1879.

(1) L.R. 16 Eq. 275.

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Messrs. *Colvin*, *Ross* and *Vansittart*, Pandit *Ajudhia Nath*, and Shah *Asad Ali*, for the respondents.

The High Court (SPANKIE, J. and OLDFIELD, J.) delivered the following

JUDGMENT.

The plaintiff, Lachmi Narain, alleges that the defendant Captain W. Hearsey borrowed money from him on a bond dated 3rd February, 1873, and again other sums from 7th September, 1873, to 27th October, 1876, and a further sum on a bond dated 21st March, 1874. The plaintiff obtained decrees against him, and before judgment had attached certain properties, *i.e.*, mauza Kareli, mauza Bokhara, mauza Pahajganj, mauza Lissia Ghulam, and a share in mauza Kargina. The defendant Wilayti Begam, who is the mother of the other minor defendants, claimed these properties in her own right and that of her children, on the ground that they had been conferred on them by Captain Hearsey, and the properties were released. The relief sought by plaintiff is substantially to have declared the nature of the right of Capain Hearsey in the properties, that Wilayti Begam has no right in them, and that the other minor defendants have only a life-interest in them, and that the right and interest of Captain Hearsey in the property may be declared liable to sale in execution of the plaintiff's decrees. Wilayti Begam replied that these properties had been given to her and her children absolutely by Captain Hearsey, three years before the plaintiff became a creditor of Captain Hearsey, and that Captain Hearsey ceased to have any interest in them ; and Captain Hearsey replied to the same effect. The Subordinate Judge has decided that there was a gift of the properties made by Captain Hearsey in consideration of love and affection for Wilayti Begam and his children, and that it was fully carried out by transfer of possession to them. There was no fraud on the plaintiff in the matter, for at the [435] time Hearsey was in affluent circumstances, and the debt which he incurred to plaintiff was incurred after the gift had been made, and he finds that these properties were not hypothecated in the plaintiff's bonds, a fact the Subordinate Judge thinks affords an argument in favour of the fact that they had been already transferred to defendants, and that the transfer was known to the plaintiff, who otherwise, being well acquainted with Hearsey's affairs, would have insisted on their being pledged as security for the money he was lending. The Subordinate Judge finds that the gift was made to Wilayti Begam by Captain Hearsey, who regarded her as his wife, on condition of her continuing his wife, and to the children, on the condition of their adhering to the Christian religion, and he disallows the plea that since it is admitted Wilayti Begam was not his married wife, but only his mistress, the condition was really one for continuance of concubinage, and immoral, and the transfer null and void in consequence. On this point the Subordinate Judge remarks that: "Wilayti Begam is at least the mother of Mr. Hearsey's children, and lives with him as his wife ; under these circumstances he made the gift of the property, having considered it his duty to support and provide for them, but as Wilayti Begam was of a different religion and the children were minors, he introduced conditions calculated to invalidate the title of the transferees in case of their deviation;" and further on in his judgment he seems to consider that the gift having taken effect cannot be set aside at the instance of theplaintiff, and he dismissed the suit. The questions which we have to determine in appeal are (i) whether there was an actual gift which took effect and became

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operative by transfer of possession; (ii) its nature, what interest the transferees took under it, and whether anything remained to Captain Hearsey which can be taken in execution of plaintiff's decrees; (iii) whether the gift to Wilayti Begam can be set aside in this suit as illegal and immoral. (After determining that there was an actual gift which took effect and became operative by transfer of possession, and that in virtue of the gift the property vested absolutely in the donees, and no interest in the property remained to Hearsey, which could be sold in execution of a decree, the judgment continued:) Nor are we of opinion that the bequest to Wilayti Begam can be set aside by the plaintiff, and the property be taken in execution of his decrees, on the ground of ille-[436]gality. It is quite true that she is not the married wife of Hearsey, and that their connection is open to the charge of immorality, but it is clear, in making this bequest to her, he regarded her in the light of a wife and the mother of his children, and it appears to us that the consideration he had in mind in making the gift may be held to have been rather her continuing to remain and discharge her duties to the children she had by him, than the continuance of their illicit intercourse, for it must be remembered he considered his state of health at the time to be precarious, and a personal object does not appear to have actuated him. The imputation of an immoral object is based solely on some words which appear in Hearsey's application for mutation of names, *viz.*, the words, "on condition of her continuing to be my wife and remaining obedient to me, her husband," but there is nothing in these words by themselves to support the imputation, but it is sought to attach an immoral object to them on the ground, though she is referred to as his wife, she was his mistress but when explained by all the circumstances the object implied in the words does not necessarily appear to have been such as is imputed. Nor should we be disposed to allow this plea, so as to rescind the bequest, and make the property available as Captain Hearsey's to satisfy plaintiff's claim, so many years after the donees had taken possession under the bequest. On this point we may refer to *Ayerst* v. *Jenkins* (1), as the principle on which that case was decided seems applicable here. It is not pretended, nor can it be shown, that the bequests were made in fraud of plaintiff. On the contrary there is evidence to show that at the time Captain Hearsey had a balance in plaintiff's hands of over a lakh of rupees, and the loans, the subject of this suit, were taken some years after the bequests had been made, and, as remarked by the Subordinate Judge, it is a significant fact that while other property was pledged for the loans, these properties were not, and as plaintiff was well aware of Captain Hearsey's affairs, the reason why the plaintiff did not insist on their being pledged may well be that he knew they had passed out of Captain Hearsey's hands. We have now disposed of all the material pleas in appeal, and there is no force in the last objection as to costs. We dismiss the appeal with costs.

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(1) L. R. 16 Eq. 275.

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[437] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

ABLAKH RAI AND OTHERS (*Defendants*) *v.* SALIM AHMAD KHAN (*Plaintiff*).* [1st September, 1879.]

Suit for cancelment of lease—Breach of conditions involving forfeiture—Act XVIII of 1873 (N.W.P. Rent Act), s. 93, cl. (c).

The plaintiff, the representative in title of a lessor, sued under cl. (*c*), s. 93 of Act XVIII of 1873, for the cancelment of a lease, on three grounds, *viz.*, on the ground that the lessees had paid the rent to the Collector, on account of the revenue due in respect of the estate, instead of to him; secondly on the ground that they had failed to pay certain instalments of rent on the due dates; and thirdly, on the ground that they had planted trees and sunk wells, and allowed their tenants to do the same, without the lessor's consent; thereby committing breaches of the conditions of the lease involving its forfeiture. *Held*, on the construction of the lease, with reference to the first ground, that as the lease was intended to be perpetual, and as the rent had been paid to the Collector for many years under an arrangement effected between the parties to the lease and it was not shown that the plaintiff had repudiated this arrangement (even if he had the power of so doing) or demanded payment of the rent directly to himself, payment of rent by the lessees to the Collector did not amount to a breach of the conditions of the lease: with reference to the second ground, that the lease being intended to be perpetual, and no arrears of rent being due, irregularity and unpunctuality in the payment of the instalments of rent in question were not breaches of the conditions of the lease involving its forfeiture; and, with reference to the third ground, that the condition as to the planting of trees and sinking wells being merely a prohibition, and not a condition the breach of which involved the forfeiture of the lease, the lease could not be cancelled because the lessees had planted trees or sunk wells and allowed their tenants to do the same, without the lessor's consent.

Held also that, assuming that the lessor was entitled, on the third ground, to the cancelment of the lease, cancelment was not to be deemed the invariable penalty for the breach of such a condition as that mentioned in that ground. The Full Bench ruling in *Sheo Churn* v. *Bussunt Singh* (1), followed.

THIS was a suit, under cl., (*c*) s. 93 of Act XVIII of 1873, for the cancelment of a lease dated the 7th December, 1838. The material portion of this lease was as follows: " As the lessee has agreed to take a permanent lease of mouza Darsan from the beginning of 1246 fasli at an annual rent of Rs 1,111 (*sicca*) and has executed a kabuliyat, therefore this lease is granted to him: he shall now hold possession as *mustajir* and shall consider the fulfilment of the following conditions to be the means of his continu- [438] ing to be lessee: (i) he shall pay the rent annually, instalment by instalment, from the month of Kuar to the month of Baisakh, at the times fixed by the Government for the payment of instalments of revenue; in case the rent is not so paid, all his property moveable and immoveable shall be sold, and the proceeds of such sale shall be deposited in the Government treasury towards satisfying any arrears: (ii) he shall not allow, without the lessor's permission, any one to plant trees, dig tanks, or sink wells, neither shall he himself do such things: as long as the lessee or his heirs shall continue to pay the rent annually, instalment by instalment, the lease shall remain in force, but if even one instalment falls into arrear the lease shall

* Special Appeal, No. 1029 of 1877, from a decree of J.W. Power, Esq., Judge of Ghazipur, dated the 8th August, 1877, affirming a decree of A.E.C. Casey, Esq., Assistant Collector of the first class, dated the 26th June, 1877.

(1) H.C.R.N.W.P. 1871, p. 282.

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become null and void, and shall be cancelled." It appeared that for many years, by an arrangement between the parties to the lease, the lessee had paid the rent into the Government treasury on account of revenue instead of to the lessor. The plaintiff who had purchased, on the 20th November, 1876, the rights and interests of the lessor, claimed in his plaint the cancelment of the lease on the ground that the defendants had failed to pay instalments of rent due severally on the 15th November, 1876, 15th January, 1877, and 1st May, 1877, on the due dates, and that they had allowed their tenants to plant trees and sink wells, and had themselves planted trees and sunk wells, without the lessor's permission. The Court of first instance held that, as the defendants had failed to pay the instalments of rent in question punctually, a breach of the condition of the lease involving its forfeiture had taken place, and gave the plaintiff a decree cancelling the lease. On appeal by the defendants the lower appellate Court concurred in the decision of the Court of first instance and affirmed the decree of that Court.

The defendants appealed to the High Court, contending that the lease was intended to be a perpetual lease, and on a proper construction of its terms, a failure to pay an instalment of rent when due did not involve the forfeiture of the lease.

Mr. *Conlan* and *Lala Lalta Prasad*, for the appellants.

Pandit *Bishambar Nath* and Shah *Asad Ali*, for the respondent.

The High Court (STUART, C.J. and SPANKIE, J.) remanded the case to the lower appellate Court for the trial of the issues stated in the following

ORDER OF REMAND.

[439] We are of opinion that the pleas in special appeal must be maintained. The lower appellate Court remarks that some years ago Nawal Kishore, representative of the deceased Babu Ram Ratan Singh, one of the original lessors in 1838 of the village in suit, fell into difficulties, and on the 20th November, 1876, his zamindari rights were sold at auction to the present plaintiff, respondent. The auction-purchaser found that the conditions of the lease, as regards the payment of rent, had not been complied with. He therefore sues to cancel the lease in accordance with the terms of the agreement recorded therein. The Judge considers that any private arrangement by which the lessees have been in the habit of paying the rent direct to the Government treasury, instead of to the lessor, has no bearing upon the case, and questions as to what might happen to respondent if appellant failed to pay his instalments. The question was whether or not appellant had by his failure caused a breach in the conditions of the lease. If the lessees paid direct to the Government treasury they should have paid before the instalment fell due, and this they had not done. He concludes that it has been proved that there has been a breach in fulfilment of the conditions as regards the regular and punctual payment of the instalments on the part of the lessees, and therefore the lease was liable to cancelment. He dismisses the appeal and affirms the decree of the first Court cancelling the lease. On examination of the lease we must hold from its terms that it was intended to be perpetual. The original lessors reserved no profits for themselves. The lessees were to pay as rent Rs. 1,111 *sicca* rupees. The Government demand was or is Rs. 1,103-5-2, and there is no satisfactory evidence to show what became of the difference between these Rs. 1,111 and the equivalent in Queen's coin, Rs. 1,180-7-0, after payment of the Government

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revenue. According to the terms of the lease, the Rs. 1,111 Moorshedabad rupees were to be paid to the lessor. The first condition as to payment of rent is that it is to be paid, instalment by instalment, when the Government revenue is paid. In case of its non-payment all the property of the lessees both moveable and immoveable may be sold, and the proceeds applied, to the liquidation of arrears. The second and fourth conditions impose upon the lessees all the responsibilities and duties of a full **[440]** proprietor and declare that the lessors have no concern with the yearly rent as specified above. The lessees are to pay for roads, dak and police expenses, and patwaris' fees. The final condition is that the lease shall be held valid as long as the lessees shall pay the lessors regularly at every instalment the rent of the estate. If even a single instalment in any way falls into arrears the lease shall be deemed null and void and shall be cancelled, the lessors having the right of making other arrangements with any one, as they pleased. It is not denied that, for convenience's sake or for some other reason, the lessor and lessees in times past arranged that the rent should be paid direct to the Collector, and not to the lessor, and the lease has now held good from 1838 to May, 1877, when the suit was instituted, a period, of nearly 39 years. It is not shown that the plaintiff, after his auction-purchase in 1876, repudiated this arrangement, even if he had the power of doing so, or demanded the payment of rent directly to himself. We are not therefore disposed to hold that, in paying the rent to the Government treasury, there was any breach of the conditions of the lease that would entitle the plaintiff to claim its forfeiture. The money paid to and received by the Collector in accordance with the custom of past years must be regarded as money paid on account of the lessor and for him. We have seen that in addition to the alleged breach of conditions in paying directly to the Government treasury, the Judge finds that the payments have been made with irregularity and want of punctuality. This may be the case, but we do not see in the lease itself any provisions which would justify the forfeiture of the lease on this account. Looking at the wording of the first condition, we should hold that a suit for rent was contemplated in the first instance on the failure to pay with regularity, and a decree to bring to sale the moveable and immoveable property of the lessees in satisfaction of any arrears. We are disposed to regard the last condition as a provisional clause for the security of regular payments, but not as one intended to enable the lessor to take advantage of any remediable lapse on the part of the lessees to pay their rent, and we think that the fact that the lease has held good for 39 years, and that its terms have been, in the matter of payment to the lessor, modified, is a proof that the lease was perpetual and not to be cancelled at all as long as the rent was paid. It is worthy **[441]** of note that there are other conditions in the lease not affecting the question of the payment of rent which has been raised in this suit and which appear to be framed with the view of maintaining some evidence of the lessor's proprietary rights, though the lease was intended to be perpetual. It seems to us that the suit in so far as it has been brought to cancel the lease because the rent was not paid to the representative of the lessor, but to the Government, must fail, for the reasons assigned, and that it must also fail as brought on the ground taken by the Judge, irregularity in payment and want of punctuality, there being no proof of any existing arrears.

But there are allegations in the plaint which neither of the Courts below have taken notice of in their judgments. The plaintiff states that the

lease is liable to cancelment because the lessees have allowed others to plant trees, and have themselves dug, and caused others to dig, wells on the land, and their doing so is an infringement of the lease. We have no judgment of the Court below on these allegations; doubtless the plaintiff is entitled to a judgment on them. Before we decide the appeal we must remand the case under s. 354, Act VIII of 1859, to the lower appellate Court to determine whether or not the lessees have allowed others to plant trees, and have themselves done so, without the permission of the lessor; whether they have allowed others to dig wells, and have done so themselves, without the permission of the lessor; and though doubtless we ourselves might determine the point, we direct the lower appellate Court to say whether, in the event of it being shown that the lessees have exercised these proprietary rights, they have thereby incurred the forefeiture of their lease.

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The lower appellate Court found that the lessees had planted trees and sunk wells, and allowed their tenants to do so, without the permission of the lessors, thus breaking the conditions of the lease, and that such breach of the conditions of the lease involved, under the terms thereof, its forfeiture. On the return of this finding the High Court delivered its judgment, the material portion of which was as follows:

JUDGMENT.

[442] The main point on which the plaintiff relied was default in the payment of revenue, according to the Government instalments, the cause of action accruing on the 16th November, 1876, 16th January, and 2nd May, 1877. At the end of the plaint, and as it were an after-thought it is stated that the lease is also liable to forfeiture because the lessees have dug wells and caused wells to be dug by others, but no instances are specified and no detail given. (After determining that the lessor had acquiesced in the construction of wells and gardens by the lessees and their tenants, the judgment continued:) We have already disposed of that portion of the appeal which relates to the alleged unpunctuality in payment of the revenue. We have held that there is nothing in the lease to justify forfeiture of the lease in regard to the mode in which the revenue was paid, or the regularity or irregularity with which it was paid. In payment of the revenue the lessees followed an arrangement between the lessor and themselves which held good from 1838 to 1877, and we also held that there was no proof that after the purchase the plaintiffs repudiated the arrangement; we also held that the lease would not justify forfeiture on the ground of any irregularity in the punctual payment of rent; our reasons are given in our judgment of the 13th February of this year; they need not be repeated here. We now hold regarding the issue remanded to the Judge that the sixth clause of the lease contains no provision that, if the lessees should build wells without the consent of the lessor, they should be liable to forfeiture of the lease. There is no such condition in this clause; on the contrary the concluding part of it provides that as long as the said lease-holders or their heirs shall continue to pay the Government revenue annually, instalment by instalment, the lease shall remain in force, but if they fall into arrears for a pice even the lease shall become null and void, and the lease shall be cancelled. It is clear that the lease contemplates as the main condition that there shall be no default in payment of the Government revenue, there is nothing more than a prohibition regarding wells and planting trees. Even where the right of the zamindar to claim forfeiture in such a case is proved, according to a Full

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Bench ruling in *Sheo Churun* v. *Bussunt Singh* (1) forfeiture is not to be [443] deemed the invariable penalty for breach of contract occasioned by the construction of a well or improvement of a tenant's holding. With this view of the case we decree the appeal and reverse the judgment of the Court below with costs, thus dismissing the suit as brought.

Appeal allowed.

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2 A. 443=4 Ind. Jur. 580.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

SHIB DAT (*Judgment-debtor*) *v.* KALKA PRASAD (*Decree-holder*)*
[2nd September, 1879.]

Decree for money payable by instalments—Execution of decree—Act XV of 1877 (*Limitation Act*), s. 19—*Acknowledgment—Limitation.*

Held, in the case of a decree for money payable by instalments, with a proviso that in the event of default a decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and not having applied for execution within three years from the date of the first default, the decree was barred.

Held, also, the judgment-debtor having three years after the first default, acknowledged in writing his liability under the decree, and signed such acknowledgment, that the decree being already barred, such acknowledgment did not create a new period of limitation.

[R., 16 A. 371 (372); 15 C. 502 (505); 12 Ind. Cas. 741=7 N.L.R. 147; D., 5 A. 201 (206).]

THE decree in this case was dated 14th July, 1873, and directed the payment of Rs. 700, together with interest at twelve annas per cent. in instalments, the first instalment being Rs. 200 payable in Pus 1281 Faslsi (5th December, 1873—2nd January, 1874), the second being the same amount payable in Pus 1282 Fasli (24th December, 1874—21st December, 1875), and the third being Rs. 300 payable in Asarh 1282 Fasli (20th June, 1875—18th July, 1875). The decree further directed as follows :—"In the event of default the decree shall be executed for the whole amount." On the 4th January, 1875, the first instalment having become due on the 2nd January, 1874, the judgment-debtor paid Rs. 200. On the 22nd January, 1875, or after the date that the second instalment became due, he paid Rs. 150. On the 11th July, 1876, or after the date the third instalment became due, he paid Rs. 100. On the 6th November, 1876, he paid Rs. 300. On the 28th June, 1877, he acknowledged in writing on the decree that up to that date a balance of Rs. 124-1-0 was due thereunder and signed this [444] acknowledgment. On the 27th November, 1878, the decree-holder applied for execution of the decree. The Court of first instance held that the application was barred by limitation, being of opinion that it should have been made within three years from the date the first instalment fell due and was not paid. On appeal by the decree-holder the lower appellate Court held that under s. 19 of Act XV of 1877, the

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* Second Appeal, No. 63 of 1879, from an order of W. Tyrrell, Esq., Judge of Bareilly, dated the 4th April, 1879, reversing an order of Muhammad Nizam Ali Khan, Munsif of Pilibhit, dated the 20th December, 1878.

(1) H. C. R. N. W. P. 1871, p. 282.

acknowledgment by the judgment-debtor of his liability under the decree created a fresh period of limitation, and allowed the application.

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2 A. 443= 4 Ind. Jur. 580.

The judgment-debtor appealed to the High Court.

Mr. *Chatterji*, for the appellant.

Pandit *Bishambhar Nath*, for the respondent.

JUDGMENT.

The following judgment was delivered by

SPANKIE, J.—In my opinion the decree-holder was bound strictly by the terms of the decree. When the first default occurred, under the wording of the decree, he was bound to execute it in one lump. The instalment arrangement then ceased. If the decree-holder chose to continue to receive instalments, he did so at his own risk. When the acknowledgment of the balance due was made, it seems to me that the decree was already dead, and could no longer be executed. Though the cases cited (1) may not be strictly in point, the principle upon which they proceed applies to this case. I would decree the appeal and reverse the order of the Court below with costs.

STRAIGHT, J.—I entirely agree in the views of my colleague Mr. Justice Spankie.

Appeal allowed.

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2 A. 444=4 Ind. Jur. 581.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. GANRAJ AND OTHERS. [4th September, 1879.]

Confession made by one of several persons being tried jointly for the same offence—Act I of 1872, Evidence Act, s. 30.

Where the confession of a person being tried jointly with other persons did not implicate him to the same extent as it implicated such other persons, [445] and was not sufficient of itself to justify his conviction, *held* that such confession could not be taken into consideration under s. 30 of Act I of 1872, against such other persons. *Queen* v. *Belat Ali* (2), followed.

[F., 2 A. 646 (649); A.W.N. (1881), 20; A.W.N. (1881), 135; L.B.R. (1893—1900), 7; Rat. Unr. Cr. Cas. 436; R., L.B.R. (1893—1900), 70 (71); D., 35 M. 247=13 Cr. L. J. 305=14 Ind. Cas. 849=22 M.L.J. 490=11 M.L.T. 1=(1912) M.W.N. 207.]

THIS was an appeal against convictions by Mr. J. W. Power, Sessions Judge of Ghazipur, dated the 21st June, 1879. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Colvin, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—This is an appeal by four persons (i) Ganraj, (ii) Basraj, (iii) Jhamman, (iv) Sittu, who were jointly tried and convicted,

(1) *Kristo Komal Singh* v. *Huree*. *Lal Mookerji* v. *Roy Dhampat Singh*, *Sardar*, 13 W. R. (F.B.) 44; and *Hira*, 24 W. R. 282.

(2) 10 B.L.R. 453=19 W.R. Cr., 67; see, also, the other cases cited in the second paragraph of note (2) to the case of *Empress* v. *Bhawani*, 1 A. 664. See, however, *Queen* v. *Bakur Khan*, H.C.R.N.W.P. 1873, p. 213.

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together with a man named Samaru, at the Ghazipur Sessions Court on the 21st June last, for attempting to break into a dwelling house. It appears that upon the night of the 22nd April of the present year two chaukidars, by name Palak Singh and Musafir Singh were going their rounds in the town of Zamaniah, about 11 O' clock, when they suddenly lighted on some eight or ten persons apparently engaged in endeavouring to effect an entrance into the house of one Malik Chand by breaking a hole through the wall. These officers at once made efforts to arrest the culprits, calling loudly for assistance the while, but the numbers against them were too great and after a fight and sevaral blows being exchanged the offenders escaped. About dawn of the 23rd April, however, Samaru was caught close to the scene of the attempted crime, and very soon after his being taken into custody he made a statement. On the 28th the charge against him alone was gone into before Mr. Wheeler, the Magistrate, and in his presence Samaru appears to have given two further accounts of the transactions. The result of these was that on the adjournment day the four appellants were placed in the dock with him, and at the conclusion of the proceedings the case was transferred to the Court of Mr. Rustomji. Further inquiry took place on the 6th May, and then all five defendants were committed. Upon the hearing of the appeal it was urged by Mr. Colvin for **[446]** the four appellants : (i) that the evidence of their identity as parties to the attempted crime was unsatisfactory, and that Palak Singh and Musafir Singh were untrustworthy witnesses ; (ii) that each and all the confessions made by Samaru were inadmissible under s. 30 of the Evidence Act against his co-prisoners, because the statements contained in them did not admit his own participation in the crime, but on the contrary were obviously made to show that he was no party to it.

It will be as well to dispose of the last contention first. In order to do so I have very carefully examined each of the statements, five in all, made by Samaru. I need not point out their variations or discrepancies one from the other ; even were they admissible I should not think of acting upon them for a moment. But I am clearly of opinion that none of them satisfy the requirements of s. 30, and that they are not *confessions* in the sense of that section. The charge upon which Ganraj, Basraj, Jhamman and Sittu were tried in the Sessions Court was one of attempted house-breaking and unless Samaru's statements went the length of admitting that he was at the spot approving of and coinciding in, in fact, in other words, that he was a principal in, the commission of the unlawful act upon which the others were engaged, I do not think that such statement should "be taken into consideration." In every one of them he seeks to fix guilt on the others, and to excuse himself, and I do not, therefore, think these so-called confessions "implicate him to the same extent as they implicate the persons against whom they are proposed to be used,"—*Queen* v. *Belat Ali* (1). As I pointed out at the hearing of the appeal it seems to me that the test s. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it *of the offence* for which he is being jointly tried with the other person or persons against whom it is tendered. In fact to use a popular and well-understood phrase the confessing prisoner must tar

(1) 10 B.L.R. 452=19 W.R. Cr. 67 ; see also the other cases cited in the second paragraph of note (2) to the case of *Empress* v. *Bhawani*, 1 A. 664. See, however, *Queen* v. *Bakur Khun*, H.C.R. N.W.P. 1873, p. 213.

himself and the person or persons he implicates with one and the same brush. I therefore think that [447] Mr. Colvin's objection to Samaru's statements is a valid one, and they should not have been taken into consideration in the Sessions Court. I have however come to the conclusion after a very close and careful examination of all the proceedings that, in the terms of s. 167 of the Evidence Act, there was sufficient evidence, without Samaru's statements, to justify the conviction of all the appellants, and I accordingly dismiss the appeal, at the same time observing that I do not think they were prejudiced in their defences by the admission in evidence of those statements. I see no ground for interfering with the punishment. The accused were convicted of a very serious offence, which they followed up by violence to the officers of the law, and I think the Sessions Judge very properly proportioned the punishment.

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Appeal dismissed.

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2 A. 447 = 4 Ind. Jur. 582.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* KASHI. [5th September, 1879.]

Act X of 1872 (*Criminal Procedure Code*), s. 215—*Examination of witnesses named for the prosecution—Discharge of accused without examining all the witnesses.*

Before a Magistrate discharges an accused person under s. 215 of Act X of 1872, he is bound, under that section, to examine all the witnesses named for the prosecution. *Empress* v. *Himatulla* (1) followed.

[F., A.W.N. (1882), 179.]

THIS was a case reported to the High Court by Mr. R. G. Currie, Sessions Judge of Gorakhpur, for its orders. One Kashi, who had been accused of an offence under s. 211 of the Indian Penal Code, had been discharged by Mr. J. H. Carter, the Magistrate trying him, without the evidence of all the witnesses named for the prosecution being taken. In reporting the case the Sessions Judge suggested that the order of discharge should be allowed to stand, as it did not appear that there had been any miscarriage of justice or material error sufficiently requiring the re-trial of the accused.

STRAIGHT, J.—I regret that I feel myself prevented by the terms of s. 215, Criminal Procedure Code, from adopting the suggestion [448] of the Sessions Judge. The words of the explanation are plain and positive, and establish as a condition precedent to a discharge, the examination of all the witnesses named. It is impossible for me to say whether Mr. Carter was right or wrong in the view he took of the case, but he was clearly in error in determining it without satisfying the directions of s. 215. This point has already been made the matter of decision twice in this Court in the cases of *Empress* v. *Tantia* (2) and *Empress* v. *Bohdram* (3) decided 28th July, 1879. In both of those I followed the authority of *Empress* v. *Himatulla* (1) with which I may add I entirely agree. I must therefore set aside Mr. Carter's order of discharge, and direct him to re-open the case and examine the further witnesses named, and then pass such order in the matter, as the whole of the evidence may appear to call for.

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(1) 3 C. 389.
(2) Legal Remembrancer, N.W.P., Vol. I, 11.
(3) Unreported.

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CRIMINAL JURISDICTION.

2 A. 448.

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CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF SUKHO *v.* DURGA PRASAD AND OTHERS. [6th September, 1879.]

High Court, Powers of Revision—Act X of 1872 *(Criminal Procedure Code)*, ss. 272, 297 *—Power of private prosecutor to move the Court in a case of acquittal.*

A private prosecutor can move the High Court, in the case of an acquittal, to exercise its powers of revision under s. 297 of Act X of 1872 (1).

[F., 9 Cr.L.J. 211=1 Ind. Cas. 238=5 N.L.R. 4 (6); R., 2 S.L.R. 25 (26).]

THIS was an application by one Sukho for the revision of a judgment of acquittal by Mr. W. Tyrrell, Sessions Judge of Bareilly, dated the 21st February, 1879.

Babu *Jogindro Nath Chaudhri*, for the petitioner.

Mr. *Leach*, for the opposite parties.

JUDGMENT.

STRAIGHT, J.—This was an application by petition on the part of one Sukho for revision of an order passed by the Sessions Judge of Bareilly, acquitting four persons prosecuted in his Court by the applicant. At the commencement of the proceedings before me objection was taken by Mr. Leach for the parties whose acquittals are complained of to the "*locus standi*" of Babu Jogindro Nath, to make such an application on the part of a private prosecutor, s. 272 of the Criminal Procedure Code giving the Local Government alone the [449] right to move against a judgment of acquittal. I was, however, of opinion that this being an application for revision, it was competent for a private prosecutor to bring to the knowledge of this Court material errors that had taken place in a judicial proceeding in a Court subordinate to it, with a view to having them set right. The circumstance that an acquittal had taken place in the Court below did not appear to me to affect the consideration of the objection, the whole question appearing to me to be whether the applicant's petition showed upon the face of it material error in law or procedure in the proceedings of the Sessions Court. I have carefully examined it, and find it deals purely with questions of fact, and that no point of law is raised upon it, consequently there is nothing to revise and the record may be returned. Properly I ought to have rejected the former application to send for the record.

(1) See *In the matter of Hardeo*, 1 A. 139, in which case Stuart, C.J. and Turner, J. express opinions to the same effect.

2 A. 449.

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APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

BHUPAL (*Defendant*) v. JAG RAM (*Plaintiff*).* [17th November, 1879.]

Condition against alienation—Mortgage.

Held that where a person stipulates generally not to alienate his property he does not thereby create a charge on any particular property belonging to him (1).

[R., 12 A. 175 (178); 10 Cr.L J. 237 = 2 S.L.R. 25.]

THE plaintiff in this suit obtained a decree for Rs. 72 in a Court of Small Causes on the 16th July, 1870. He applied for the execution of this decree against his judgment-debtor, who on the 19th December, 1871, preferred a petition to the Court executing the decree in which, after promising to pay the judgment-debt, and also another judgment-debt, in instalments, he promised as follows : " I shall not alienate my own property or my father's until the amount of both decrees has been paid : if I do so I will first pay the amount of the decrees." In contravention of this promise he sold his property in a certain village to one Bhupal. The plaintiff now sued Bhupal [450] to establish his right to recover Rs. 181, the amount of the decrees, by the sale of this property. The Court of first instance gave the plaintiff a decree, and on appeal by the defendant the lower appellate Court affirmed this decree.

The defendant appealed to the High Court.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Mr. *Chatterji*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court :

STUART, C. J.—In this case one Jawahir, in the course of execution of a Small Cause Court decree against him at the suit of the plaintiff, had by a petition in the execution department, dated the 19th December, 1871, agreed to pay the debt by yearly instalments, and the petition then proceeds as follows : " In case of default I shall pay the amount of both the decrees in a lump sum: I shall not alienate my own property and that of my father until the amount of both the decrees has been paid : if I do so I shall first pay the amount of the decrees : the first instalment shall fall due in the month of Baisakh, Sambat 1829." It is contended that this has the effect of constituting a valid lien by hypothecation in favour of the plaintiff, and that therefore a subsequent sale to Bhupal the defendant was invalid. But such a contention cannot be allowed. The agreement contained in the petition is not evidence of any hypothecation, not even of a verbal one, but simply an arrangement that the property should not be alienated till the debt was paid. In fact such an agreement goes to disprove that any mortgage or hypothecation was made, or even intended by it, for the very fact of an undertaking " not to alienate " shows that

* Second Appeal, No. 370 of 1879, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 14th December, 1878, modifying a decree of Sayyid Munir-ud-din Ahmad, Munsif of Jalesar, dated the 20th September, 1878.

(1) For other cases in which it was held that a mere covenant not to alienate does not amount to a mortgage, see *Gunoo Singh* v. *Latafut Hossain*, 3 C. 336 ; *Ram Buks* v. *Sookh Deo*, H.C.R.N.W.P., 1869, p. 65 ; *Chonnee Lall* v. *Puhulwan Singh*, H.C.R. N.W.P., 1868, p. 270.

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neither the property itself nor any interest in it had actually passed to the plaintiff, which, if there had been a good and valid hypothecation, must have occurred. The sale therefore to the defendant, appellant, cannot be impugned. The present appeal must be allowed, the decrees of both the lower Courts are reversed and the suit dismissed with costs in all the Courts.

OLDFIELD, J.—It appears that the plaintiff obtained a decree in the Small Cause Court against his judgment-debtor for a sum of [451] money, and in course of execution of it the judgment-debtor entered into an arrangement to pay the amount by instalments, and stipulated that he would not alienate his property until the amount was satisfied. He, however, made an alienation by private sale to the defendant, appellant before us, and the plaintiff has brought this suit to have the property resold, on the ground that it had been hypothecated to him by the arrangement entered into the execution proceedings above referred to. The Courts below have decreed the claim. The appeal on the part of defendant however must prevail since on examination of the proceedings on which plaintiff relies, it cannot be held that the judgment-debtor made any pledge of any particular property to the plaintiff, for a mere stipulation not to alienate his property generally cannot be taken to effect a mortgage of property as security for a debt. The appeal is decreed and the decrees of the Courts below reversed and the suit dismissed with all costs.

Appeal allowed.

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2 A. 451 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

UMRAO BEGAM (*Judgment-debtor*) *v.* THE LAND MORTGAGE BANK OF INDIA (*Decree-holder*).* [18th November, 1879.]

Act XVIII of 1873 (*N.-W.P. Rent Act*), ss. 9, 171—*Land-holder—Right of Occupancy tenant—Transfer of Right of Occupancy in Execution of Decree.*

Held (SPANKIE, J., *dissenting*), affirming the decision of a Division Bench of the High Court in this case (1), that s. 9 of Act XVIII of 1873 does not prevent a land-holder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself.

[F., 2 A. 735 (738); R., 7 A. 851 (852) (F.B.); A.W.N. (1882), 45; D., 7 A. 511 (513).]

IN this case an application for the review of a judgment passed by a Division Bench of the High Court on the 2nd January, 1878 (1), having been granted by the learned Judges of that Bench (Pearson, J. and Oldfield, J.) those Judges referred to the Full Bench the question whether the view taken in that judgment, *viz.*, that s. 9 of Act XVIII of 1873 was enacted in the interest of the [452] landlord and was not intended to bar a sale made with the landlord's consent, was correct or not. The grounds on which the review was sought were (i) that the judgment was opposed to the express provisions of that section, which declared the holding of the tenant to be transferable among the co-sharers only, and

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* Application for Review of Judgment, No. 2 of 1878.

(1) 1 A. 547.

(ii) that the judgment was opposed to the spirit, and defeated the object, of the law relating to tenants having a right of occupancy.

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The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

STUART, C. J.—This is a reference to the Full Bench of Court by a Division Bench (Pearson, J., and Oldfield, J.) to whom an application for a review of judgment had been presented. The Division Bench had held that s. 9 of the Rent Act XVIII of 1873 did not prevent a zamindar, who was the holder of a decree against a tenant with a right of occupancy, from attaching and selling in execution of his decree his judgment-debtor's occupancy-right. In the course of the hearing before the Division Bench, a Full Bench ruling of this Court in the case of *Ablakh Rai* v. *Udit Narain Rai* (1) was referred to. In that Full Bench case it was held by a majority that the right of an occupancy-tenant was only transferable by sale in execution of a decree, where the decree-holder was a co-sharer by inheritance in such right. I agreed with the majority so far, but I went further and held, and still hold, that the right to enforce legal process by execution of any decree against such property *quantum valeat* cannot under any circumstances be taken away unless by express words to that effect, and I referred to s. 171 of the Rent Act to which the attention of the Full Bench had been directed as strengthening my view of the meaning and application of s. 9. Under these circumstances I could not dissent from the judgment of the Division Bench in the present case, for, in my opinion, s. 9 read in connection with s. 171 allows the transfer of property by the execution of a decree against the tenant in the hands of any [453] decree-holder. Nor in so expounding the law do I consider that I am legislating by arbitrarily adding to its body. On the contrary I am simply giving effect to the rights of suitors, with decrees in their hands against such a class of judgment-debtors, and which decrees in my view can be executed against any property or right and interest in property which his debtor may have, and for what it may be worth. I would therefore refuse the present application for a review on the grounds assigned and affirm the ruling of the Division Bench.

I may here observe that the report of my judgment in that Full Bench case is not quite correct in one particular. I am there made to say that "I consider that the words 'or otherwise' must be understood to be a general expression controlling the particular words which go before." It should have been "controlled by the particular words which go before."

PEARSON, J.—It is intelligible that it was the intention of s. 9, Act XVIII of 1873, to empower occupancy-tenants to transfer their rights to co-sharers by inheritance in such rights without the consent of the land-owner. But it is difficult to understand that it was intended to prohibit absolutely a transfer of such rights by such tenants to any person to whom the land-owner was willing that such transfer should be made. A land-owner can oust a defaulting tenant in execution of a decree for arrears of rent and make over the holding to another person. Why should not a transfer of the holding be arranged and effected between the defaulter and another person with the land-owner's consent? In such a transaction

(1) 1 A. 353.

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there appears no moral turpitude or political evil such as to warrant the Legislature in forbidding and repudiating it as essentially bad and declaring it to be null and void in law. On the contrary, such a transaction appears to be of an innocent, unobjectionable and convenient nature, and incapable of harming anybody. It seems also, as the judgment which it is sought to review observed, unreasonable to hold that a land-owner should not be at liberty to cause the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself, if he be willing to accept the auction-purchaser as a tenant. Although the terms of s. 9 are not qualified by any reference to the consent of the land-owner, we are yet bound to construe them in such a reasonable [454] manner as to avoid absurd conclusions. I therefore adhere to the view expressed in the judgment of the 2nd January, 1878.

SPANKIE, J.—We must, I think, accept the strict terms of s. 9 of the Rent Act. The rights of tenants at fixed rates are heritable and transferable. But no other right of occupancy shall be transferable by grant, will or *otherwise*, except as between persons who have become by inheritance co-sharers in such right. It seems to me that to allow sales, provided that the landlord consents to them, would be law-making on the part of this Court. We should practically add to the section a proviso which the framers of the law and the Legislature might have introduced, when the Act was passed, had they been so minded. I would therefore say that s. 9 bars a sale made with the consent of the zamindar, which, without reference to his consent, is prohibited by the terms of the section, except as between persons who have become by inheritance co-sharers in the right, the subject of the sale.

OLDFIELD, J.—The question raised in this case is whether the sale in execution of a decree of a Civil Court of the rights and interests of a tenant having rights of occupancy made at the instance of his landlord, who has obtained a decree against him, is valid so as to convey any rights or interest to the purchaser. S. 9 of Act XVIII of 1873 is relied on to show that such a sale is invalid. That section is as follows: "The rights of tenants at fixed rates shall be heritable and transferable: no other right of occupancy shall be transferable by grant, will or otherwise except as between persons who have become by inheritance co-sharers in such right." If this section is to be taken to mean that a landlord may not bring to sale his tenant's rights in his holding in execution of a decree of a Civil Court obtained against him, it can only be by interpreting this section as absolutely and without qualification forbidding and rendering void all transfers outside the limitation prescribed under whatever circumstances they have been made, whether with the consent of the landlord, the tenant, or of both, and if so, such a transfer will necessarily be void although made with the consent of both landlord and tenant. It seems to me impossible to suppose that this was the intention of the law. The object of this section was, I apprehend, to define the extent of a tenant's interest in his [455] holding as opposed to the landlord's, and settle what had been a vexed question, how far a tenant has the power, without the consent of his landlord, to transfer his holding. The section refers to transfers made by the tenant independently of the landlord, and it was not intended to disallow transfers when made with the consent of the landlord, or at his instance, as in the case before us, in execution of a decree of the Civil Court, when there is otherwise nothing in the law forbidding a tenant's rights to be sold in execution of such a decree. It will be seen that the effect of s. 9, Act XVIII of 1873, is to give a larger property

in their holdings to tenants at fixed rates than it gives to the tenants with rights of occupancy, and a larger property to the latter than it gives to mere tenants-at-will. The first class can transfer their holdings at their own pleasure, and the second class can only do so under limitations. The distinction between the different powers of transfer in different classes of tenants is intelligible only when we ascribe it to the desire to protect the landlord against transfers at the will and pleasure of his tenants. It is certain that the Rent Act does not extend to the tenants any absolute right to be maintained in their holdings against their landlords. Tenants with rights of occupancy are not protected against being ejected from their holdings by their landlords in execution of decrees for arrears of rent obtained against them by their landlords, and it would appear that the landlord might, if so disposed, bring to sale his tenant's interest in his holding in execution of a decree for rent, under s. 171 and following sections of Act XVIII of 1873. I see no reason to suppose that it was the intention of s. 9, Act XVIII of 1873, to invalidate the sale in the case before us.

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2 A. 455=4 Ind. Jur. 583.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

BASANT RAI AND OTHERS (*Defendants*) *v.* KANAUJI LAL (*Plaintiff*).*
[8th July, 1879.]

Usufructuary mortgage followed by sale—Revival of mortgage by cancelment of sale—Redemption of mortgage—Attachment in the execution of decree—Claim to attached property—Effect of order under Act VIII of 1859 (*Civil Procedure Code*), *s.* 246.

Z mortgaged in 1859 certain immoveable property, being joint ancestral property, for a term of five years, giving the mortgagee possession of the mortgaged [456] property. In 1861 *Z* sold this property to the mortgagees, whereupon the sons of *Z* sued their father and the mortgagee, purchaser, to have the sale set aside as invalid under Hindu law, and in August 1864 obtained a decree in the Sudder Court setting aside the sale. The mortgagee, purchaser, remained, however, in possession of the property as mortgagee. In May 1867, *Z* having sued the mortgagee for possession of the property on the ground that the sale had been set aside as invalid, the High Court held that *Z* could not be allowed to retain the purchase money and to eject the mortgagee, purchaser, but must be held estopped from pleading that the sale was invalid. In November 1867, one *K* having caused the property to be attached and advertised for sale in the execution of a decree which he held against *Z* and his sons, the mortgagee objected to the sale of the property on the ground that *Z* and his sons had no saleable interest in the property. This objection was disallowed by the Court executing the decree, and the rights and interests of *Z* and his sons were sold in the execution of the decree, *K* purchasing them. In 1878 *K* sued, as the purchaser of the equity of redemption, for the redemption of the mortgage of 1859. *Held* that *K* was entitled to redeem the property. *Held* also that the mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of *K's* decree, he could not deny that *K* had purchased the rights and interests remaining in the property to *Z* and his sons. *Held* also that the mortgagee had no lien on the property in respect of his purchase-money. *Held* also that, it being stipulated in the deed of mortgage that the mortgagee should pay the mortgagor a certain sum annually as "*malikana*" and the mortgagee not

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* Second Appeal. No. 1365 of 1878, from a decree of R. S. Saunders, Esq., Judge of Farukhabad, dated the 13th November, 1878, affirming a decree of Pandit Harsahai, Subordinate Judge of Farukhabad, dated the 2nd September 1878.

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2 A. 455 = 4 Ind. Jur. 583.

ON the 17th June 1859, one Zalim Singh mortgaged a ten biswas share in a certain village to Basant Rai and certain other persons for Rs. 2,200, for a term of five years, giving the mortgagees possession of the share. On the 21st May, 1861, Zalim Singh executed a deed of sale of the share in favour of the mortgagees. The sons of Zalim Singh sued their father and the mortgagees, purchasers, to set aside this sale as being invalid under Hindu law, it having been made without their consent and to meet liabilities created through the personal extravagance of Zalim Singh. On the 1st March, 1864, the Court of first instance gave the sons of Zalim Singh a decree setting aside the sale on the ground that it had not been made for legitimate family purposes, but for the gratification of the vendee's personal extravagances. This decree was affirmed by the Sudder Court on appeal by the mortgagees, purchasers, on the 22nd August, 1864. The mortgagees, purchasers, remained however in possession of the share as mortgagees. In 1866 Zalim Singh sued the mortgagees for the possession of the share on the ground that the sale had been set aside. On the 27th May, 1867, the High [457] Court held, on appeal by the mortgagees, that Zalim Singh could not be allowed to retain the purchase-money, and to eject the purchasers, but must be held estopped by his own act from pleading the invalidity of the sale. Subsequently one Kanauji Lal having applied for the sale of the share in the execution of a decree which he held against Zalim Singh and his sons, the mortgagees objected to the sale. On the 15th November, 1867, their objection was disallowed. On the 20th November the share was sold in the execution of this decree, and was purchased by Kanauji Lal. Kanauji Lal brought the present suit in June 1878 for the redemption of the mortgage of the 17th June, 1859. The facts of the suit are sufficiently stated in the judgment of the High Court, to which the defendants appealed from the decree of the lower appellate Court affirming that of the Court of first instance in the plaintiff's favour.

Mr. *Howard* and Munshi *Hanuman Prasad*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Pandits *Bishambar Nath* and *Nand Lal*, for the respondent.

The High Court (SPANKIE, J. and STRAIGHT, J.) delivered the following

JUDGMENT.

The plaintiff, respondent, is the auction-purchaser of the ten biswas zamindari share of Zalim Singh, the subject of dispute. He avers that the share was mortgaged on the 17th June, 1859, to the defendants for Rs. 2,200, and for a term of five years, and that on the 21st May, 1861, Zalim Singh executed a deed of sale of the property in favour of the mortgagees, giving them credit for Rs. 2,000, the mortgage-money, Rs. 250 in cash, and retaining 5,800 to be paid on account of debts to the plaintiff: Lalta Prasad and others, sons of Zalim Singh, sued to set aside the sale and succeeded in obtaining a final decree in their favour from the Sudder Dewany Adawlat, North-Western Provinces, on the 22nd August, 1864: the defendants, however, continued in possession of the share as mortgagees: there was a stipulation in the mortgage-deed that Zalim Singh was to receive Rs. 75 yearly as "*malikana*" or proprietary

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allowance: this sum the mortgagees deducted yearly from the principal sum advanced on the mortgage, leaving now a balance of Rs. 925 due to the mortgagees: the plaintiff claims to redeem the share of Zalim Singh on payment of Rs. 925 or such sum as the [458] Court shall declare to be due. The defendants contend that the purchase of the interest of the sons of Zalim Singh by the plaintiff at auction gave him no right of suit: they had no right during their father's life-time: Zalim Singh had admitted the sale to defendants and he had ineffectually endeavoured to recover possession of the share, but the High Court, North-Western Provinces, on the 27th May, 1867, rejected his claim: the plaintiff's suit to redeem the mortgage on the ground that the sale of the 21st May, 1861, was invalid was barred by s. 13, Act X of 1877, and the admission of Zalim Singh. They also contend that they were entitled to re-payment of the sale consideration and that the allowance of Rs. 75 ceased from the date of the sale, and that there was no condition in the mortgage-deed for the deduction of this sum yearly from the principal sum advanced on mortgage: Zalim Singh himself realized this sum prior to the sale. The Subordinate Judge held that the defendants, who objected to the sale of the share in execution of decree and against whose objection an order was passed on the 15th November, 1867, ought to have contested that order in a regular suit within the period prescribed by law: they had not done so, and the order became final, and they could not now contend that Zalim Singh had no rights that could be sold: the plaintiff therefore had a clear right of suit. He also held that the property in dispute could not be considered liable for the consideration of the sale-deed, that deed having been set aside by the Sudder Dewany Adawlat in 1864: the defendants themselves have admitted all along that they were mortgagees: as they had failed to show that the proprietary allowance of Rs. 75 had been paid yearly, the sum should be deducted from the amount of the mortgage-loan. He accordingly gave a decree to plaintiff as claimed. The defendants appealed and repeat their original pleas. The Judge held that the mortgage of 1859, which had merged in the sale of 1861, revived when that sale was cancelled under the decision of the Sudder Dewany Adawlat of 1864: the sale was set aside because it was invalid under the Hindu law. He accepts the argument of the Subordinate Judge in regard to the finality of the order under s. 246, Act VIII of 1859, and he further holds that defendants were not entitled to any refund of Rs. 8,000, as sale-consideration, before redemption could be allowed; if they are entitled to that sum, they could only claim it from Zalim Singh [459] personally: they could not claim it from the plaintiff who had purchased the equity of redemption: the defendants had never brought a suit for the recovery of the money. The Judge also allowed the deduction of Rs. 75 yearly from the mortgage-loan as there was no proof that the allowance had been paid.

In second appeal the same pleas are urged. The decision of the Sudder Dewany Adawlat of the 22nd August affirmed that of the Judge, dated 1st March, which set aside the sale of 1861 as not having been made for legitimate family purposes but for the gratification of the personal extravagance of Zalim Singh. It was therefore invalid under the Hindu law. But though the sale was set aside, possession was not given to the plaintiffs, the sons of Zalim Singh. The defendants remained in possession as mortgagees. The sale having been declared altogether inoperative, and having been completely set aside, it cannot be said that the mortgage was extinguished by the execution of the sale-deed. The defendants were simply left in possession as mortgagees. The mortgage

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transaction has never been impugned, and the plaintiff as the representative of the original mortgagor has certainly a right to redeem the mortgage.

The Courts below appear to have rightly held that, as the defendants objected to the sale by auction of the rights of Zalim Singh and an order was passed against them on the 15th November, 1867, which they had never contested in a regular suit, they could not now deny that the plaintiff had purchased whatever rights still remained to Zalim Singh and his sons. In holding this to be the case the lower appellate Court has followed the ruling in *Badri Prasad* v. *Muhammad Yusuf* (1) of this Court in Full Bench.

The lower appellate Court has not, as urged by the appellant, misunderstood this Court's decision of the 27th May, 1867. That decision ruled that, although the sale by Zalim Singh was set aside, yet Zalim Singh (then plaintiff) could not equitably be allowed to retain the purchaser's money and to eject the purchaser from the property sold. He must be held estopped by his own act from pleading the invalidity of the sale. But this decision was passed as against Zalim Singh himself, who on the strength of the Sudder Dewany Adawlat's decision of the 22nd August was seeking to obtain possession of the property from the defendants. But it does not follow **[460]** that the defendants have a lien on the property to the extent of the purchase-money. They are not in possession under the sale-deed, but were in possession as mortgagees, and as such have continued to be recorded in the Collector's books. The sale had already been declared invalid, when the plaintiff purchased Zalim Singh's rights at auction and acquired by his purchase the right of redeeming the mortgage. If the purchase-money had been received by Zalim Singh, who is no longer alive, the purchasers might have sued to recover the purchase-money from him during his life, and might possibly in execution of their decree have proceeded against Zalim's rights and interest in the property. They did not adopt this course, though the sale was, as has been observed, completely set aside by the judgment of the Sudder Dewany Adawlat in 1864. Any claim to recover the money now would appear to be barred by time, and the defendants, mortgagees, can have no right now to make the property responsible for the re-payment of the purchase-money on account of the sale in 1861, which was held to be altogether invalid, as against the plaintiff who has purchased the equity of redemption of the mortgage in 1859, and that too after the objections of these defendants had been overruled, and the order made against them on the 15th November, 1867, had become final.

The finding of the lower appellate Court regarding the Rs. 75, "*malikana*" is one of fact, with which we cannot interfere. The Judge in deducting this yearly allowance from the principal of the mortgage-loan has not acted contrary to law, and the plea that he should not have done so, because the term of the mortgage had expired, has no force, inasmuch as the mortgagees have continued to hold possession under the mortgage and as long as they do so are bound by its conditions. We dismiss the appeal and affirm the judgment with costs.

Appeal dismissed.

(1) 1 A. 381.

2 A. 460.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

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APPELLATE CIVIL.

2 A. 460.

KAMAL SINGH (*Plaintiff*) v. BATUL FATIMA (*Defendant*).*
[25th July, 1879.]

Trust—Assignment by Trustees—Limitation.

In 1840 the purchasers and recorded proprietors of a four biswas share of a certain village caused a statement to be recorded in the village record-of-[461] rights to the effect that *B* claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of revenue due on such share. In 1843 *M* purchased such share and became its recorded proprieter. In 1877 *K*, the son of *B*, sued the representative of *M*, for possession of a moiety of such share, alleging, with reference to the statement recorded in the record-of-rights, that such moiety had vested in *M's* assignors in trust to surrender it to *B* or his heirs on payment of a moiety of the sum they had paid on account of revenue, and paying into Court a moiety of such sum. *Held* that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M* having purchased without notice of the trust and for valuable consideration.

[R., 9 A. 97 (101)=A.W.N. (1886), 303.]

IN 1838 one Kesri Singh was the recorded proprietor of a four biswas share in a certain village. In 1839 Kesri Singh's rights and interests in this share were purchased by one Pitamber Singh at a sale in the execution of a decree held by him against Kesri Singh. On the 7th June, 1839, Pitamber Singh transferred his rights under this purchase by sale to one Ratan Singh and one Dirgpal Singh, who were recorded as the proprietors of the four biswas share, and paid the arrears of revenue due in respect of the share amounting to Rs. 108. In 1840, at the settlement of the village, Bal Singh, brother of Kesri Singh, having claimed to be the owner of a moiety of the four biswas share, Ratan Singh and Dirgpal Singh caused the following statement to be recorded in the village record-of-rights: "We Ratan Singh and Dirgpal Singh have purchased Kesri Singh's share: Bal Singh claims a moiety of it: he owes us Rs. 54 on account of the revenue we have paid: whenever he pays that amount with interest he shall become the proprietor of his share." The four biswas share was then specified in manner following: "Our exclusive share (one moiety):" on account of Bal Singh (one moiety)." On the 20th November, 1843, one Muzaffar Husain purchased the four biswas share from Ratan Singh and Dirgpal Singh, and became its recorded proprietor. In 1874, at the settlement of the village, Kamal Singh, the son of Bal Singh, who had meanwhile died, applied to the Settlement Officer to have his name recorded as the proprietor of a moiety of the four biswas share as his father's heir. The Settlement Officer refused this application. In April, 1877, Kamal Singh brought the present suit against Muzaffar Husain's widow for the [462] possession of a moiety of the four biswas share, alleging, with reference to the statement which Ratan Singh and Dirgpal Singh had caused to be recorded in 1840 in the village record-of-rights, that a moiety of the

* Second Appeal, No. 266 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 19th December, 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 4th March, 1878.

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four biswas share has vested in them and their assigns in trust to surrender it on payment of the sum, with interest, which they had paid on account of the revenue due in respect thereof. The plaintiff paid into Court Rs. 54, and an equal sum on account of interest, or Rs. 108 in all. The defendant set up as a defence to the suit that the plaintiff's right was extinguished by length of time, because Ratan Singh and Dirgpal Singh were not trustees of the property when they assigned it to Muzaffar Husain, and because, assuming that they were trustees of it when they so assigned it, Muzaffar Husain had purchased it in good faith, without notice of the trust, and for valuable consideration. The Court of first instance held that Ratan Singh and Dirgpal Singh were trustees of the property, and that Muzaffar Husain had not purchased the property in good faith, as he had purchased without making any inquiry, and the suit was consequently not barred, and gave the plaintiff a decree. On appeal by the defendant the lower appellate Court, for reasons which will be found stated in the judgment of the High Court, dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Niblett*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, for the respondent.

JUDGMENT.

The judgment of the Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

SPANKIE, J.—The property in suit was recorded in the name of Kesri Singh, who fell into arrears in 1838 to the amount of Rs. 108. In 1839 Ratan Singh and Dirgpal Singh bought the rights and interests of Kesri Singh, and in 1840 they paid up the arrears of the entire share of four biswas. It is now alleged that Bal Singh, a brother of Kesri Singh, was also the owner of half the land, and the plaintiff relies upon an entry in the settlement record of 1840, which it is contended not only amounts to a recognition of Bal Singh's title by Ratan Singh and Dirgpal Singh, but shows that they continued to hold Bal Singh's share in trust, and plaintiff now seeks to pay the share of arrears due by Bal Singh and to take over the share. We are far from satisfied that [463] the acknowledgment can be regarded as evidence of a trust as between Bal Singh and the original purchasers of Kesri Singh's rights. The entry is to the effect that a petition had been presented by Bal Singh claiming to be the owner of half of the four biswas in possession of Ratan Singh and Dirgpal Singh, and that the latter are willing to allow his share, when he pays the arrears due on it. We doubt whether these words are sufficient to raise a valid trust such as that which the plaintiff is endeavouring to set up. There is no undertaking on the part of Ratan Singh and Dirgpal Singh that they would continue to hold Bal Singh's share in trust for him and his heirs, over any extent of time, until some one of them was able to recover the land. In effect they did not do more than express their willingness, if Bal Singh chose to pay up his arrears, to give him up the land. Bal Singh might have availed himself of this opportunity, but he never did. There does not appear to have been any promise to give up the land at any future time after long years of enjoyment of it to any other person than Bal Singh. If there was any agreement at all, it was a present one between the parties, but beyond the entry already referred to there is no sufficient evidence of any agreement, and

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Ratan Singh and Dirgpal Singh continued to be recorded as the owners of the entire four biswas. They were not the first purchasers of Kesri Singh's rights, which had been brought previously by one Pitambar Singh, and had been sold by him to Ratan Singh and Dirgpal Singh on the 7th June, 1839, and it was probably owing to this circumstance, and not caring to litigate the point whether Pitambar Singh had bought four or two biswas, when he purchased Kesri Singh's rights, they, who had paid up the arrears due to Government on the entire share, which was recorded in the name of Kesri Singh alone, were willing to release two biswas to Bal Singh, if he chose to discharge the arrears that would be payable by him. Beyond what has been stated there is nothing to show that the transaction had any of the characteristics of a trust. Pitambar Singh was put in possession of the share; Ratan Singh and Dirgpal Singh purchased it from him, and had to pay Rs. 108, Government arrears, on account of it, and certainly obtained possession of the four biswas as Kesri Singh's. They continued to hold them as owners, being recorded as such in the settlement record, until Dirgpal Singh [464] died, and subsequently Ratan Singh and his brother Mardan Singh sold the four biswas on the 20th November 1843, to the defendant's husband, in whose possession and that of his family the property remained for twenty-nine years before the plaintiff made any claim to it in 1874, to the Settlement Officer, who, in October 1874, rejected his claim. The plaintiff then allowed two years and a half to elapse before he brought the present suit. The lower appellate Court, after reviewing the old Regulations which related to transfers by the Collector of a defaulting share or patti of an estate, distinguishes the alleged transfer in this case from those made by authority, and if we understand him aright, he appears to regard it as one made by agreement or mutual understanding between Bal Singh and Ratan Singh and Dirgpal Singh, and accepting that view, he looks upon their possession as that of trustees or mortgagees. But as already observed there is no other evidence of a mutual understanding or agreement than the entry in the settlement record, by which, as we are advised at present, no trust was raised. All the circumstances point to a different conclusion from that at which the Judge has arrived. There was a sale in execution of a decree, and very soon after a sale by the auction-purchaser to Ratan Singh and Dirgpal Singh, and immediately, or very soon afterwards, the latter obtained full possession of the four biswas and paid up all the arrears due upon the share, and at this time the lower appellate Court itself admits "that there is no record to show that Bal Singh's rights and interests were recognised as then existing, and that an assignment of them was made to Ratan Singh and Dirgpal Singh by authority," though, strange to say, he adds that the presumption is that they were so transferred as in similar cases of default of land revenue. The presumption would appear to be the other way, assuming it to be the fact, as stated by the Judge, that Bal Singh's rights were not even recognised by the Revenue authorities. It is also inconsistent with the other view of the case which he immediately adopts, that by private agreement, or mutual understanding Ratan Singh and Dirgpal Singh held as mortgagees or trustees. Assuming however that the Judge is right in this view, we are of opinion that he was justified in holding that the claim was barred by limitation for there is nothing whatever to prove, nor is it alleged, that the purchasers from Ratan [465] Singh and Mardan Singh in November 1843, took the property with any notice of the trust, and it is certain that the purchasers in 1843 bought for a valuable consideration and have been

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holding ostensibly as proprietors from that date. Under these circumstances limitation would run from the date of that conveyance. So that this suit fails altogether, whether or not we admit a trust in 1839 40, and we therefore dismiss the appeal and affirm the judgment with costs.

Appeal dismissed.

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2 A. 465.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF GOBIND PRASAD AND ANOTHER. [15th October, 1879.]

Act XLV of 1860 (*Penal Code*), *s.* 441—*Criminal trespass.*

Certain immoveable property was the joint undivided property of *C*, *G*, and a certain other person. *R* obtained a decree against *G* for the possession of such property and such property was delivered to him in the execution of that decree in accordance with the provisions of s. 264 of Act X of 1877. *C*, in good faith, with the intention of asserting her right, and without any intention to intimidate, insult, or annoy *R*, or to commit an offence, and *G*, in like manner, with the intention of asserting the right of his co-owners, remained on such property.

Held that, under such circumstances, they could not be convicted of criminal trespass (1).

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence or to intimidate, insult or annoy is conclusively proved.

[**F.**, 14 Cr.L.J. 633=21 Ind. Cas. 681=12 A.L.J. 151; **R.**, 22 C. 391 (407); A.W.N. (1882) 236; 2 Cr.L.J. 81=13 P.R. 1905 (Cr.)=81 P.L.R. 1905; 12 P.R. 1906 (**F.B.**) Cr.=54 P.L.R. 1907; U.B.R. (1892—1896) 259; U.B.R. (1897—1901) 352; **Observed**, 9 Cr.L.J. 561=2 Ind. Cas. 240=5 N.L.R. 69.]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The facts of the case are sufficiently stated, for the purposes of this report, in the judgment of the High Court.

Mr. *Leach*, for the petitioners.

Pandit *Ajudhia Nath*, for the opposite party.

JUDGMENT.

STRAIGHT, J.—This is an application for revision under s. 297, Criminal Procedure Code, of an order of the Magistrate of Mirzapur, passed upon the 3rd of September last, convicting two [466] persons, namely one Gobind Prasad and Chaurasi, his wife, of criminal trespass, under s. 441, Penal Code. The case has been very fully and exhaustively discussed before me by the pleaders on both sides, and I must frankly say, that I have experienced the greatest difficulty in forming any determinate opinion upon it. This has arisen from the unusually vague and elastic language used in s. 441, which, if not closely scrutinized and strictly interpreted, might lead to its application to sets of facts or circumstances, for which it was never intended by the Legislative authorities who framed it. For it is easy enough to conceive multitudinous

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(1) See also *Empress* v. *Budh Singh*, 2 A. 101.

cases, some approaching the verge of absurdity, that would fall within the letter, not the spirit, of the section, and which no one would for a moment consider fit subject even for civil proceedings, much less for a prosecution in a criminal Court. To lay down any rule, as to the extent to which its operation should be limited, is scarcely possible, but it is plain that its scope must be confined within those bounds that common sense and sound reason dictate. In this view let us see what the words of the section practically enact, and how they are to be practically applied. First, there must be an unauthorised entry into or upon property,—unauthorised, that is to say, either directly against the will of the person in possession, or constructively against his will, in the sense that he who enters has an unlawful intention, which, were it known to such person, would make him object, forbid or prevent the entry that in ignorance of such intention he sanctions and permits; or, again, if the entry has been lawfully and legitimately obtained, there must be an unlawful "remaining," either directly or constructively against the will of the person in possession, to be judged by the tests already explained. In either case, the unlawful entry or unlawful remaining must be with intent (i) to commit an offence, (ii) to intimidate, (iii) to insult, (iv) to annoy, any person in possession of the property. As to these intents, the first three are sufficiently explicit by the light of ss. 40, 503 and 504 of the Penal Code, but as to the fourth, very grave difficulty arises to ascertain what is or is not meant. Is the word "annoy" to be taken in its fullest and most general sense, or with what limitations is it to be construed? The varieties and differences of human temperament are so innumerable that it is next to impossible **[467]** to estimate to what lengths a literal definition might not extend. It is a matter of daily observation, that what will annoy one man will not disturb an emotion in another; and in a vast community like the native population of this country, the endless fancies, feelings and prejudices, religious or caste-born, necessarily are stronger and more sensitive with one set of persons than with another. It must, therefore, be that the word "annoy" in this s. 441 must have some plain and intelligible construction placed upon it, and its application must not be left to depend upon each individual case and the peculiarities of character or idiosyncrasies of feeling of the special person who comes forward to complain. It seems to me that the word "annoy" in s. 441 must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.

I cannot agree in the argument of the pleader who appeared to support the conviction, that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by s. 441. Because an act is illegal in the sense that it is a breach of a man's duties and obligations under the civil law to obey and submit to any process that is sought to be enforced against him by execution or otherwise, it does not follow as a necessary consequence that that act is criminally unlawful and therefore punishable. The intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires.

So far I have dealt with the intent to annoy But with intent to annoy whom? "Any person in possession of such property." Then the question arises what sort of possession is here intended, express or implied, constructive, in the sense of "legally entitled to," or actual, as contemplated in s. 530, Criminal Procedure Code. As to this last-mentioned provision, it is plain that, in the interest of public peace, it may

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be used to declare and protect the possession of a mere trespasser until he is "ousted by due course of law." How far a person in that position could invoke the provisions of s. 441 of the Penal Code against the party "legally entitled to possession," for making an entry upon property in the occupation [468] of the trespasser, I am not prepared here to discuss. That would be opening up the discussion of a question of so expansive a character that, as it is unnecessary for the purposes of the decision of the present case, I avoid entering upon it. Suffice it that, to deal with the matter before me, I am of opinion the possession contemplated and intended by s. 441, must be actual in the sense and meaning of s. 530, Criminal Procedure Code.

Having thus dealt with the legal aspects of s. 441, let us see in what way it can be applied to the present case, the circumstances of which are as follows:—On the 16th January 1873, Gobind Prasad, Chaurasi his wife, and his brother Kalika, jointly mortgaged to one Ram Ratan Das four houses, two situate in Narghat, in Muzaffarganj mohalla,-and one at Tirmohani, for an advance of Rs. 2,000. It was stipulated by the deed that the loan should be repaid within six months, otherwise it would become a deed of conditional sale. Neither the capital sum nor any portion of it was repaid within the time mentioned, and on the 12th February 1874, notice as required by s. 8 of Regulation XVII of 1806 was duly issued. Some arrangement then appears to have been come to between the mortgagors and the mortgagee, the result of which was that, on the 4th July 1874, the two houses at Narghat were sold for Rs. 833 8-0 and the proceeds of such sale were handed over to Ram Ratan Das. The year's grace from the notice of February 1874, ran out, but no further steps were taken by the mortgagee, who on the 15th March 1875, accepted a further sum of Rs. 300 on account of his debt, thus making a total of Rs. 1,133-8-0 paid in satisfaction of the original principal sum of Rs. 2,000. On the 24th August 1876, an order of foreclosure was made and issued. Thereupon a suit for possession was instituted, which was met by the defence that, as the plaintiff had accepted the payments before mentioned, his claim to foreclosure was barred. The Subordinate Judge of Mirzapur, who tried that case, decided in the plaintiff's favour, and against his decision Chaurasi and Kalika appealed. The judgment, however, stood good as against Gobinda Prasad, who, on the 25th June 1877, executed an agreement by which he promised to pay the balance due, with interest, within one year, failing which the plaintiff should have a decree for possession. It was intended that Kalika and Chaurasi should be parties to that document, but [469] as a matter of fact they were not: on the contrary, they lodged an appeal against the Subordinate Judge's decision, which was heard on the 29th November 1877, and resulted in their favour. Gobind Prasad failed to fulfil the terms of the agreement, and the twelve months having elapsed and principal and interest not having been paid, Ram Ratan Das applied to be placed in possession of the two houses in Muzaffarganj mohalla and Tirmohani. To this Gobind Prasad objected: firstly, that the grounds upon which the appeal of Kalika and Chaurasi had been allowed applied equally to him as a matter of defence to the plaintiff's claim; secondly, that the houses were the joint property of himself and the other two mortgagors of the mortgage-deed of 1873. The Subordinate Judge passed an order of possession on the 2nd November 1878, against which Gobind Prasad appealed to the Judge, and his case came on for hearing and was disposed of on the 14th November 1878, the appeal being

dismissed. Meanwhile, on the 11th November, the amin of the Court had gone to give possession of the house in Muzaffarganj mohalla to Ram Ratan Das, but he there found Kalika and an agent of Chaurasi on the chabutra, who said they owned a share of the house "and objected, and so I went back and reported to the Court." A few days later another amin was sent, who gave possession as directed by s. 264 of the Civil Procedure Code, Kalika objecting and Gobind Prasad being upon the premises at the time. This was the full extent of possession ever obtained by Ram Ratan Das. Between November 1878, and April 1877, disputes continued between the parties, and instead of directing his attention towards obtaining possession of the house in question by due process of law, Ram Ratan Das seems to have resorted to the Criminal Court for sureties of the peace by Gobind Prasad and his relations, no doubt with the view of making a cheap short cut to secure his object, namely, to force a surrender of the property. Ultimately, early in April, he preferred a charge under s. 441 against Gobind Prasad and Chaurasi for criminal trespass, which he alleged to have taken place on the 15th April. For some reason best known to himself the Magistrate, instead of taking up the case under the section upon which complaint had been made, proceeded of his own motion to deal with the matter under s. 530, Criminal Procedure Code, and on the 8th May he **[470]** found that Gobind Prasad and his wife were in possession of the house, but he directed them "to clear out within 10 days." This most irregular order, made in the teeth of the words of the section, came up to this Court for revision and was necessarily quashed by Mr. Justice Oldfield, who directed that the possession of Chaurasi must be maintained, while he at the same time pointed out that the complaint under s. 441 should be disposed of.

On the 14th July Gobind Prasad and his wife appeared before the Magistrate, to answer the charge under s. 441 for the alleged trespass on the 15th April, and after a hearing they were on the 14th July convicted and fined one rupee. They took no steps to set this conviction aside, and on the 1st September a second complaint was lodged before another Magistrate against them for an alleged trespass on the 14th July, the very day when they had been in attendance at the Magistrate's Court. Upon this charge, after they had been given twenty-four hours' grace to turn out of the house, they were, on the 3rd September, convicted and fined Rs. 200 each. It is that conviction and sentence that now comes before this Court for revision. The only other facts that should be recapitulated are that, on the 17th February, Gobind Prasad had filed an application to be declared insolvent, which was rejected by the first Court, but granted on appeal to this Court, and that on neither occasion before the Magistrate did Ram Ratan Das himself appear as a witness or to support his complaint.

Such were the circumstances out of which the Magistrate was called upon to decide as to the guilt or otherwise of Gobind Prasad and his wife under s. 441, Penal Code, and it is as to the propriety of his determination upon that point that the case now comes before this Court. I do not forget that I must deal with it, not as I should with an appeal, but simply as a matter for revision under s. 297, Criminal Procedure Code. At the same time it is my duty to see that the Magistrate had before him sufficient legal evidence to justify him in convicting. Applying the tests I have already adverted to in the earlier part of this judgment, I am clearly of opinion that no such possession as is required by s. 441 was ever proved to have been in Ram Ratan Das so as to make Gobind Prasad liable either

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for his "entering into" or "remaining" on the premises [471] in question. Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another, for the purpose of asserting rights he may have solely or jointly with other persons, is not criminal trespass unless the intent to commit an offence, or to intimidate, insult or annoy is conclusively proved. Evidence of any such intent in this case seems to me to be altogether absent, nor does the complainant himself come forward to establish anything of the kind. Rightly or wrongly, both Kalika and Chaurasi allege a joint interest in the house in Muzaffarganj mohalla, and the former has made formal objection to possession of it being given to Ram Ratan Das. The original mortgage was joint, and of all four houses jointly, the loan was joint, the payment of the Rs. 1,133-8-0 was made on the joint account, and so accepted by the mortgagee, and the agreement of 25th June 1877, was intended to be joint, though it was only executed by Gobind Prasad. Without enumerating other facts in the case, that appear to me to negative any of the intents under s. 441, there is quite sufficient to justify Gobind Prasad in protesting that what he has done has been with the *bona fide* object of asserting his rights or the rights of his co-sharers. Ram Ratan Das, if he had thought proper to do so, had only to put the machinery of the civil law in motion, and it would have accomplished for him all that he required, but he elected to appeal to the Criminal Courts, and he has no one to blame but himself if he finds that he must now revert to the course of procedure he should have originally adopted. The convictions are quashed.

Convictions quashed.

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2 A. 471=4 Ind. Jur. 585.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

RAMADHIN AND ANOTHER (*Defendants*) *v.* MAHESH AND ANOTHER (*Plaintiffs*).* [17th November, 1879.]

Arbitration—Filing of award—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 2, 520, 521, 522, 525, 526, 588.

Where, in a suit for the filing of an award made on a private reference to arbitration, the Court of first instance, holding that there was no reason to remit such award to the reconsideration of the arbitrator, under the [472] provisions of s. 520 of Act X of 1877, or to set it aside under s. 521 of that Act, did not proceed to give judgment according to such award followed by a decree, but merely directed that such award should be filed, *held* that its order was not appealable as a decree, or as an order.

[R., 7 B. 316 (320).]

THIS was a suit in which the plaintiffs claimed under s. 525 of Act X of 1877 that an award made on a private reference to arbitration should be filed in Court. The defendants objected to the award being filed on the ground that the arbitrator had determined matters not referred to arbitration, that the award was vague and consequently incapable of execution, and that the arbitrator had been guilty of misconduct and corruption. The Court of first instance, holding that the award was valid, made an

* First Appeal, No. 69 of 1878, from a decree of Maulvi Sultan Husain, Subordinate Judge of Gorakhpur, dated the 5th April 1878.

order in the following terms: "Ordered, that the claim of the plaintiffs be decreed." 1879 Nov. 17. — Appellate Civil. — 2 A. 471 = 4 Ind. Jur. 585.

Ramadhin and Tulsi Ram, two of the defendants, appealed to the High Court against "the decree" of the Court of first instance, contending that the arbitrator had determined matters not referred to him, and had been guilty of misconduct and corruption.

Pandit *Ajudhia Nath*, Lala *Lalta Prasad*, and Maulvi *Medhi Hasan*, for the appellants.

Mr. *Niblett* and Munshi *Kashi Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the High Court:

STUART, C. J.—A preliminary objection is taken by the plaintiffs, respondents, that the present appeal does not lie, seeing that it is an appeal from an order, which, taken in connection with the relief asked for in the plaint, is simply an order directing the award to be filed as provided by s. 526, Act X of 1877, and that such an order is not one of those made appealable by s. 588. This objection must be allowed. The award in the present case was made in a private arbitration, but the effect of s. 526 is to place it on the same footing as an award made in an arbitration made before the Court, and the procedure to be followed for enforcing the award must be precisely the same in both cases. Instead therefore of the Subordinate Judge recording the order he has made, by which he appears to decree the plaintiffs' claim on its merits, he should have proceeded as directed by s. 526, read in connection with s. 522 of Act X of 1877, and given a formal [473] judgment according to the award and a decree following upon such judgment. And this he ought to do still. The present appeal is an incompetent proceeding; we cannot hear it but must disallow it with costs.

OLDFIELD, J.—The suit before us was brought for filing an award under s. 525, Act X of 1877. The Subordinate Judge has decreed the claim, and the first question we have to determine is whether the appeal now preferred by the defendants is maintainable. By s. 525 the application made under that section has to be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and it is incumbent on the Court to determine if any such grounds as are mentioned in ss. 520 and 521 are shown against the award, and if not, it is provided by s. 526 that "the Court shall order the award to be filed, and such award shall then take effect as an award made under the provisions of this chapter," *i.e.*, chapter xxxvii. I understand this to mean that the Court, after ordering the award to be filed, shall proceed to do as directed in s. 522, *i.e.*, give judgment according to the award and follow the judgment so given by a decree (1), and that the decree will then be enforced in the manner provided for the execution of decrees, and no appeal will lie from such a decree except in so far as the decree is in excess of or not in accordance with the award. In the suit before us the Subordinate Judge has determined questions under ss. 520, 521, but his final order is merely that the claim be decreed, and looking to the plaint and the nature of the claim this amounts only to an order for filing the award · no judgment according to the award followed by a decree required by s. 522 can be said to have been given, and the question does not arise whether there is an appeal with reference to the provisions of s. 522

(1) *Sahib Ram Jha* v. *Kashee Nath Jha*, 21 W. R. 295.

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Nor do I consider that there is any appeal from the order that has been made. It is not one of those orders from which an appeal is allowed by s. 588, and it cannot be held to be a decree as the word is defined in s. 2, Act X of 1877, so as to give a right of appeal as from a decree, as has been urged before us, for the order is not the formal order of the Court in which the result of the [474] suit (and the proceeding is a suit) is embodied; the order for filing an award is but an interlocutory order, a step in the decision of the suit, the result of which is embodied in the final decree which the law (s. 522) directs shall follow judgment. The Court below should be moved to give judgment in accordance with the award and a decree to follow it. There may or may not be an appeal from that decree according to circumstances, but this appeal must I think be dismissed with costs.

Appeal dismissed.

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2 A. 474

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

SHEO PRASAD (*Defendant*) *v.* A. B. MILLER, OFFICIAL ASSIGNEE TO THE HIGH COURT, CALCUTTA (*Plaintiff*).* [17th November, 1879.]

Stat. 11 *and* 12 *Vict., c.* 21 (*Insolvent Act*), *ss.* 21, 24, 26, 32—"*Voluntary*" *conveyance by insolvent.*

Where two days before a person was adjudicated an insolvent and his property had by order vested in the Official Assignee, under the provisions of Stat. 11 and 12 Vict., c. 21, such person had, not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property, *held* by STUART, C.J., that such assignment was not "voluntary" within the meaning of s. 24 of that Statute, and was therefore not fraudulent and void under that section as against the Official Assignee.

Held by PEARSON, J., that such assignment was not a voluntary one in the sense that it was made spontaneously, without pressure, but as the vesting order was not passed on a petition by the insolvent for his discharge, that section was not relevant to the case.

[F., 3 A.L.J. 604 = A.W.N. (1906) 250.]

ONE Baij Nath and his two brothers Bansi Dhar and Ghasi Ram carried on business at Calcutta under the style of Nanu Mal. These persons also carried on business at Cawnpore under the style of Bansi Dhar and Ghasi Ram, and at Lucknow under the style of Chotey Lal and Sita Ram. On the 20th December 1875, the firm of Bansi Dhar and Ghasi Ram were indebted to Sheo Prasad, the defendant, who carried on business at Cawnpore, in certain moneys. On the same date one Ram Prasad residing at Lucknow was indebted to the firm of Chotey Lal and Sita Ram in certain moneys. On the 21st December 1875, two of the creditors of the firm of Nanu Mal applied to the Calcutta High Court that Baij Nath and his partners might [475] be adjudicated insolvents. On the 22nd December 1875, such persons were adjudicated insolvents by that Court, and that Court made an order vesting their property in the Official Assignee of the Court. In December 1877, Mr. A. B. Miller, the Official Assignee, instituted the present suit against the defendant to recover from him the amount of Ram Prasad's debt to the firm of Chotey Lal and

* First Appeal, No. 151 of 1878, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th September 1878.

Sita Ram, which he alleged had been fraudulently transferred to him by Baij Nath. This debt was transferred under a "*rukka*" drawn on one Kanahiya Lal by Ram Prasad in favour of one Paras Ram, the agent of the defendant. That *rukka* was drawn in the following terms:—"My friend Lala Kanahiya Lal, Rs. 10,352 are due by me to Baij Nath: I now draw this *rukka* in your favour to the effect that under his assignment I am causing Rs. 9,452 to be paid to Paras Ram on account of his debt: take a receipt from Paras Ram according to this *rukka* and enter the amount in my account: I will give credit for this item against my item of deposit, at the time of adjustment of accounts; it is necessary that you should attend to this matter." The *rukka* purported to have been drawn on the 20th December 1875. The plaintiff alleged that the debt had been transferred, not as appeared from the *rukka* and the books of the firm, before the 22nd December, 1875, when Baij Nath, Bansi Dhar, and Ghasi Ram were adjudicated insolvents, but after that date, and that the transfer was fraudulent and void. From the evidence of Paras Ram it appeared that the *rukka* was drawn under these circumstances: Two or three days previously to the 20th December, 1875, Paras Ram had learnt that the Bank of Bengal at Lucknow had refused to negotiate a *hundi* drawn by Baij Nath, and he had therefore on behalf of the defendant asked Baij Nath for the money due to the defendant. On the 20th December 1875, he again asked Baij Nath for the payment of the debt, requiring payment in cash. Baij Nath replied that he had no money, but that if Paras Ram would accompany him to Ram Prasad's house, he would cause Ram Prasad, who owed him money, to pay the debt. Paras Ram accordingly accompanied Baij Nath to Ram Prasad's house, where a settlement of accounts took place between Baij Nath and Ram Prasad, and a balance of Rs. 9,452 being found due to the former by the latter, Ram Prasad drew the *rukka* in question and gave it [476] to Paras Ram. The Court of first instance held that the debt was transferred after the 22nd December 1875, and that the transfer was fraudulent and void, and gave the plaintiff a decree. The defendant appealed to the High Court.

Mr. *Colvin*, Pandit *Bishambhar Nath*, and Babu *Beni Prasad*, for the appellant.

Mr. *Howard* and Mr. *Greenway*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court.

STUART, C. J.—This appeal must be allowed. The simple question is whether the *rukka* drawn by Ram Prasad on Kanahiya Lal was transferred by the former to the defendant, Lala Sheo Prasad, honestly and for good consideration, or "voluntarily" within the meaning of that word in s. 24 of the Insolvent Act 11 and 12 Vict., c. 21. That is the sole question before us, and it must be answered favourably for the *rukka* and against the plaintiff. The facts material to the question may be stated as follows:—The *rukka* was drawn and transferred to the defendant on the 20th December, 1875, and on the 22nd December, 1875, the parties represented by the plaintiff were adjudicated insolvents by the Calcutta Insolvency Court. By s. 20 of the Insolvent Act the whole estate of the insolvent, without necessity of express conveyance or assignment, vests in the Assignee in trust for the benefit of the insolvent's creditors. By s. 21 it is provided that the Assignee shall take possession of such estate, and by s. 26, it is, among other things, enacted that persons holding property of, or being indebted to, the insolvent shall hold

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such property for, and pay according to such indebtedness to, the Assignee for the general benefit of the creditors of such insolvent. These sections of the Insolvent Act give to the Assignee an absolute title to and complete control over the entire estate of the insolvent as at the date of the vesting order. But by s. 24 of the Act it is enacted that "if any insolvent * * * * * shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, * * to any creditor, or to any other person in trust for or to, or for the use, benefit, or advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances and *within* [477] *two months* of the date of the adjudication of insolvency * * * shall be deemed, and is hereby declared to be fraudulent and void as against the assignee of such insolvent." Relying on this section the plaintiff claims the value represented by the *rukka* on the ground, first, that the 20th December, 1875, was not its true date, and secondly, even if it was, that the *rukka* was given voluntarily and fraudulently, that is, in fraudulent preference of the defendant. But I can see nothing in the evidence to support such a contention. It is very clear in the first place that the 20th December, 1875, was the true date of the *rukka*; this is the plain inference from all the evidence on the subject. The plaintiff's recorded statements to the contrary are not distinct and absolute according to certain knowledge on his part, but as rather suggestedly asserted with the view apparently of giving him a *locus standi* for contending that the date of the *rukka* was subsequent to the vesting order, and the transaction was voluntary and fraudulent within the meaning of s. 24 of the Insolvent Act. It is also in evidence that the debt represented by the *rukka* was due by Baij Nath to the defendant, and there was therefore good consideration for the transfer to the defendant. There is also evidence to show that the defendant Sheo Prasad, by himself or by Paras Ram, his manager, had been pressing for payment of the debt due to the defendant by Baij Nath, and it is further in evidence that Ram Prasad discharged his debt to Baij Nath by honestly and in good faith transferring to the defendant the *rukka*, which appears to have been duly cashed by Kanahiya Lal. Under these circumstances it is idle to argue that the *rukka* was obtained by the defendant by any voluntary or fraudulent act on the part of Ram Prasad.

Some English cases were referred to at the hearing on the part of the appellant and they appear fully to support his contention. Thus in *Strachan* v. *Barton* (1) it was laid down that, in order to make a payment to a creditor by a bankrupt a fraudulent preference the bankrupt must be a volunteer, and not pay in consequence of any request or pressure for payment on the part of the particular creditor. During the argument Pollock, C.B., remarked that the simplest request may be sufficient if payment was the result of that request. In answer to a suggestion by counsel that there [478] was no request, and that the offer of payment on the part of the bankrupt was voluntary, the Chief Baron observed that it was only voluntary in the sense that the bankrupt offered it to satisfy the demand of the creditor, and he gave his judgment in accordance with these views. Alderson, B., was of the same opinion. He said "The question is what is the meaning of a voluntary payment? I understand it to be a payment made by the debtor alone," that is, by the debtor without pressure or solicitation on the part of his creditor. He

(1) 25 L. J. N. S. Ex., 182.

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goes on to say, "The test in cases such as the present is, would the bankrupt have made the payment without the creditor's coming?" In the present case the creditor undoubtedly did come, for it is clear from the evidence to which I have referred that Baij Nath was hard pressed for payment by the defendant and his manager. In the same case Martin, B., concurring, observed that "every creditor has a right to go to his debtor and get his debt, if he does so *bona fide*. But in *Mogg* v. *Baker* (1) it was distinctly laid down, that a payment is not necessarily voluntary because pressure, in the ordinary sense of the word, has not been used. There the question was whether a possession of goods was voluntary under the then Insolvent Act. Lord Abinger, than whom no man better understood the law on this subject, said, 'that if a demand is made by a creditor *bona fide*, and a transfer takes place in pursuance of that demand, that takes it out of the case of voluntary transfer contemplated by the Insolvent Act,' and he observes that the constant practice at Nisi Prius has been that a demand by a creditor is sufficient."

Another case referred to at the hearing was that of *ex-parte Hitchcock* (2) before Bacon, Chief Judge in Bankruptcy, where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bona fide*, and the payment was upheld. In giving judgment Bacon, C. J., said, "The act of the debtor was the only thing that could be inquired into, and if the act done by him could be referred to any other motive than that of giving one creditor preference above another, the payment **[479]** would not be fraudulent or void." In the same judgment (p. 82) it was further observed: "Here was a debt paid to a person entitled to receive it, and received in good faith by the payee. Clearly, it came within the proviso at the end of the section. The Statute had put the law upon a plain, reasonable, straightforward footing, by having saved the rights of payees acting in good faith. No motive could here be assigned for the bankrupts preferring this creditor to any other. In order to make out that the payment was fraudulent, it should have been proved that there was such a preference, or some motive for presuming such a preference must be shown from the other facts proved. Here a fraudulent preference was neither proved, nor could it be justly or reasonably inferred that there was any motive for such preference."

Many other authorities might be cited to the same effect, and they all go to show that, until the bankruptcy or insolvency of a debtor takes legal effect, he does not act voluntarily in the sense of giving a fraudulent preference, where he simply pays a debt that is really due at the request, in good faith, of a particular creditor. That such was the state of things in the present case cannot reasonably be doubted. And this view of the facts before us derives considerable force when the present state of the law of debtor and creditor in these Provinces is considered. I have already in another case, *Kheta Mal* v. *Chuni Lal* (3), shown what that law is, and I may be here allowed to repeat what I there laid down. I there said :—"There is no bankruptcy law in these Provinces nor any coercive legal process which can be enforced against the property of an unwilling insolvent for the benefit of all his creditors. A person in the position of the present

(1) 4 Mee. and W. 348=8 L. J. N. S. Ex., 55.
(2) 40 L. J. N. S. Chanc. and Bankr. 79
(3) 2 A. 173.

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defendant, appellant, may avail himself of the provisions of the Code of Civil Procedure for the purpose of being relieved of his debts, but he can only do so under the conditions of that Code, he himself being the applicant, and under executed process by arrest or imprisonment. No such result can be attained by the legal action of any or even all of an insolvent's creditors. Doubtless creditors and their debtors can agree as to the disposal of property for the benefit of the former, and that is an agreement of course that can be given effect to. But irrespective of such an agreement among a debtor and [480] his creditors, the law, at least in these Provinces, places no compulsory machinery in the hands of the creditors as a body. On the other hand, there is no law in this country to prevent a debtor from making an assignment of his estate for the benefit of all or a limited class of his creditors; nor, for that matter, from his assigning, conveying, or settling his estate in favour of any person or persons whom he may wish to favour, provided of course that he makes those assignments, settlements, or conveyances without fraud, that is, honestly and in good faith. The fundamental principle that underlies this state of things is that, so long as the law does not step in to deprive a man of his control over his estate, he remains *sui juris*, and can up to the last moment of its possession deal with his property as he thinks fit. The legal right remains in him, and if he acts honestly and in good faith, and not fraudulently, he may transfer his estate, or any portion of it, to any one or more of his creditors, but whose acceptance of such transfer or assignment, or whatever the form of the conveyance may be, of course deprives them of all further relief against their debtor, and the only remedy of other persons to whom he is indebted, and who have by that means been excluded from any such transfer, assignment, or other conveyance, can only be against such property of the debtor as may not have been so dealt with, or against the debtor's person (1)." Such undoubtedly is the law binding on this Court, and according to it, Baij Nath and the defendant, acting without any fraudulent intent, but in good faith, with respect to a debt honestly due by the one to the other, were justified in their dealing, and the plaintiff cannot interfere between them.

The Subordinate Judge does not appear to have understood the law on the subject, but has occupied himself with irrelevant and trivial considerations and details quite immaterial to the case. And not apparently knowing the law he was probably misled by the somewhat confused and evasive contention on the part of the Official Assignee persistently and elaborately maintained before him. Our judgment must therefore be for the appellant and the suit must be dismissed, with costs in the Court below and in this Court.

PEARSON, J.—Ram Prasad's debt to the firm of Chotey Lal and Sita Ram, and that firm's debt to the defendant, appellant, [481] on the date of the alleged transfer of the former debt are not points in issue. The single point for determination is, whether the assignment was made before or after the date of the order by which the property of the insolvents, Baij Nath, Bansi Dhar, and Ghasi Ram, was vested in the plaintiff. (After determining that the assignment was made before the date of the vesting order, the learned Judge continued): The assignment made by him was not a voluntary one in the sense of having been made spontaneously without pressure, but as it has been stated by the respondent's attorney

(1) 2 A. 173 (179).

that the vesting order of the 22nd December 1875, was not passed in consequence of any petition filed by the insolvents for their discharge, s. 24 of the Insolvency Act is not apparently relevant to the case. I would decree the appeal and dismiss the suit with all costs.

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Appeal allowed.

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2 A. 481.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

SURJU PRASAD (*Plaintiff*) v. BHAWANI SAHAI (*Defendant*).*
[17th November, 1879.]

Sulehnama—Mortgage—Agreement creating a charge on immoveable property—Registration—Stamp—Suit for money charged on immoveable property.

Certain immoveable property having been attached in the execution of a decree held by *S*, *B* and *L* objected to the attachment. An arrangement was subsequently effected between the objectors and the parties to the decree which resulted in all parties jointly filing a "*suleh-nama*" in Court, in which *B* and *L*, who had purchased the rights of the judgment-debtor in the attached property, agreed to pay the amount of the decree, which exceeded one hundred rupees, within one year, and hypothecated such property as security for the payment of such amount. *S* having sued upon this document claiming to recover the amount of the decree by the sale of such property, *held*, that the document required to be registered, and not being registered, the suit thereon was not maintainable.

Cases decided by the High Court in which the "*sulehnama*," having been relied on, not as containing the hypothecation itself, but as evidence only of a separate parol agreement, or in which a decree having been made in accordance with the terms of the document, was held not to require registration, remarked upon and distinguished by SPANKIE, J.

THIS was a suit for Rs. 159-7-3, being the amount of a decree dated the 4th August, 1865, charged on certain immoveable property by a "*suleh-nama*" dated the 30th July, 1866. [482] The plaintiff obtained this decree against one Bhika Rai and applied for its execution against his judgment-debtor. The property on which the plaintiff now sought to enforce a charge was attached in the execution of this decree and advertised for sale. One Bhawani Sahai and his brother Brij Lal objected to the attachment and sale of this property. On the 30th July, 1866, the pleader for the decree-holder, the pleader for Bawani Sahai, the pleader for Brij Lal, and the pleader for the judgment-debtor presented to the Court executing the decree the "*suleh-nama*" in virtue of which the plaintiff now sued. This document upon which a Court-fee of eight annas had been paid, recited that the interests of the judgment-debtor in the property had been sold to Bhawani Sahai and Brij Lal for the amount of the decree, Rs. 135-2-0, and that the judgment-debtor was no longer in the possession of his interests in the property, but such interests were in the possession of the purchasers. The instrument then proceeded as follows: "That it being necessary to satisfy the decree, we the objectors who are in possession of the property have undertaken to pay the amount of the decree, and promise

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* Second Appeal, No. 116 of 1879, from a decree of H.D. Willock, Esq., Judge of Azamgarh, dated the 20th November, 1878, affirming a decree of Maulvi Muhammad Zahur Husain, Munsif of Azimgarh, dated the 26th June, 1878.

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to pay the same within one year: that in default of such payment the property shall be sold at auction in satisfaction of the amount of the decree : that until the payment of the amount, we the objectors have hypothecated the property and promise not to transfer it directly or indirectly : that if we wish to sell it in order to satisfy the decree, we shall obtain the permission in writing of the decree-holder to our doing so." This document was verified by the pleaders of the parties concerned. The Court upon its presentation ordered the application for execution of the decree and the objections to be removed from the file of pending cases. The decree not having been satisfied within the time mentioned in the document, the plaintiff applied for its execution against his judgment-debtor in February, 1868. In 1878, he again applied for the execution of the decree against his judgment-debtor. This application was refused on the ground that it was barred by limitation. The plaintiff subsequently brought the present suit on the "*sulehnama*" against Bhawani Sahai, suing him in his own right and as the heir of his brother Brij Lal, who had in the meanwhile died. The defendant set up as a defence to the suit, among other things, that any charge created upon the property [483] by the document in suit could not be enforced as the charge exceeded Rs. 100 in value and the document was not registered, and that the document being improperly stamped could not be received in evidence. The Court of first instance held that the document was invalid being insufficiently stamped and dismissed the suit. On appeal by the plaintiff the lower appellate Court held, among other things, that the document required registration and not being registered could not affect the property in suit.

The plaintiff appealed to the High Court.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the appellant.

Babu *Dwarka Nath Mukarji*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—It is unnecessary to consider the findings of the lower Courts in this case, as the objection taken on the ground of the *sulehnama* not having been registered is fatal to the plaintiff's claim, and the appeal must therefore be dismissed with costs. There is also an objection that the document does not bear any stamp. The Judge suggests that it might still be stamped under s. 17 of the Stamp Act then in operation, X of 1862, but I do not observe that any offer of this kind was made by the plaintiff, and it need not be considered, seeing that the compromise cannot be looked at on account of its non-registration, the value covered by it being considerably more than Rs. 100. I must however, guard myself against being supposed to acquiesce in the extraordinary and repugnant opinion recorded by the Judge respecting the effect of the *sulch-nama* on the plaintiff's claim. He finds that this instrument should have been registered, and not having been so it cannot be read in evidence, and yet at the same time he proceeds to argue upon its contents, calling it a new agreement which the plaintiff had violated and that the defendants are therefore free from their liability. I must therefore take care to confine myself to his decretal order by which he upholds the Munsif's decree dismissing the suit, and I would dismiss the present appeal with costs.

SPANKIE, J.—The plaintiff obtained a decree on the 4th August, 1865, against Bhika Rai for money. The house and [484] property of the judgment-debtor were attached in execution of the decree. The defendant

Bhawani Sahai and Brij Lal, deceased, and Mithu Lal, cousin of Bhika Rai, objected that the house was their property. An arrangement was effected on the 30th July, 1866, with the decree-holder, and a compromise filed in which the defendant and Baij Lal undertook that the money should be paid in one year, or in default to pay it, and they hypothecated the property that had been attached, in which they had privately become the purchasers of the shares of the judgment-debtor and Mithu Lal his cousin, as collateral security for the debt. The present suit is to recover Rs. 159-7-3 principal and interest, the amount of the decree, by sale of the property attached, and which was subsequently hypothecated in the compromise. The defendant Bhawani Shahai, for himself and as heir of Brij Lal deceased, contended that the suit was barred by lapse of time ; that the property hypothecated was worth more than Rs. 100, but the instrument was not registered and not properly stamped ; that after the compromise plaintiff continued to execute his decree against the judgment-debtor and received Rs. 50, thus acting in opposition to the terms of the compromise, which therefore became inoperative. The first Court held that there was an hypothecation of the property in the compromise, and that the deed was inadequately stamped and, to such a hypothecation no liability was attached: the defendant might have been personally liable, but more than twelve years had elapsed from the date of the compromise : the claim also was barred by the three years' limitation as the hypothecation was a nullity. The suit was dismissed. The lower appellate Court noticed that in 1877, when plaintiff took out execution against the defendant, the Court held that defendant the judgment-debtor had been absolved from liability under the decree by the compromise, and the order was affirmed in appeal, and the plaintiff referred to the Civil Court. The Judge holds that it was not barred because plaintiff had prosecuted his claim with all due diligence in the execution department : the deed however was not properly stamped : but there was no reason to suppose that fraud was intended, and the plaintiff was therefore permitted to make good the value : but the deed required to be registered and being unregistered could not be received. The Judge also held that the plaintiff could not sue on the compromise, [485] because he himself had endeavoured to obtain the amount of his decree in execution after the compromise had been executed ; he therefore dismissed the appeal.

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It is contended in second appeal that, as defendant undertook to pay the money under the deed of compromise in 1866, he could not be released from his liability by the act of plaintiff in realising a portion of the decree from the judgment-debtor. Looking at all the circumstances of the case, and having regard to the fact that the money received by the decree-holder after the compromise had been executed, is said to be deducted from the amount now due from the parties who effected the compromise, we should not have been disposed to hold the respondent free from liability under the deed. But what is termed the compromise is, in this case, much more than a mere compromise. It accepts the debt due by the judgment-debtor, and the defendant and Brij Lal, who had purchased the interests of the judgment-debtor and his cousin Mithu Lal in the property attached, agree to discharge the debt in a year, and they hypothecated the property that had been attached, and which was purchased by them, as security for the debt. Such an instrument is a "mortgage-deed," inasmuch as by it the defendant and his brother obliged themselves to pay money to the plaintiff, and it evidences a pledge

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of the property for securing the payment of the money. Under the Stamp Act in force in 1866 this instrument, being an obligation for the payment of money, would not have been admissible as a mere agreement, or as a *razinama*, if it had been necessary to bring a suit upon it, and the later Acts are not less stringent. The immoveable property pledged, it is not denied, is worth more than Rs. 100, and the instrument should have been registered, as the suit to enforce the lien is brought upon the deed itself, and the plaintiff seeks under it to bring to sale the property hypothecated therein and thereby to recover his money. He cannot therefore say that the deed is simply a recital of a compromise, and it is to be regarded as merely information given to the Court of an oral agreement between the parties for the adjustment of the proceedings in execution pending in Court. The case cited by plaintiff, *Ramdyal* v. *Jhaunnan Lal* (1), does not apply, as in that case it did not appear that the agreement **[486]** referred to in the compromise was made in writing. The actual agreement had been orally made, and the document put into Court was simply a petition informing the Court of the arrangement arrived at by the parties. The plaintiff's pleader has put in several decisions of this Court which he argues rule the point in his favour, and are to the effect that such documents as that now before the Court need not be fully stamped or registered as bonds or mortgages. But I have very carefully gone into these cases and now refer to them in detail.

Bhikam Ram v. *Hanuman Prasad* (2)—In this case the decree under the compromise dated 12th June, 1866, gave a lien on the property to the decree-holder, and the claim before the Court was not to enforce the compromise but clearly to enforce the lien given by the decree. *Jiwan Singh* v. *Rampartab Singh* (3)—In this case the sixth plea in appeal raised the point whether the transaction in dispute was valid, the deed not having been properly stamped and registered. It is doubtful whether the plea was pressed. It is certain that the judgment does not determine the point and that it is absolutely silent with regard to it. *Mukand Ram* v. *Cheda Singh* (4)—In this case the petition put into Court was held not to be the agreement itself. It was filed in order to inform the Court that an oral agreement had been made and it asks for postponement of sale. The judgment proceeds upon the fact that the agreement itself (apart from the petition) had never been denied. *Bansidhar* v. *Ahmad Husain Khan* (5); *Bansidhar* v. *Muzaffar Husain Khan* (6)—In these cases there were several petitions asking for postponement of sale which were not alleged in the subsequent claim to have been the basis of that claim. The dispute arose out of the several agreements to pay high interest. When the cases came before the High Court the learned Judges ruled that the first Court had misunderstood the nature of the claim, which was not founded on the petitions, but on a separate oral agreement. There was no hypothecation whatever in those agreements or petitions. *Bisharath Hussain* v. *Imamunnissa* (7)—**[487]** In its judgment this Court expressly stated that it was satisfied that the document objected to was not a compromise, but simply a petition informing the Court regarding an arrangement at which the parties

(1) H.C.R. N.-W. P. 1871, p. 14.
(2) R. A. 99 of 1875, decided 6th March, 1876.
(3) R. A. 54 of 1876, decided 9th November, 1876.
(4) S. A. 688 of 1876, decided 8th November, 1876.
(5) R. A. 82 of 1876, decided 3rd May, 1877.
(6) R. A. 42 of 1874, decided 24th August, 1874.
(7) R. A. 85 of 1876, decided 9th May, 1877.

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had arrived. This judgment cites, as ruling the point, the case of *Ramdyal* v. *Jhaunnan Lal* (1) which I referred to above as cited by plaintiff's pleaders during the hearing, and which I have held inapplicable to the present case. It also cites for the same purpose the case of *Bansidhar* v. *Ahmed Husain Khan* (2) above referred to. The learned Judges lay it down that such a petition, not being the agreement itself, cannot be rejected as evidence of an arrangement between the parties simply because it was not sufficiently stamped and was not registered.

It will thus be seen that none of the rulings cited are applicable to this case in which the claim is based upon the hypothecation contained in the compromisé. Here the document, put in in execution of a decree and not embodied in a decree charging the property, which property plaintiff seeks to sell in order to secure his money, is not relied upon as evidence of a distinctly separate parol evidence, but as the hypothecation itself. Such a document I hold to be one which must be sufficiently stamped, and if necessary, as it is here, registered. I would therefore on this ground dismiss the appeal and affirm the judgment with costs.

Appeal dismissed.

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2 A. 487=4 Ind. Jur. 641.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Spankie.

RANJIT SINGH *(Defendant)* v. SHEO PRASAD RAM *(Plaintiff)* AND RAGHU NANDAN RAM *(Defendant.)** [17th November, 1879.]

Appellate Court, Powers of—Addition of parties—Act X of 1877 *(Civil Procedure Code)* ss. 32, 582—*Act XV of* 1877 *(Limitation Act)*, s. 22.

S sued *N* and *R* jointly and severally for certain moneys. The Court of first instance gave *S* a decree for such moneys against *N* and dismissed the suit against *R*. *N* appealed from the decree of the Court of first instance, but *S* did not appeal from it. The appellate Court, at the first hearing of *N*'s appeal, made *R* a respondent, the period allowed by law for *S* to have [488] preferred an appeal having then expired and eventually reversed the decree of the Court of first instance, dismissing the suit as against *N* and giving *S* a decree against *R*. *Held* that, although the appellate Court was competent to make *R* a party to the appeal, under ss. 32 and 582 of Act X of 1877, yet it was not competent, with reference to s. 22 of Act XV of 1877, to give *S* a decree against *R*, the former not having appealed from the decree of the Court of first instance within the time allowed by law.

[F., 27 A. 23 (24)=A.W.N. (1904), 155; 1 A.L.J. 358; Cons., 13 A. 78 (82).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court, to which Ranjit Singh, one of the defendants in the suit, appealed from the decree of the lower appellate Court.

Lala *Lalta Prasad*, for the appellant.

Munshis *Hanuman Prasad*, *Kashi Prasad*, and *Sukh Ram*, for the respondents.

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* Second Appeal, No. 1152 of 1878, from a decree of R. Wall, Esq., Judge of Ghazipur, dated 24th September, 1878, reversing a decree of Munshi Zamir-uddin Ahmad, Assistant Collector of the first class, dated the 27th May 1878.

(1) H.C.R., N.W.P. 1871, p. 14. (2) R.A. 82 of 1876, decided 3rd May, 1877.

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JUDGMENTS.

The following judgments were delivered by the High Court:

STUART, C. J.—The question in this case is a very nice one, showing a certain conflict between the law of procedure and the law of limitation relating to suits and decrees. It is the first time I have met with it as a Judge of this Court, and I am not aware that it has arisen in any of the other High Courts. The circumstances under which it comes before us for decision in the present appeal are these :—The plaintiff, respondent, instituted a suit in the Court of the first-class Assistant Collector at Ghazipur, on the 14th December, 1876, against Raghu Nandan Ram and Ranjit Singh for recovery of Rs. 164-11-3 principal and interest, being the profits of a one-anna share in a zamindari estate from 1281 to 1282 Fasli. A decree, however, was not made in that suit till the 27th of May, 1878, when the Assistant Collector found the claim proved as against Raghu Nandan Ram and decreed accordingly against that defendant with all costs, but the suit as against Ranjit Singh was dismissed. Raghu Nandan Ram, however, the defendant against whom the decree had been given, appealed to the Judge who, after inspection of the record of the Court of first instance and hearing the pleaders of the parties, ordered that Ranjit Singh, although he had been absolved by the first decree, should be made a respondent in the appeal before him, and the appeal thus supplemented was heard by the Judge and decided by him against Ranjit Singh, whom in his judgment he somewhat inaccurately calls an "outsider," but whom he nevertheless found accountable for a large [489] surplus, and he therefore decreed the appeal and set aside the order of the lower Court, thereby reversing the Assistant Collector's decree. The Judge added to his order this remark: "The effect of this decision will be that I give a decree in favour of respondent as against Ranjit for the amount claimed, *viz.*, Rs. 164-11-3, with all costs, and interest thereon at six per cent. per annum."

Against this order of the Judge the present second appeal has been brought in which it is contended, among other things, that the Judge's decree against Ranjit Singh was illegal, seeing that Ranjit held the decree of the first Court in his favour, and that decree, under the Limitation Law, Act XV of 1877, sch. ii, art. 152, had become final, seeing that the limitation period thereby prescribed, *viz.*, 30 days, had expired before the filing of the appeal to the Judge. The two material dates are these, the 27th of May, 1878, when the Assistant Collector's decree dismissing the claim against Ranjit Singh was given, and the 10th of July following, when the appeal to the Judge was filed, so that 43 days had expired.

This contention on the part of the appellant must be allowed. As a general rule there can be no doubt that a Judge under the present procedure law, Act X of 1877, is acting within his powers when he orders a party in the position of this Ranjit Singh to be made a respondent in an appeal before him. Indeed, s. 582 read with s. 32 is to my mind sufficient for such a general conclusion. But in the present case there is this peculiarity, that the Judge, who must be taken to have known the law he was administering and the legal position of the parties in the matter in issue before him, was bound to take cognizance of the fact that, while he thought it desirable that Ranjit Singh should be made a party to the appeal, this same Ranjit Singh had obtained a decree in his favour in the suit which was the subject of that same appeal, and that since the date of such a decree the limitation period provided by law had

run out, and that the appeal before him, so far as it impugned that decree, could not be entertained. Instead, however, of proceeding in this way, the Judge made an order as if Ranjit was a party properly before him, and which order therefore cannot stand. Whether such is a satisfactory state of the present law of procedure may perhaps be doubted, for it humbly appears to me [490] to be very awkward and embarrassing that a power or discretion vested in a Judge for the purposes of justice may be defeated by another and almost contemporaneous law. The result is that the Judge's order against Ranjit Singh comes to nothing and must be set aside, and *pro tanto* the present appeal must be allowed with costs.

SPANKIE, J.—The plaintiff, respondent, sued Ranjit Singh, Raghu Nandan Ram, and others, defendants, for Rs. 164-11-3, principal and interest, being the profits of a one-anna share in a zemindari estate from 1281 to 1282 Fasli. The question was whether Ranjit Singh or Raghu Nandan Ram, or both of them, owed the money claimed, and in what proportion the sum sued for should be recovered. The first Court decreed the claim in full against Raghu Nandan Ram and dismissed it in regard to Ranjit Singh. The defendant Raghu Nandan Ram appealed, but plaintiff accepted the decree which absolved Ranjit Singh and did not appeal from it as he might have done. The Judge found it necessary to make Ranjit Singh a respondent, and having done so, he decreed the appeal of Raghu Nandan Ram and set aside the order of the first Court. He added these words,—" The effect of this decision will be that I give a decree in favour of respondent as against Ranjit Singh for the amount claimed, *viz.* Rs. 164-11-3, with all costs, and interest at six per cent. per annum."

It is contended in second appeal by Ranjit Singh that, as neither plaintiff nor Raghu Nandan Ram had appealed against the Munsif's decree as regards him, no decree should have been passed against him in appeal: the Munsif's decree absolving him from all responsibility, not being appealed, became final; the powers given by s. 582, Act X of 1877, are not applicable to the case, and if they were, the appeal as against appellant was barred by limitation.

S. 582, Act X of 1877 provides that the appellate Court shall have the same power in appeal under ch. xli as are vested by the Code in Courts of original jurisdiction in respect of suits instituted under ch. v, and by s. 587 the provisions contained in ch. xli shall apply as far as may be to appeals under ch. xlii. After a suit has been instituted in the manner prescribed by s. 48, ch. v, the Court [491] has power under s. 32 (chapter iii, relating to parties and their appearances and acts), on or before the first hearing, upon the application of either party, to strike out the name of any party, whether as plaintiff or defendant, improperly joined. By the second clause of the section the Court has "*proprio motu*" power to order any plaintiff to be made a defendant, or any defendant to be made a plaintiff, and also that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. Under s. 73, Act VIII of 1859, and s. 37 of Act XXIII of 1861, corresponding with ss. 32 and 582 of Act X of 1877, the appellate Courts in past years have always felt themselves at liberty to add parties who have been parties to the original suit. I have no doubt that the lower appellate Court in this case did not exceed its jurisdiction in making Ranjit Singh, a defendant in the suit, who was no party in the appeal, a

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respondent, to enable it effectually and completely to adjudicate upon and settle all questions involved in the appeal.

It has, however, been urged that when Ranjit Singh, defendant in the suit, was made a party to the appeal as respondent, the limitation prescribed by law within which an appeal must be instituted had expired so far as he was concerned.

Clause 5, s. 32, Act X of 1877, provides that "all persons whose names are added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, s. 22) the proceeding as against them shall be deemed to have begun only on the service of such summons." It has been contended that "the parties whose names are so added," are parties whose names have been added on the application of the plaintiff, or on their own application, and that the clause does not refer to cases in which the Court acts on its own authority and without application. It has also been suggested that the preceding clause shows this. The clause runs thus:—"Any person on whose behalf a suit is instituted or defended under s. 30 may apply the Court to be made a party to such suit," and then follows the fifth clause," all parties whose names are so added, [492] &c., &c." But this contention appears to be more ingenious than successful. Under all circumstances it would be necessary to serve a summons on every person made respondent by a Court, to enable him if absent to appear and answer the appeal, and such a party appears to be of necessity one of those "parties whose names are so added as defendants," that is to say, meaning "so added" under the clauses of s. 32 of the Act. At the same time the addition of a defendant to an appeal as respondent cannot override the law of limitation. In an appeal, the appellant is for the time the plaintiff, and the respondent for the time defendant, and if cl. 5, s. 32 applies at all, it carries with it the saving of s. 22 of the Limitation Act, XV of 1877. Section 22 provides that when, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. This being so, I am of opinion that though the Court of appeal, if it hold it desirable for the purposes of justice, in order to determine the appeal, might make any one a party to it, who was a party to the original suit, or represented a party to the suit, it would not be able to decree the original claim as against the party so made a respondent, if the first Court had dismissed the suit in his favour and the plaintiff had not appealed against that part of the decree within the time prescribed by the Limitation Law.

I would therefore hold that the Judge should have closed the case by decreeing the appeal of Raghu Nandan Ram and reversing the order as against him, with costs payable by plaintiff, and further that the Judge should also have dismissed the appeal as regards Ranjit Singh, with costs payable by plaintiff, as the latter ought to have appealed against him within the time prescribed by law. At the same time, I do not think that it was necessary in this case for the Court to make Ranjit Singh a party to the appeal as plaintiff had accepted the first Court's judgment relieving him of liability, and the Judge had the record before him, which contained materials sufficient to enable him to determine the appeal of Raghu Nandan Ram on the merits. I would decree the appeal with costs in favour of appellant, and not interfere with the rest of the judgment.

Appeal allowed.

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[493] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

HARBHAJ AND OTHERS (*Plaintffs*) v. GUMANI AND ANOTHER (*Defendants*).* [18th November, 1879.]

Wajib-ul-urz—Absent share-holders—Trust.

Held that a village administration-paper which provides for the surrender to absent share-holders on their return to the village of the lands formerly held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust.

Where a village administration-paper provided for the surrender to certain absent share-holders on their return to the village of the lands formerly held by them, but did not contain any declaration of a trust as existing between such absent share-holders and the occupiers of their lands at the time such administration-paper was framed *held*, that the administration-paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers.

[F., 85 P.R. 1909; R., 3 A. 458 (464); 13 C.P.L.R. 99 (101).]

THIS was a suit for the possession of certain land and a house situated in a certain village. The plaintiffs sued on the allegation that one Amir Chand and one Sarhu, from whom they were descended, departed from such village for a village in the Rohtak district some thirty years before the suit was brought, intrusting the property in suit to Ramjas, the father of the defendants, to be held by him on the condition that, whenever they or their children returned to the village, the property was to be restored to them; that Ramjas had accepted this trust, and had held the property subject thereto, and after his death the defendants had so held it, and had admitted the trust and caused it to be recorded at the recent settlement of the village: and that the plaintiffs having returned to the village had demanded the restoration of the property, but the defendants refused to restore it. The defendants denied that the property had been made over to their father to be held in trust for Amir Chand and Sarhu and their children, alleging that their father, and they, after him, had held the property in their own right, for forty years, and the right of the plaintiffs was consequently extinguished. The clause of the administration-paper, which was dated the 7th January, 1869, on which the plaintiffs relied as establishing the alleged trust, was as follows:—

[494] "Clause 16.—Absent share-holders: the following persons are at present absent from the village (here follows a list of absent share-holders, the entry relating to the plaintiffs being as follows:)—

Thoke.	Absent share-holders.	Present occupier.	Period of absence.	Present residence of absent share-holder.
Thirteen biswas, Thoke of Ramjas.	Harbhaj and Hansa, sons of Amir Chand, and Dya Ram, son of Sarhu, *Jats*.	Ramjas, son of Amir Chand, *Jat*.	Twenty-two years.	Mauza Dhorana, pargana and tahsil Gohara, zila Rohtak.

*Second Appeal, No. 117 of 1879, from a decree of S. Melville, Esq., Judge of Meerut, dated the 5th December, 1878, reversing a decree of Munshi Ram Lal, Munsif of Gaziabad, dated the 25th June 1878.

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"Whenever the absent share-holder, or his descendants, returns and settles in the village, he shall immediately be put in possession of his property without taking any account of profit or loss; the person occupying the property shall not object to relinquish his occupation of the said property: if from any cause the share of the present occupier is transferred, the property of the absent share-holder shall be held by the brother of the present occupier or by one belonging to the same stock; whenever the absent share-holder, or his descendants, returns and settles in the village, effect will be given to the above condition: if any absent share-holder is a defaulter in respect of the Government revenue, he or his descendants shall pay the same, before they become entitled to obtain possession."

The Court of first instance gave the plaintiffs a decree. On appeal by the defendants the lower appellate Court reversed this decree, and dismissed the suit.

The plaintiffs appealed to the High Court from the decree of the lower appellate Court on the grounds that the finding of that Court, that the defendants had held the property in suit adversely to the plaintiffs was directly opposed to the admission contained in the administration-paper: that according to the terms of that document the defendants were bound to surrender the property; and that the terms of that document established conclusively the trust alleged by the plaintiffs.

Pandit *Nand Lal*, for the appellants.

The respondents did not appear.

The High Court (STUART, C. J. and SPANKIE, J.) delivered the following

JUDGMENT.

The plaintiffs, appellants, asserted that Amir Chand and Sarhu, some thirty-two years ago, made over their zemindari [495] share and a house in trust to Ramjas, the father of defendants, on condition that when they or their children returned to the village they would be allowed to re-occupy their lands: Ramjas and his successors had all along remained in possession as trustees, and had admitted the trust when the settlement papers were last revised: the plaintiffs returned in 1934, Sambat, and are heirs of Amin Chand and Sarhu, but defendants refused to surrender the share. The defendants deny that any land or house was made over to Ramjas in trust by Amin Chand and Sarhu: Ramjas and they (defendants) have held the property adversely to plaintiffs for forty years, and the suit was barred by limitation: Amin Chand and Sarhu owed nearly Rs. 600 to defendants, they broke down and could not pay the Government revenue: Ramjas held possession for eight years and paid it: when he asked Amin Chand and Sarhu to pay him their debt they left the village, and since then the possession of Ramjas and defendants has been adverse. The Munsif decreed the claim for the land and dismissed it for the house. He held that the administration-paper provided for re-entry. The Judge in appeal has reversed the Munsif's decree, holding that there was no satisfactory proof that Sarhu and Amin Chand intrusted their property to defendant's father Ramjas: parol evidence after such a time was not good for anything, and the administration-paper was not a proof of the trust: it recites that absentees or their descendants may, on their return, re-enter on their lands: the community assented to this, but any one could recall his consent: the entry is no proof that any one in possession of the share of an absentee held it as a

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trustee: the possession of the defendants was shown to have been adverse, and to have been so for at least twenty years.

We are not disposed to interfere. The finding as to the adverse character of the possession of defendants is one of fact. A village administration-paper does not necessarily constitute a valid trust. It might be evidence of a trust, but in this case, as regards the share in dispute, the persons entered as "absent share-holders" were neither present in the village when the settlement was in progress, nor were they assenting parties to the arrangement recorded in the administration-paper. The arrangement as to the re-entry of an absentee was made amongst the co-sharers present in the village; [496] possibly the main object in making it was to secure peaceable possession to those in occupation of the shares of absentees. In this administration-paper there is also a proviso that no owner who is a defaulter as regards Government-revenue will be re-admitted until he pays up the arrears due by him. If an administration-paper containing a clause such as that before us is to be regarded as constituting a trust, it would appear to be a trust created by the share-holders of the estate, ostensibly for the benefit of absentees, though the latter really derive no present benefit from their land remaining in the possession of the share-holders in the estate, whereas the share-holders are at once benefited by taking up the shares of the absentees which they may possibly be never called upon to surrender without, as in this case, the institution of a suit. Moreover, the arrangement may be one which the share-holders actually present when it is made may afterwards, if they please, revoke, or omit to record in a future settlement. However this may be, it is sufficient in this case to say that the Judge has not acted erroneously in refusing to accept the administration-paper as conclusive evidence of a trust, and we must not overlook the nature of this claim as stated in the plaint. The claim of the plaintiffs was that thirty-two years ago Amin Chand and Sarhu made over their share in trust to Ramjas, so that it is not pretended that the trust was raised by the administration-paper: that paper is relied on as evidence of the trust, and an admission by the parties who signed it that there was a trust. But there is no such admission of any actual trust as that set up by the plaintiffs. There was a long list of absentees, and amongst them are the plaintiffs, as sons of Amin Chand and Sarhu. The declaration is general that any absconding parties returning to and settling in the village shall immediately be put in possession: the occupants shall not object to relinquish their holdings. There is no declaration of any pre-existing trust as between the absentees and the occupants of their shares individually. We accept the finding of the lower appellate Court on the matter of fact that there is no evidence to establish the claim that Amin Chand and Sarhu personally intrusted their shares to Ramjas thirty-two years ago. The present appeal is therefore dismissed with costs.

Appeal dismissed.

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FULL BENCH.

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[497] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

LACHMAN SINGH (*Plaintiff*) *v.* MOHAN AND ANOTHER (*Defendants*).*
[28th November, 1879.]

Act X of 1877 (*Civil Procedure Code*), ss. 2, 13, 540—*Decree—Judgment—Appeal.*

The plaintiff in this suit sued for the possession of certain land, on the ground that he was the owner thereof in virtue of a purchase from *N.* The defendants claimed such land as owners on the ground that it was included in a certain garden which they had previously purchased at a sale in the execution of a decree against *N*, and they also claimed it on the ground that they were lessees thereof under a lease from *N.* the term whereof had not expired. They also set up as a defence to the suit that it had been finally determined in a former suit between themselves and *N*, whom the plaintiff represented, that such land was included in such garden, and that consequently their title to such land as owners could not be questioned in the present suit. The Court of first instance held that such land was not included in the defendants' garden, and they were not the owners of it, but that they could not be ejected from it as they were in possession under the lease which had not expired, and that the question whether such land was included in the defendants' garden and they were the owners of it was not *res judicata.* It made a decree dismissing the suit in these terms: "Ordered, that the plaintiff's claim as it stands at present be dismissed." *Held* (STRAIGHT, J., *dissenting*) that the defendants were entitled, under s. 540 of Act X of 1877, to appeal from such decree.

[**Diss.**, 4 M. 134; **F.**, 57 P.R. 1907=66 P W R. 1907; **Appr.**, 7 A. 606 (610) (**F.B.**)= A.W N. (1885). 89; **R.**, 3 A. 239 (246); 17 A. 174 (184); 9 C.W.N. 584; **D.**, 3 A. 152 (155) (**F.B.**)]

THIS was a reference by a Bench of the High Court composed of two Judges (Spankie, J. and Straight, J.) to the Full Bench of the High Court. The facts of the case and the point of law referred will be found stated in the judgments of the Full Bench.

Pandit *Ajudhia Nath* and Munshi *Kash Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Babu *Ratan Chand*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

STUART, C. J.—This is a reference to the Full Bench of the Court by a Division Bench (Spankie, J. and Straight, J.) and since it was heard, the Code of Procedure, Act X of 1877, has been [498] amended by Act XII of 1879 passed on the 29th July, 1879, and among other changes made by the amending Act a new definition of the term "decree" has been given. But the suit in the present case having been instituted, and the appeal having been presented, before the amending Act came into operation, the present reference must be considered according to the provisions of Act X of 1877. The point referred is the subject of the first reason of appeal, and is to the effect that the Munsif's decree shows nothing on the face of it against which the defendants could appeal to the Judge. The question was very fully argued before us, and we were much pressed with the contention that, having regard to s. 540 of the Procedure Code, Act X of 1877, and the definition of the "decree" in s. 2

* Second Appeal, No. 46 of 1879, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 13th December, 1878, modifying a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 23rd September, 1878.

of the same Code, we were to look to the decree alone, without reference to the judgment, and that, on a strict reading of the definition given of "decree" in s. 2, the decree in the present case came within the meaning of that definition, and was not appealable under s. 540, inasmuch as it was a decree which so far as it decreed any thing, did so in favour of the defendants, seeing that it dismissed the suit against them, and therefore was not a decree by which these same defendants could be said to be aggrieved. It appears to me, however, that such a view of the Code is too narrow, and that we may look not only into the judgment, but into the pleadings to see what the decree really means. Nor are we to confound the decretal order given at the end of the Munsif's judgment with the decree itself as actually and formally made, although the same principles of interpretation apply to both where the order or decree is in any respect ambiguous or imperfect. In the present case it is plain that the decretal order is not self-explanatory, and if we had nothing else to go upon it would be necessary, in order to its being intelligible, to read it with the judgment; and as to a decree itself in its complete form, I hold the opinion very strongly that, where it is ambiguous or imperfect as to any essential particular, it may be read with the judgment and the record. Nor is this view of the legal quality of a decree inconsistent with the definition of a decree given in s. 2 of the Code, where it is defined to mean "the formal order of the Court in which the result of the decision of the suit, or other judicial proceeding, is embodied." This definition in no [499] way prevents us from looking into the judgment and record, in order to a correct understanding of the true meaning and intended application of the decree as formally drawn up. On the contrary, we are told that a decree is to embody the "result," a general term which, however, is to be particularized by reference to the decision or judgment made in the suit. These materials therefore may, if necessary, all be considered where the decree, owing to any defect or ambiguity in its terms, has to be cleared up in order to its proper enforcement. And quite consistently with these considerations, s. 206 of the Code of Procedure declares that "the decree must agree with the judgment," and therefore any defect or ambiguity in the decree cannot be seen without reference to the judgment. In the present case it is with the decree and not with the decretal order that we have to deal, and that decree shows plainly that it was one of which the defendants Mohan and Hira had reason to complain as being materially unfavourable to them, and that they were therefore entitled of right to appeal against it to the Judge. The decree sets out the claim made by the plaint as one for possession of 3 bighas, 15¼ biswas *maafi* land, the boundaries of the land and the names of the parties, and after decreeing 17½ biswas, being No. 79 in the record, and as to which there is no dispute, it proceeds to order that "the rest of the claim of the plaintiff be dismissed as brought, the costs of the plaintiff to the extent decreed be charged to Nawab Ahmad Husain Khan and Khuman Singh, defendants, with future interest at eight annas per cent. per mensem, that Mohan and Hira, defendants, be exempted, and their costs with future interest at eight annas per cent. per mensem be charged against the plaintiff, that the costs of Nawab Ahmad Husain Khan and Khuman Singh, defendants, be borne by themselves, and that under the circumstances of the case the defendants' pleaders' fees be separately calculated in the case." There is here not only a full recognition of the plaintiff's title as against the defendants, but the suit against Mohan and Hira is dismissed

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as brought, which, when we look into the judgment, we find is tantamount to a decision that their right, if any, was not as proprietors, as they had alleged, but as being in the inferior and subordinate position of lessees, and that any claim which the plaintiff had against these defendants as such lessees could not be entertained in the present suit, but must be made in [500] another. Now this is not only a finding *pro tanto* against the defendants, but it is one which may injuriously affect any future proceedings on their part for the vindication of the proprietary rights they claim, for in any suit they might hereafter bring they might, according to the rulings of this Court and the Privy Council, probably be met by the plea of *res judicata* although with what effect I cannot anticipate. Strictly speaking there is in the state of things appearing on the face of the Munsif's judgment and decree no *res judicata*, but for the determination of the question as to the true nature of these defendants' rights the parties are simply, or at least by necessary implication, referred to another suit. My own opinion has always been, and is, that under such circumstances there is no room for the plea of *res judicata*, and in a case before Mr. Justice Oldfield and myself, where, as in the present case, the parties were merely referred for the determination of the matter of the plea to another suit, I expressed the opinion that the plea could not hold good (1). But it is difficult to anticipate what view may be taken of such a plea in a particular case, and undoubtedly the rulings of the Courts would go to put parties, whether plaintiffs or defendants, and pleading *res judicata*, in any subsequent suit, in considerable danger; and that is a consideration which of itself goes to strengthen the defendants' right of appeal in the present case.

The case of *Ram Golam* v. *Sheo Tahal* (2) was referred to on behalf of the defendants as favouring their contention as it clearly does. Reference was also made to a previous Full Bench decision of this Court, *Pan Kooer* v. *Bhagwant Kooer* (3), where it was held that the appellate Court should not have entertained the appeal. Particular stress was laid on my own judgment in that case. I there stated that, "for the purposes of the suit then before us, the words decree, decision and judgment may all be taken to mean the same thing, *viz.*, the ultimate and final determination of the matter or matters in issue between the parties." I also held that the decree in that case was not of such a nature as to entitle the defendants to appeal against it to the Judge, seeing that it was an appeal "by the defendants themselves against a decree wholly in their own favour, and the legal meaning of which is and can only be that the plaintiff's suit alto-[501]gether fails," and I ended my judgment by observing that "the decree as read by the light of the plaint is not only entirely in their favour, but is possibly beneficial to them, and their appeal therefore to the Judge was incompetent and anomalous." In the present case, however, I have shown that the decree, although apparently, and so far as it goes, favourable to the defendants, was imperfect and not self-explanatory, but that when read by the light of the record it was really unfavourable and might prove injurious to them, and that they were therefore aggrieved by it and had every interest to appeal to the Judge.

Holding this opinion and that there is nothing in the Code of Procedure to exclude the appeal from the Munsif's order to the Judge, and that the relative position of the parties in the suit, the effect of the

(1) R.A. No. 100 of 1876. decided on the 1st February, 1878, unreported.
(2) 1 A. 266.
(3) H.C.R. N.W.P. 1874, p. 19.

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Munsif's decree on their rights and interests, and the justice and the reasonableness of the defendants' contention, must be admitted, my opinion is that the appeal to the Judge ought to be heard. The first reason of appeal must therefore be disallowed, and the case will go back to the Bench who referred it to the Full Bench for determination of the other reasons of appeal on the merits.

SPANKIE, J.—The plaintiff, appellant, claimed possession of 3 bighas, 15¼ biswas of *maafi* land in mauza Sheopat Patti, under a sale deed executed on the 2nd January 1873, by the Nawab Ahmad Husain Khan, for the sum of Rs. 700: Mohan and Hira had, however, taken possession of the land, asserting that it formed part of the garden known as "Bakhshiwala," but it was not included in their auction-purchase, being a separate plot: the plaintiff therefore prays for possession by ejectment of the defendants Hira and Mohan. These two defendants contend that when Nawab Ahmad Husain Khan sold the land to plaintiff, he had no longer any interest in it: the lands in suit are Nos. 74, 75, and 78, and they were included in the previous purchase by defendants at auction and form part of the garden known as "Bakshiwala." They also urged that as between the Nawab and themselves it had already been found that the land belonged to the garden, and therefore the suit was barred by s. 13, Act X of 1877, as the plaintiff claims under a deed of sale from the Nawab. The first issue laid down by the Munsif was, whether the land Nos. 74, 75, and 78 form part of the garden "Bakhshiwala" purchased by the defendants Mohan [502] and Hira. The second issue was, has the plaintiff a right to sue and are defendants entitled to possession by virtue of a lease. The Munsif held upon the auction-sale certificate dated 17th May 1870, the schedule of property attached in execution of decree dated 12th September 1869, the copy of the sale notification dated 16th November 1869, and the proceeding confirming the sale dated 4th March 1870, that only the garden "Bakhshiwala" was sold, and that the land in dispute was not sold at auction. It is unnecessary here to give the Munsif's reasons for the conclusion at which he arrived. On the second issue the Munsif found that though the land in dispute had not formed part of the garden known as "Bakhshiwala" and purchased by defendants at auction, they nevertheless were in possession of it under a lease that had not expired at the time of the institution of the suit and it had not been shown that it had expired up to date. The defendants therefore could not be ejected. "They," and this is an important part of the judgment, "having acquired the rights of a lessee by payment of consideration, possess the same title which the lessee did." The Munsif also found that s. 13, Act X of 1877, did not bar the suit. The first Court in its decretal order with reference to the lands Nos. 74, 75, 78, dismisses "the plaintiff's claim, as it stands at present," and the defendants Mohan and Hira get their costs. Both parties appealed. I need not refer to the plaintiff's appeal. The defendants Mohan and Hira contended that, as it had already in a previous suit been found as between themselves and Nawab Ahmad Husain Khan, whose representative plaintiff is, that the disputed land was a portion of the "Bakhshiwala" garden, no finding to the contrary could be made in this suit, which was barred by s. 13, Act X of 1877. It was also urged, amongst other grounds, that the evidence of the patwari and exhibits filed showed that the disputed land was a part of the garden. The Judge reversed the Munsif's decree, finding that the defendants had purchased at auction the lands in dispute. On the

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objection of the plaintiff the lower appellate Court also held there was an appeal in this case on the part of the defendants, because the Court below had ruled that the latter were not proprietors but lessees only. The Judge cited the case of *Ram Gholam* v. *Sheo Tahal* (1).

[503] The plaintiff appealed to this Court and his first plea is that, whereas the claim as against respondents were dismissed by the Court of first instance, the defendants, respondents, could not appeal from that decree to the lower appellate Court, whose decision was therefore bad in law. This plea led to the reference of the case to the Full Bench, the Judges of the Division Bench before whom the appeal came holding different opinions on the point. Mr. Justice Spankie holding that the Judge had been at liberty to dispose of the appeal on its merits, Mr. Justice Straight doubting whether the decree contained any matter on which the defendants could be heard in appeal.

The plea raised by appellant's pleader goes to the extent that, whereas the suit of the plaintiff was dismissed, the defendants could not appeal, and the decision of the Judge was bad in law for entertaining it. But such a plea is opposed to the very terms of s. 540 of Act X of 1877, which expressly declares that an appeal *shall* lie from the decrees or from any part of the decrees of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts. There is therefore an appeal by right from all decrees. When a decree has been prepared and signed, an appeal may at once be preferred. The form in which it is to be filed is laid down in s. 541. It can only be rejected for the reasons assigned in s. 543. Once admitted and registered it must come on for hearing. It may be dismissed under s. 551 and the judgment of the Court from whose decision the appeal has been admitted may be confirmed, without issuing notice to that Court or upon the respondent. But there is no room for the contention that the appellate Court cannot entertain the appeal. The appellant's pleader, however, was relying on the judgment of this Court dated 24th November 1873, *Pan Kooer* v. *Bhagwant Kooer* (2), in which the suit was to recover possession of certain lands by setting aside a lease of them. The decree dismissed the suit, but the judgment contained a finding against the defendant as to certain items of the consideration for the lease, against which the defendant appealed, and it was held that the appellate Court should not have entertained the appeal. I was a party to this ruling, so far that I concurred in the observations, [504] of Mr. Justice Jardine on the point. It was urged in that appeal that an appeal ought not to have been entertained merely on the ground of error in the judgment when the decree was admittedly correct. In construing the language of the sections in Act VIII of 1859 regarding decrees and judgments and decisions the learned Judge observed, " It appears to me that the proper interpretation of this language is that the appeal must be strictly from the decree, that is to say, the appellant must object to the decree before he can be allowed to enter upon his detailed objections to the judgment. In effect, the appeal is equivalent to an allegation that the decree is wrong and that the reasons which led to the decree are, as stated in the lower Court's judgment, insufficient." Summed up the ruling in that case amounts to this that the appellants must be aggrieved by the decree. It was held in the particular case then before the Court that he was not so aggrieved, and the learned Chief Justice

(1) 1 A. 266.

(2) H.C.R. N.W.P. 1874, p. 19.

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went so far as to say that, read by the light of the plaint, the decree was not only entirely in appellant's favour, but was positively beneficial to him. I am now quite ready to accept the principle that an appellant must be aggrieved by the decree. But since the ruling of this Court in 1873, Act VIII of 1859 has been repealed, and we have a new Code of Procedure. The language of the sections as to appeals, judgments, reviews of judgment, is much the same as that cited in Mr. Justice Jardine's judgment. But there are two important points of difference between the old and the new Codes, first that "judgment" and "decree" are defined by the latter, and secondly that s. 540 not only allows appeals from decrees but from any part of decrees. When this section is read with s. 2, we are in a position to put a more liberal construction on the words of the first section without going beyond the principle that an appellant must be aggrieved by the decree. "Judgment" means the statement given by the Judge as the grounds of the order or decree by which a suit or other judicial proceeding is determined. "Decree" means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. The decree therefore is not to be vague or shadowy: it is to have substance and body.

By s. 203, Act X of 1877, the judgment of the Court shall contain a concise statement of the case, the points for determination, [505] the decision thereon, and the reasons for that decision. By s. 204, when issues have been framed, the Court shall state its finding and decision, with the reasons thereof, upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit. By s. 206 the decree must agree with the judgment, and amongst other particulars it shall specify clearly the relief granted or other determination of the suit, and in fulfilling these conditions I would say that the decree must show the finding and decision on the points for determination: otherwise it will not agree with the judgment. It is true that if the decree be found to be at variance with the judgment, or if any clerical or arithmetical error be found in it, the Court by this section can amend it, so as to bring it into conformity with the judgment, or to correct such error. The section, however, gives no power to alter or vary the decree, a review of judgment or an appeal can alone do this. But a review of judgment can only be allowed under the limitations imposed by s. 623. It could not be allowed merely to enable the Court to reconsider its judgment upon the same evidence. If therefore a party feels himself aggrieved by a decree and desires to vary, or alter or get rid of it altogether, he claims his right of appeal under s. 540. Now a decree may not contain all that it should contain, may not in fact fulfil the conditions of ss. 2 and 206 of the Act. It may in consequence of omissions operate prejudicially against one of the parties and that party may be the defendant, in a suit which is dismissed. It may be in the highest decree prejudicial to him, for since the enactment of Act X of 1877, s. 13 has widely extended the provisions of s. 2, Act VIII of 1859 and it becomes more than ever imperative to appeal from a decree in a suit, which may become final within the meaning of the section, and in which the decree by omissions or otherwise may endanger the future interests of any party. By the terms of the section no Court shall try any suit or issue in which the matter directly or substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit, between the same parties, or between parties under whom they or any of them

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claim, litigating under the same title. The "explanations" attached to the section very clearly show how a decree, if it does not fulfil all the conditions of the law as laid down in ss. 2 and 206, may [506] prove hereafter injurious to any party to the suit. If therefore the omissions in a decree are such as to aggrieve any party, and yet are not such as can be amended by s. 206, it follows that he must appeal in order to protect his own interests, and it is perhaps possibly on this account that decrees may be appealed not only altogether but in part. For it is obvious that a person may be aggrieved by one part of a decree, though he may not be aggrieved by the remaining portion of the decree, and the remedy, admittedly, in this case is appeal. It seems to me inconsistent that there should be grounds for an appeal when the matter of the decree is prejudicial to the interests of a party, and none when the decree itself is equally injurious to a party in consequence of its omissions. I am therefore led by these conditions to conclude that a decree which is materially defective, and cannot be amended, is appealable on that ground alone, and that any party aggrieved thereby may take that objection, and in support of his objection may refer to the judgment of the Court whose decree is appealed, and this conclusion is borne out by the fact that by s. 541 an appellant not only is bound to file a copy of the decree appealed, but also a copy of the judgment, unless the appellate Court dispenses with the latter. Now with respect to the case in which the reference has been made to us, I hold that the decree is defective, not only because it contains omissions, which, if they had been supplied, would have at once given admittedly grounds for an appeal, but because the decree itself does contain matter which laid it open to appeal. It is defective because it does not embody the result of the Court's finding on the points for determination, as both parties claimed the ownership of the lands in dispute, and the judgment declares plaintiff to be the owner and defendants merely lessees, whereas the decree is silent on the issue. The omission in this respect makes the decree injurious to the defendants because they will not be able to plead in any future suit that they were owners, as this issue in the suit was decided against them finally in the present suit, if there was no appeal, and therefore s. 13 of Act X of 1877 would be pleaded in bar of a second trial of the issue.

The decree then is open to appeal on this ground, and also because the words "the rest of the claim *as it stands at present* be dismissed," read and interpreted by the copy of the judgment filed with [507] the copy of the decree, show that these words are injurious to the interests of defendants, inasmuch, as they maintain the right of the plaintiff to the land as owner, though he cannot have possession at once, because the lease of defendants had not expired. These words can have no other meaning and having that meaning the decree limits the rights of defendants to those which lessees have, and denies their right as owners, and therefore defendants may be aggrieved by the decree, assuming that they have a case to lay before the appellate Court, and not only is their appeal in that Court entertainable but it is one that should be heard on the merits. Holding these views I maintain that the Full Bench ruling of this Court to which I was a party in 1873 (1) is not a bar to the appeal, whilst the ruling of a Division Bench in which I also was one of the Judges, *Ram Gholam* v. *Sheo Tahal* (2), is strictly applicable, and this latter decision is the one upon which the Judge of the lower appellate

(1) H.C.R. N.W.P. 1874, p. 19. (2) 1 A. 266.

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Court relied in deciding the point before him as to the admissibility of the appeal.

OLDFIELD, J.—By s. 540, Act X of 1877, "an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." It appears to me that the object and effect of this section are to postpone the right of appeal until the decree or formal order embodying the result of the decision of the suit or judicial proceeding has been made, and that on the decree being made, an appeal shall lie from it, as a matter of right, and since in s. 541 it is directed that the appeal shall be accompanied by a copy of the judgment (unless the appellate Court disposes therewith), and since the decree is nothing more than the formal order embodying the result of the judgment it seems to me a necessary consequence, and to have been the intention of the Legislature, to give a right of objecting to the judgment, when preferring an appeal from the decree.

In the case before us I see no reason why the appeal should not be maintainable, for whether we regard the judgment or the decree the defendant is aggrieved by both. Although plaintiff's suit was dismissed, the judgment decided in favour of the plaintiff's title [508] as against defendants, and the decree by its order "dismisses the suit as it stands," an order which is no proper embodiment of the judgment, and impliedly allows the plaintiff's title. The decision of this Court in *Ram Gholam* v. *Sheo Tahal* (1) is in point.

STRAIGHT, J.—This was a suit to obtain possession by ejectment of 3 bighas, 15¼ biswas of land numbered 74, 75, 78, and 79, claimed by the plaintiff under a purchase from the defendant Ahmad Husain Khan. The sale to plaintiff was admitted by Ahmad Husain Khan, and with regard to No. 79, that may be excluded from consideration, for as to that judgment was confessed by defendant Khuman Singh. The other three portions were admittedly in the occupation of the defendants Mohan and Hira, who to the plaintiff's claim for possession set up the following pleas,—(i) That they were auction-purchasers of proprietary rights in respect of 74, 75, and 78;—(ii) That if not purchasers of proprietary rights they were purchasers of lessee's rights. At the hearing before the Court of first instance the evidence was very fully gone into, and the following were the issues of fact that had to be decided:—(i) Whether the lands 74, 75, and 78 form part of the garden "Bakshiwala" purchased at auction by the defendants Mohan and Hira:—(ii) Has the plaintiff a right to sue and are the defendants entitled to possession by virtue of the lease. The Munsif in his judgment very exhaustively deals with these matters, and disposes of them by finding "that the defendants cannot be ejected from the lands Nos. 74, 75 and 78 owing to the term of the lease not having expired; they having acquired the right of a lessee by payment of consideration, they possess the same title the lessee did; therefore the plaintiff's suit against them is wrong." The terms of the decree are, so far as they affect the point in this case, these: "That the rest of the plaintiff's claim as it stands at present be dismissed, that the defendants Mohan and Hira be considered as exempted (from costs), that the whole of the costs with future interest at eight annas per cent. per mensem be paid by the plaintiff." Against this decision of the Munsif both the plaintiff and the defendants Mohan and Hira appealed to the lower

(1) 1 A. 266.

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appellate Court, the ground taken by the latter being, that the Court of first instance had wrongly disallowed their proprietary claim. On [509] the part of the plaintiff, respondent, it was objected, that the decree of the Munsif being in favour of the defendants they had no right of appeal, and the case could not be entertained The Judge rejected the contention and found the defendants Mohan and Hira to be auction-purchasers of "proprietary" right, dismissing the cross appeal of the plaintiff. Against this decision the plaintiff appealed to the High Court, and the case came on to be heard before Mr. Justice Spankie and myself, when there being a difference of opinion between us upon a point of law it was referred to the Full Bench. The matter has now been very fully argued, but the whole question resolves itself into this. Does an appeal lie under s. 540 of Act X of 1877 by a party to a suit, as to whom upon the face of the decree there is no adverse finding or declaration? In other words, can the terms of s. 540 "shall lie from the decree or from any part of the decrees" be so elastically construed as to justify what in the present case is practically an appeal from a judgment. No doubt the point taken for the plaintiff, respondent, is somewhat technical and I had every indisposition to entertain it, but after careful consideration and a close examination of the Act I can come to no other conclusion than that it should prevail. The expressions used in s. 540 do not appear to me to present any ambiguity, nor do the words "or form any part of the decrees" substantially alter the law as it stood in s. 332 of Act VIII of 1859, upon which the Full Bench Ruling (1) of this Court was given in November, 1873. To my mind language cannot more plainly declare what an appeal is to be from. "From the *decrees* or any part of the *decrees*," I turn to the interpretation clause of the Act only to find a perfectly plain and definite description of "decree" in contradistinction to "judgment." "Judgment" means the statement given by the Judge as the *grounds of the order or decree.* "*Decree*" means the formal order of the Court in which the result of the decision of the suit is embodied. In short, the judgment has no operative effect of itself at all and until its terms are drawn up in the decree the suit remains open It is the decree that has effect and must be enforced, not the judgment, and what it is to contain and how it is to be expressed are provided by ss. 205 and 206 of the Procedure Code. It is altogether idle [510] and useless for the purposes of the present case to examine, as was suggested, any proposed Bill now under consideration of the Legislative authorities for the further amendment of the Civil Procedure of this country, which may or may not hereafter prevent the recurrence of the difficulty that now arises. Language can readily be found to alter s. 540 in such a way as to give the fullest power of appeal, but while it remains as it is and the broad distinction exists between judgment and decree, to which I have already called attention, it must in my opinion be taken, that the words "an appeal shall lie from the decrees, or any part of the decrees," mean that it is the terms of the decree itself, and nothing but the terms of the decree, that are to be made the subject of appeal. The words at the end of s. 540 "to the Courts authorised to hear appeals from the decisions of those Courts," so far as the use of the expression *decision* is concerned, seem to me in no way to extend the meaning of what precede them or to have any bearing upon the construction to be applied. While feeling that the limitation which I hold to exist in s. 540,

(1) H.C.R. N.W.P. 1874, p. 19.

confining an appeal to the decree, is a somewhat capricious one, and involves the incongruity, that the Court of Appeal from appellate decrees might entertain matters of appeal outside the decree which could not be dealt with by the first appellate Court, I cannot strain the interpretation of what seem to me explicit words, because as was urged hardship might arise. Nor does it appear to me that the possible operation of s. 13 of Act X of 1877 upon the defendants, respondents, had they not appealed the decision of the Court of first instance, in any after proceedings in respect of the same property, is a matter that has any relevancy to the present argument. I may, however, point out that it was competent for them under s. 206 of the Procedure Code to have had the decree put in order by the Munsif and his finding in reference to their claim duly declared upon the face of it. Had this course been adopted all difficulty would have been obviated, for then "in accordance with his judgment" (s. 205) he must have decreed them to be "lessees" and not "proprietors," which of necessity would have at once disclosed matter for appeal. Further than this, s. 13 of Act X of 1877 would under such circumstances have afterwards become applicable, had they not appealed, because a Court of competent jurisdiction would not only have "heard" but have **[511]** "*finally determined*" their claim. It was suggested in the course of the argument, that upon the face of the decree itself there was something that affected the defendants, respondents, in the words "as it stands at present," so as to afford them matter of appeal. At the hearing I was somewhat disposed to adopt the view and I wish I could do so now, as it would avoid the necessity of my differing with the rest of the Court. I cannot, however, upon further consideration see in the terms of the decree anything but a most positive finding against the plaintiff and in favour of the defendants, with their costs, and I see nothing upon the face of it giving them any ground for appeal. No doubt the decree is most carelessly and inadequately framed and is altogether out of compliance with s. 205 of the Procedure Code, but for the reasons I have already given it is the only document to be looked at for the purposes of appeal, and however full the judgment, that is ineffectual and inoperative, except so far as it finds voice and expression, in the words of the decree. But to the extent it goes it deals with the plaintiff, as a non-suit would in the English Courts, and relegates him to an assertion of his rights of possession by a fresh proceeding whenever the proper moment arrives. Under all these circumstances I am of opinion that the Judge of the lower appellate Court was wrong in entertaining the defendants' respondents' appeal and that the present appeal should be allowed.

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2 A. 511 (P.C.) = 7 I.A. 6 = 4 Sar. P.C.J. 99.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith and Sir P. R. Collier.

IN THE MATTER OF F. W. QUARRY. [25th November, 1879.]

Suspension of a pleader for misconduct—Act XX of 1865—*Special leave to appeal.*

The High Court, acting regularly within its jurisdiction, suspended a pleader from practice for misconduct.

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The Judicial Committee, not being prepared to say, from the materials before it, that the High Court's conclusion on a pure question of fact was wrong, refused to grant special leave to appeal.

It would not have followed, even if more doubt had been entertained on such a question, that an appeal would have been granted against Judges so acting.

[512] THIS was a petition presented by Mr. F.W. Quarry, a pleader admitted in the High Court of the North-Western Provinces in 1871, for special leave to appeal against an order of that Court dated 3rd April, 1879, suspending him from practice for three months for misconduct as a pleader.

Mr. *J. Graham* was heard for the petitioner.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR J.W. COLVILE.—This is an appeal made to the discretionary power of the Court to grant special leave to appeal against an order of the High Court dated as long ago as the 3rd of April, 1879, whereby the petitioner was suspended for three months from practising as a vakil. The period of suspension has obviously expired considerably before the time at which this application is made, and that in itself forms some ground why their Lordships should not accede to the application. Their Lordships, however, do not mean to go so far as to say that, if the effect of the order had been to inflict upon the character of the applicant a lasting stigma, and there had been a clear miscarriage of justice shown, the fact that the period of suspension had expired would alone have induced them to refuse this application. But it appears to their Lordships after hearing the statement at the bar, and reading the proceedings which have been filed in support of the application, that the Court below acted within its jurisdiction; that upon the complaint of Mr. Bullock, the Judge of the Small Cause Court, they formulated certain charges, charges which, if substantiated, would have justified their order, that a rule to show cause was served upon the applicant, that he put in his answer, that that were affidavits filed on both sides, that the Court heard both parties, and having heard both parties made the order which is now complained of. Their Lordships think that the Court acted within its jurisdiction when they found upon the evidence that ground was made out upon which the rule should be made absolute, or rather that enough had been made out to justify them in suspending the applicant for the time for which they did suspend him from practice, and, so far as their Lordships can judge from the materials before them, they are not prepared to say that this was not a right conclusion. It would not have followed, even [513] if their Lordships had entertained more doubt on the subject, that they would have granted an appeal against Judges acting regularly within their jurisdiction upon a pure question of fact. The application must therefore be refused.

Agents for the petitioner : Messrs. *Carpenter & Sons.*

1879 DEC. 1.

APPEL-LATE CIVIL.

2 A. 513.

2 A. 513.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

MUNIA AND OTHERS (*Defendants*) v. BALAK RAM (*Plaintiff*).*
[1st December, 1879.]

Certificate to collect debts—Act XXVII of 1860*—Alienation of the Estate of a deceased person for the payment of his debts—Succession.*

Where a person to whom a certificate had been granted under Act XXVII of 1860 to collect the debts due to the estate of a deceased Hindu, but who had no share or interest in such estate, contracted a debt for the purpose of paying debts due from such estate, and charged such estate with the payment of such debt, *held* that the creditor could not by virtue of the acts oc such person claim to recover the moneys advanced by him to such person from the heirs and estate of the deceased, even though such moneys had been applied to the liquidation of the debts of the deceased.

ONE Janki applied, as the widow of one Bisram, deceased, to the District Court of Cawnpore for a certificate under Act XXVII of 1860 to collect the debts due to Bisram's estate. This application was opposed by one Munia and one Lachminia, claiming to be the daughters of Bisram, on the ground that Janki had no right to the certificate, having been the concubine and not the wife of Bisram. The District Court allowed Janki's application on the 28th July, 1876, and granted her a certificate on the 12th December, 1876, empowering her to collect the debts due to Bisram's estate. In the meantime, on the 6th September, 1876, Janki, as the widow of Bisram and heir in possession of his estate, gave one Balak Ram a bond for Rs. 1,901, in which she mortgaged a portion of Bisram's real estate as collateral security for the payment of such money. This bond recited that the money was borrowed with the object of paying the debts due from the estate of Bisram. On the [514] 20th March, 1877, Munia and Lachminia, who had sued Janki to set aside the certificate granted to her and to establish their own right to a certificate, obtained a decree setting aside the certificate granted to Janki. In February, 1878, Balak Ram sued Janki, Munia, and Lachminia on the bond of the 6th September, 1876, claiming to recover the debt due thereunder from the defendants personally and by the sale of the mortgaged property. The defendants Munia and Lachminia set up as a defence to the suit, amongst other things, that Janki was not the widow of Bisram and she had therefore no right of inheritance in his property and was not competent to mortgage it, and further that she was not competent to mortgage the property in virtue of the certificate granted to her under Act XXVII of 1860, which moreover had been granted to her subsequently to the mortgage.

The Court of first instance held that Janki, not being the widow of Bisram or his heir, was not competent to mortgage his property, and further that she was not competent to mortgage it in virtue of the certificate granted to her under Act XXVII of 1860. It also held that, under the circumstances, the fact that a debt of Rs. 900, due from the estate of Bisram to one Badri Das, was paid out of the money advanced to Janki on the mortgage did not make Munia or Lachminia, or the property of Bisram, liable for the money so advanced. It observed on this point as follows:—

* Second Appeal, No. 618 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 25th February, 1879, modifying a decree of Babu Abinash Chandar Banarji, Subordinate Judge of Cawnpore, dated the 17th June 1878.

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"I hold that a stranger cannot take upon himself to pay another's debts without his consent and make him liable to himself by making such payments: the plaintiff had no business to pay the debts of Bisram without the consent of his daughters, who were his real and proper heirs: it is not denied that their consent was not taken by the plaintiff: the plaintiff cannot therefore make the daughters of Bisram liable for this debt: for the same reason Bisram's property of which those daughters were owners is not liable for this debt: the principle of *caveat emptor* applies: the plaintiff got the property mortgaged to him by a person who had no right to mortgage it: he made a voluntary payment without any consideration: it was an officious act on his part to pay debts due not by him or his mortgagor but by other persons, and he has no legal right to enforce the liability of that act against those persons: I hold therefore that the plaintiff cannot get a decree against the daughters of the property [515] of Bisram, but he should get a decree against the person of Janki." On appeal by the plaintiff the lower appellate Court modified the decree of the Court of first instance, giving the plaintiff a decree against all the defendants and against the mortgaged property. The Court observed:—"She (Janki) had been to all intents and purposes the wife of Bisram, although not married to him, and, holding a recognised position in his house for many years, she was competent to so administer his affairs as to clear them from the debts of their deceased owner: the discharge of Badri Das' money-claim was a primary and obligatory charge on the estate; the period of his loan for Rs. 500 was two years; contracted in July, 1874, its time for payment was up in July, 1876, but it could not be paid off without incurring a fresh loan, which was accordingly done with appellant in September, 1876: Badri Das admits the receipt of the money and return of the mortgage-bonds, and because Janki took the opportunity to include other necessary charges in her transaction with appellant, she cannot be held to blame morally or legally: the money so raised was not for her personal benefit but to benefit the estate of Bisram, and, until her power to incur the fresh debt was revoked by competent authority, she must be held to have been acting within the power conferred by the certificate granted in July, 1876: moreover it is not proved there has been any waste or misappropriation by Janki: the debt incurred by her should therefore be borne by the estate and the persons for whose benefit the act was done: s. 4, Act XXVII of 1860, affords full indemnity to debtors paying debts to the person in whose favour a certificate has been granted, the certificate being conclusive of the representative's title against all debtors of the deceased person: the presumption is that, since the certificate-holder has the power to receive moneys in discharge of debts, his right to pay them is equally good: the appellant refers to the precedent ruling of the High Court, *Hasan Ali* v. *Mehdi Husain* (1), where a sale by a female certificate-holder was found to be binding upon the minors for whose benefit it was effected, being valid under the Muhammadan law, and in accordance with justice, equity, and good conscience, the property having been sold in good faith and for valuable consideration to liquidate ancestral debts and to meet [516] other necessary purposes and wants of the certificate-holder and the minors; although that precedent has reference to Muhammadan parties, the principles are equally applicable to Hindus, among whom the payment of debts is one of the first charges incumbent upon inheritors: the Contract

(1) 1 A. 533.

Act, IX of 1872, s. 69, also authorises the re-imbursement to a person paying money for another in the payment of which he is interested: at the time of payment of Badri Das' claims both Janki and Munia and her sister were interested, the subsequent decretal order of March, 1879, recognizing a better right to inherit on the part of Munia and her sister does not alter the case, nor lessen or remove the liability of Munia and her sister, as inheritors, to pay the appellant's money-claim conjointly with Janki, who has also separately appealed against the order which fixes the liability solely upon her."

Munia and Lachminia appealed to the High Court, contending that Janki was not competent to mortgage the property of Bisram, being his concubine and not his widow, that being a stranger her acts could not bind the defendants, the lawful heirs of Bisram, and the certificate granted under Act XXVII of 1860 to her did not give her authority to mortgage.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*), for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J. and OLDFIELD, J.) was delivered by

PEARSON, J.—In our judgment all the grounds of appeal are valid and must be allowed. The reasons for which the Court of first instance exempted the daughters and the estate of the deceased Bisram from liability to the plaintiff's claim were sound and incontrovertible; while those assigned by the lower appellate Court for decreeing the claim against the appellants and the mortgaged property are untenable. Musammat Janki was not one of Bisram's heirs; she had no share or interest in the estate left by him; and she was wholly incompetent to contract debts even for the purpose of paying debts for which that estate may have been liable; and still less was she justified in creating a charge or lien on that estate. The plaintiff cannot therefore by virtue of acts done by her claim to [517] recover moneys advanced by him to her, even though they may have been applied to the liquidation of Bisram's debts, from his daughters and estate. Accordingly we reverse the lower appellate Court's decree in so far as it modifies the Subordinate Judge's decree, and affirm the latter in its entirety. The costs of the appeal are awarded to the appellants.

Appeal allowed.

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2 A. 517 (F.B.)=4 Ind. Jur. 650.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

PREM SUKH DAS AND OTHERS (*Plaintiffs*) v. BHUPIA AND ANOTHER (*Defendants*).* [5th December, 1879.]

Landlord and Tenant—Non-payment of rent—Adverse possession—Limitation.

The plaintiffs in this suit, alleging that *S*, through whom they claimed had given *B*, who was represented by the defendants, in July, 1828, the lease of a

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* Appeal under cl. 10, Letters Patent, No. 4 of 1879.

1879 DEC. 5.

FULL BENCH.

2 A. 517 (F.B.) = 4 Ind. Jur. 650.

certain house on the condition that *B* should pay a certain annual rent for such house, and, if he failed to pay such rent, that he should vacate the house, such condition being contained in a *keraia-nama* executed by *B* in *S*'s favour, sued the defendants for the rent of such house for two years, and for possession of the same, alleging the breach of such condition.

Held (SPANKIE, J., *dissenting*) that, supposing that a tenancy had arisen in the manner alleged the mere non-payment of rent by the defendants for twelve years prior to the institution of the suit would not suffice to establish that the tenancy had determined, and that the defendants had obtained a title by adverse possession, so as to defeat the claim; for if once the relation of landlord and tenant were established, it was for defendants to establish its determination by affirmative proof, over and above the mere failure to pay rent.

[R., 31 A. 514=6 A.L.J. 584; 40 C. 173=16 C.L.J. 202=17 C.W.N. 137=16 Ind. Cas. 365; 5 Ind. Cas. 350 (351); D., 31 A. 318=6 A.L.J. 239=1 Ind. Cas. 208.]

THE plaint in this case stated that on the 6th July, 1828, Sital Das, through whom the plaintiffs claimed, had leased a certain house of which he was the proprietor to one Balwa Bhona, who was represented by the defendants, on the following condition, *viz.*, that Balwa Bhona should either provide for the performance of eight days' work yearly as rent, or should pay him rent in coin at the rate of one rupee per annum, and that if Balwa Bhona failed to perform this condition he should vacate the house. The plaint further stated that rent from the 6th July, 1875, to the 5th July, [518] 1877, was due from the defendants, and the plaintiffs claimed to recover Rs. 2 from defendants as the rent for two years, and possession of the house. The condition to which the plaintiffs referred was contained in an instrument in writing styled a *keraia-nama*, dated the 6th July, 1828, which Balwa Bhona had executed in favour of Sital Das on becoming his tenant. The defendants set up as a defence to the suit, *inter alia*, that, as they had not paid rent for upwards of twelve years, they had acquired adverse possession of the house and the plaintiffs were not entitled to rent or to eject them. The Court of first instance, finding as a fact that the defendants had not paid rent for the house for more than twelve years, held that defendants had acquired adverse possession of the house, and the plaintiffs were not entitled to rent or to eject them. On appeal the lower appellate Court concurred in this ruling of the Court of first instance.

The plaintiffs appealed to the High Court, contending that, under the terms of the *keraia-nama*, the defendants were liable to be ejected, and that mere non-payment of rent did not deprive the plaintiffs of their right to recover rent or to eject the defendants on the occasion of non-payment of rent. The appeal came for hearing before Pearson, J., and Spankie, J., who, differing in opinion, delivered the following judgments:

PEARSON, J.—The claim in this suit is based on a *keraia-nama*, dated 6th July, 1828. In so far as the vacation of the houses in question is claimed in accordance with the condition stated in that document, the suit appears to be one for specific performance of a contract, to which art. 113, sch. ii, Act XV of 1877, is applicable. Neither of the lower Courts has, however, tried the material issue whether the defendants are bound by the *keraia-nama*, aforesaid. If they are in possession of the houses under the instrument, their possession cannot be held to have been adverse merely because they may not have paid rent within twelve years. The plaintiff's claim for rent for the years for which it is claimed appears to be within the time allowed by art. 110, sch. ii of the Limitation Law aforesaid. Whether the claim to enforce the condition relating to the

vacation of the houses be within the time allowed under the terms of art. 113 may be matter for inquiry and determination. 1879 DEC. 5.

[519] Setting aside the decrees of the lower Courts, I would remand the case for fresh disposal to the Court of first instance, with an instruction that the costs of this appeal shall follow the event and be costs in the cause. FULL BENCH.

SPANKIE, J.—I cannot regard the suit as one for the specific performance of a contract, and if it could be so regarded, it would be barred by lapse of time, for we must accept the finding of the Courts below that no rent has been paid for upwards of twelve years prior to the institution of the claim. Under these circumstances the plaintiff must have had notice that the performance of the contract was refused, and he should have brought his suit within three years from the first default. 2 A. 517 (F.B.) = 4 Ind. Jur. 650.

But the claim does not profess to be one for specific performance of a contract. It assumes that the conditions of the lease have been fulfilled up to the 6th July, 1875, and asks for the amount due in cash at the rate of two annas for each of the labourers that defendants should have supplied under the terms of the deed of 1828, and also for possession. The defendants totally repudiate the proprietary title of plaintiffs, and deny that any rent was ever paid by themselves or predecessors to plaintiffs, and allege that they have all along held proprietary possession of the house.

We cannot in a second appeal question the finding of fact that the rent has not been paid for upwards of twelve years prior to the institution of the suit. This being so, it appears to me that a claim now to enforce the terms of an instrument written in 1828, which it is shown have not been enforced for upwards of twelve years prior to the institution of the suit is barred, and should be dismissed. I would dismiss the appeal and affirm the judgment with costs.

The plaintiffs appealed to the Full Bench, under cl. 10, Letters Patent, against the judgment of Spankie, J.

Babu *Oprakash Chandar Mukarji*, for the appellants.

Munshi *Hanuman Prasad* and Shah *Asad Ali*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

OLDFIELD, J. (STUART, C. J., PEARSON, J., and STRAIGHT, J., *concurring*)—This is a suit to recover two years' rent of a certain house from the defendants and to eject them from the premises. [520] The plaintiff's case is that under a deed of lease, dated 6th July, 1828, their ancestors leased the house to defendants' ancestors on the following terms that the latter should supply annually eight labourers to the lessor or should pay a sum of two annas in lieu of supplying each labourer, and on failure to comply with the terms should be liable to be evicted from the premises. The answer of the defendants is that the house was built by their ancestors and has always been held by them in proprietary right, and that the deed of 6th July, 1828, on which plaintiffs rely is a forgery. The Court of first instance, after remarking that no doubt the defendants' ancestors were located by those of plaintiffs, finds that there has been no payment of rent within twelve years, and relying on this fact has concluded that their possession has been adverse and has dismissed the claim. The Judge has affirmed the decree: he remarks that "there is evidence to show that the defendant or his predecessors, in times not long ago,

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acknowledged that he was the plaintiff's ryot and had been originally located there by the plaintiff's ancestor, Sital, and whatever may be the dependency of a ryot on his lord I think clearly exists between the plaintiff and defendant here: probably the land is still the plaintiff's and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end, but that plaintiff has a right to eject or take rent is not proved, and the long tenure of defendant without rent is now equivalent to a good title to hold without payment of rent."

Neither of these judgments amounts to an adequate finding on the question of tenancy, or disposes of the real question at issue whether or not the defendants' ancestors became tenants of the plaintiff's ancestors under the deed set up by the plaintiffs, dated 6th July, 1828, and so became liable to the payment of rent and to eviction as averred. This question has not been touched on, nor has the genuineness or otherwise of the deed even alluded to, and supposing that a tenancy did arise in the manner contended for, the Courts are in error in supposing the mere non-payment of rent for a period of twelve years will suffice to establish that it has been determined, and that defendants have obtained a title by adverse possession, so as to defeat the claim, for once the relation of landlord and tenant has been proved, it is for the latter to establish its cessation by affirmative proof, over and above the [521] mere failure to pay rent. The Courts have in the present suit to decide whether the deed produced by plaintiffs is genuine, and established a tenancy on the part of defendants' ancestors, on the terms alleged, and if so whether defendants have shown that the tenancy has determined, and that they have held for twelve years since its determination. If these questions are decided in plaintiff's favour they are entitled to succeed. We are of opinion that the appeal must prevail and that a decree should pass in the terms of Mr. Justice Pearson's proposed order.

SPANKIE, J.—It will be seen from the pleas in appeal from the Judge's decision to this Court that it is assumed that the relation of landlord and tenant exists under the lease: secondly, that the Judge had not determined whether defendants paid or did not pay rent to plaintiffs, nor had he considered the admission of defendants that they were tenants: thirdly, admitting defendants did not pay rent for some time still the right to receive it cannot be destroyed. In second appeal we had to confine ourselves to these pleas and no others. It is erroneous to assume that the relation of landlord and tenant exists or was admitted as regards the *houses*. The lease itself refers to thatched and mud-built houses hired to the defendants. But the first Court found that the *houses* had been constructed entirely by the ancestors of defendants, though these ancestors had been located on the *land* by the ancestor of plaintiffs. The plaintiffs sued for rent under the lease, averring that it had been paid up to 1875. This the plaintiffs were bound to establish, and it was in issue whether they were entitled to recover possession of the houses in virtue of their proprietary right and the rent claimed by them, or whether, no rent having been paid to them within the twelve years prior to the institution of the suit, they had lost their proprietary right. The first Court found that the plaintiffs had never received the rent within twelve years prior to the institution of the suit: the defendants had repudiated the proprietary title of plaintiffs in the house. The first Court also found that defendants had held adversely to plaintiffs for more than twelve years prior to the institution of the suit. The second Court appeared to me to accept

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the judgment of the first Court "that defendants had held over twelve years adverse possession and therefore had acquired a title against plaintiff."

[522] It seems to me that the rest of the judgment of the lower appellate Court has been misunderstood. The Judge refers to the original location on the *land* of the persons who constructed the houses which formed the *sarai*, and in his view, only so far as the land is concerned is there any connection between the plaintiff and defendant as landlord and ryot. "Probably," observes the Judge, "the land is still the plaintiff's and cannot be diverted to other purposes or sold by the defendant without the consent of the plaintiff, and there probably the plaintiff's interest and power end." But the Judge holds the right to take rent or eject the defendants not proved, and that defendants have acquired a good title by long tenure to hold without payment of rent.

When then the first plea before us in second appeal referred to the lease of 1828, and the second to the payment of rent and the admission made by defendant that he was a tenant and paid rent, it appeared to me that the Judge had disposed practically of both these pleas in the finding at which he arrived, and that after such a finding no claim brought under the lease could be enforced. The plaintiff's allegation and averment that he had received rent under the lease up to 1875 had broken down, and the lease had never been in operation, certainly for twelve years prior to the institution of the suit. The Judge and Court below him also found that the defendant had acquired a title against plaintiffs by continuous occupation for a very long period without payment of rent, asserting their own proprietary possession as regards the house. Under these circumstances the lease, having never been enforced within twelve years prior to the institution of the suit, could not be enforced now, and I thought that the suit as brought failed and was therefore properly dismissed, and I think so now and would dismiss the appeal.

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2 A. 522.

CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice.

EMPRESS OF INDIA *v.* FOX. [16th December, 1879.]

Culpable Homicide not amounting to murder—Voluntarily causing Hurt—Spleen disease —Act XLV of 1860, *Penal Code, ss.* 299, 304, 321, 323.

Where a person hurt another, who was suffering from spleen disease, intentionally, but without the intention of causing death, or causing such [523] bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, and by his act caused the death of such other person, *held* that he was properly convicted under s. 323 of the Indian Penal Code of voluntarily causing hurt.

[F., 3 A. 776 = A.W.N. (1881), 132; A.W.N. (1881), 112; A.W.N. (1887), 144; L.B.R. (1872—1892) Cr. 179 (182); R., 157 P.L.R. 1913 = 5 P.W.R. 1913 (N.W.F.P.) Cr.]

THIS was a case called for by the High Court under s. 294 of Act X of 1872. The facts of the case are sufficiently stated in the order of the High Court.

Mr. *Chatterji*, for the accused.

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CRIMINAL JURISDICTION.

2 A. 522.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STUART, C.J.—This case was first brought to the notice of the Court by a letter from the Government of these Provinces, dated the 11th November last, in which letter it was inquired "whether in the opinion of the High Court the judgment of the Magistrate was legal and equitable." On reading this letter it occurred to me that, instead of returning an answer to it in the same form, it would be better for the Court to take judicial cognizance of it and to dispose of it under s. 297 of the Criminal Procedure Code. That course was adopted and the record sent for. I should state that I adopted this course of action in order to avoid the discussion and inconvenience experienced by the Government and by this Court in the well-known *Fuller's Case*, and also in order to avoid the suggestion that was made in that case that the Court, although consulted by the Government in its judicial capacity, had not heard and determined the matter in the usual way, but simply by letter in reply to the Government.

The case has now according to the course of the Court come on for hearing and disposal by myself, both prosecutor and accused being professionally represented, the Government by Babu Dwarka Nath Banarji, the Junior Government Pleader, and the accused by Mr. Chatterji, barrister and advocate of this Court. Both these gentlemen submitted their arguments very fairly, although it did not appear that there was any serious difference between them as to the legal aspect of the case. I have very carefully considered all that they advanced, and I have also very anxiously perused and examined the evidence, and I have arrived very clearly at the conclusion that, in the first place, the conviction of Fox under s. 323 of the Indian Penal Code was right, and that the sentence of a [524] fine of Rs. 200, or, in default, one month's rigorous imprisonment, was one which it was within the discretion of the Magistrate to order, although I myself would have been satisfied with a penalty of less severity. But the fine has I believe been paid, and under all the circumstances of the case I am not disposed to interfere with the sentence by reducing it now.

I observe it is suggested in the police report that the offence was one under s. 304 of the Indian Penal Code, *viz.*, culpable homicide not amounting to murder, that is, homicide committed without premeditation. But in order to a conviction under such a charge, it is incumbent on the prosecutor to prove that the assault or blow which caused death was committed or inflicted so recklessly as to show that the offender was utterly regardless of the consequences of his act. But in the present case the evidence falls considerably short of such a degree of criminality: it simply amounts to this that very early on the morning of the 30th August last Fox, dissatisfied and irritated by the lazy and inefficient manner in which the punkha cooly Tulsia was managing the punkha, pulling it slowly and nodding in a sleepy manner while doing so, went up to him and struck him one or more blows, on what part of his person does not very clearly appear, whether on the head or on the side, or other part. One thing however is clear, and is not disputed, that Tulsia's death was the result of the injuries he had so received. But on a fair view of the evidence it would in my view be unreasonable to hold that Fox was actuated by the reckless vindictiveness contemplated by s. 304. He

simply under a feeling of annoyance at the inefficient manner the punkha was being pulled by Tulsia, and under what may be called a sudden impulse, struck him in the way described. The blows were not heavy or severe, and if Tulsia had been in a healthy condition of body, it is probable that he would not have materially suffered from them. But he was not in a healthy state. The evidence of Doctor Hilson shows that his spleen was in a very diseased condition, more than double the natural size, and thus the weakness of the poor man and his so quickly succumbing is explained. And I observe that the police report which states Fox's offence as one falling under s. 304, Indian Penal Code (culpable homicide not amounting to murder), yet strangely admits that Fox "had only seen the deceased for the first time on the morning he struck him (30th [525] August), as before that he was serving with Sergeant Justice of the Government Railway Police." Doubtless the blow or blows accelerated Tulsia's death, but that such a result was contemplated or was carelessly disregarded by Fox as possible, it is in my opinion on the evidence impossible to believe. Fox appears merely to have acted from a sudden feeling of annoyance, and to have vented that feeling by an assault, which on a healthy person would have been attended with no injurious consequences.

I cannot conclude this judgment without noticing the allusion the Magistrate makes to the recorded opinion of the Court in *Fuller's Case*. He refers to paragraphs 17 and 18 of the Court's letter in that case, which deal with the procedure which it is the duty of a Magistrate to follow. But I may be permitted to refer to other portions of that same letter and of my own minute which appear to me very clearly to expound the law to be applied to the present case. In paragraph 24 of the Court's letter in *Fuller's Case* it is stated that "By the law of India, as by the law of England, a person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby *accelerating* the death of that other, is deemed to have 'caused his death.' Nevertheless, every causing of death does not amount to the offence of culpable homicide. Unless it be proved that a person who has caused the death of another caused death with the intention—(i) to cause death; (ii) to cause bodily injury likely to cause death; (iii) to cause bodily injury as he knew to be likely to cause death to the person to whom the harm is done; or (iv) to cause bodily injury to any person sufficient in the ordinary course of nature to cause death with the knowledge; (v) that he was likely by his act to cause death; or (vi) that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death—the person who has caused death cannot by the law of India be convicted of culpable homicide of either description." And in paragraph 25 of the letter it is explained:—"Nor can a person be convicted of the offence of *voluntarily* causing grievous hurt, unless it be proved that he caused one of the descriptions of hurt defined in the Code as grievous hurt, either by means whereby he intended to cause such hurt, or by means which at the time of employing those means he knew or had reason to believe to be likely to [526] cause it (Indian Penal Code, s. 39)." And the Court then goes on to remark in paragraph 26 that "in *Fuller's Case* there was no evidence that he had committed any of the kinds of hurt defined in the Code as grievous hurt; and although a person is by law presumed to know and to intend the ordinary and probable result of his acts, the result could hardly be declared ordinary or probable; while the circumstances rebutted the presumption of

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intention or knowledge to commit either culpable homicide or grievous hurt." The same principle as to motive and intention is also explained in my own minute in *Fuller's Case*. In paragraph 23 of that paper I say, "It would appear from the medical evidence that the spleen of the deceased was in such a deceased state that very slight violence, either from a blow or fall, would have been sufficient to have caused death. Indeed, it is plain that a mere accident to the man, such as his tripping while walking or running, might have had this fatal result; but that there is nothing in the case to show that such extreme and perilous sensibility of body was known to, or could have been reasonably suspected by Mr. Fuller; and *his guilt or criminal responsibility would have been the same, and neither more nor less, if Kathwaru had not died.* The letter of the Government of India goes on to state that 'the death of Kathwaru was the direct result of the violence used towards him by Mr. Fuller,' and His Excellency in Council observes that 'the High Court assumes the connection between the two events as being clear,' but adding 'yet, on reading Mr. Leeds' judgment, he does not find that gentleman ever considered the effect, or even the evidence of this connection.' The portion of the Court's letter (*i.e.*, the Court's first letter to the Local Government) thus referred to is in these terms:—'The medical evidence shows that the spleen was in a diseased condition; that death was caused by the rupture of the spleen; that this injury might have been caused by moderate violence or by a fall; and that there were no external marks of injury on the body. Under these circumstances, it appears that no great violence was used, and that the accused neither contemplated nor could have foreseen that severe hurt would have resulted from the degree of violence exerted by him, much less that it should have been followed by the lamentable result of death.' It will be observed that Mr. Fuller's not very violent blow and Kathwaru's death are here stated as connected facts, [527] but not in such a way as to show Mr. Fuller's culpability in regard to the death. In fact, it is unnecessary to dwell on the mere fact of the connection between the two circumstances, *the material and vital, question being, not whether the death did in fact result from the blow, but whether Mr. Fuller had such a guilty knowledge of the probable consequences as to make him really responsible for the fatal occurrence.* But there is nothing in the record to show any such guilty knowledge on his part or that he intended to occasion a hurt which would ordinarily or probably cause death, and every circumstance ought to have been distinctly proved, and not left to any kind of inference or suspicion." And with respect to Mr. Leeds' judgment I observed "that it distinctly states the fact of the blow or assault, as it may be called, and also Kathwaru's ultimate death, but it does not state, and with great respect and deference, I submit it very properly does not state, these as necessarily connected facts against Mr. Fuller in the way of measuring his culpability."

The law thus laid down appears to me exactly to apply to the present case. It is impossible to conclude that Fox could have had in view the cooly's death as a probable or even possible consequence of his acts, and the measure of his culpability is therefore not that fatal result, but only the blows themselves, inflicted, as these were, suddenly, under an impulse momentarily excited and not arising from any actual malice against the man.

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APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

PHUL KUAR (*Plaintiff*) *v.* MURLI DHAR AND ANOTHER (*Defendants*).*
[5th December, 1879.]

Mortgage—Usufructuary mortgage—Bypothecation—Suit for money charged on immoveable property.

M and *S* executed an instrument in favour of *K* and *G* in the following terms: "We, *M* and *S*, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for Rs. 300, to *K* and *G*, for two years: that we have received the mortgage-money, and nothing is due to us: that we have put the mortgagees in possession of the mortgaged property: that eight annas has been fixed as the monthly interest in addition to the rent of the [528] house, which we shall pay from our own pockets: that we promise to pay the aforesaid sum to the mortgagees within two years, and redeem the mortgaged property: that if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage-money in any manner they please."

Held per STUART, C.J., OLDFIELD, J., and STRAIGHT, J, (SPANKIE, J., dissenting), in a suit upon this instrument to recover the principal sum advanced by the sale of the house, that the instrument created a mortgage of the house as security for the payment of such principal sum. *Dulli* v. *Bahadur* (1) distinguised.

[F., A.W.N. (1888) 171; R., 21 A. 4 (8)=A.W.N. (1898) 167.]

THE plaintiff in this suit, which was instituted in the Court of the Munsif of Ghaziabad, in April 1878, claimed "to recover Rs. 300, the principal amount of the mortgage-money, besides the rent of the mortgaged house, at eight annas a month, under the terms of the mortgage-deed, and Rs. 70-9-0 on account of interest from the date of ejectment up to the date of suit, at the rate of one per cent. per mensem, in all Rs. 427-1-6, by the auction-sale of the mortgaged house situated in the town of Ghaziabad, under the mortgage-deed dated the 6th November 1868." The plaintiff stated that the defendants had borrowed Rs. 300 from her deceased husband at mauza Lalyana, and executed a deed of mortgage on the 6th November 1868, in which they mortgaged their house at Ghaziabad: that it was stipulated in that deed that the mortgagee should remain in possession of the house for two years, on the expiry of which period the mortgage-money should be repaid to the mortgagee: that accordingly she held possession of the house for two years, and that on the 24th April, 1876, the defendants dispossessed her. The defendants set up as a defence to the suit, amongst other things, that the instrument of the 6th November 1868 created no mortgage of the house, and the plaintiff's claim being consequently reduced to one merely for money, the suit was not cognizable by the Munsif but by the Court of Small Causes at Meerut. That instrument was in the following terms:—"We, Murli Dhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Ghaziabad, bounded as below, owned and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kashi Ram and

* Second Appeal, No. 1260 of 1878, from a decree of R. M. King, Esq., Judge of Meerut, dated the 6th September, 1878, affirming a decree of Munshi Ram Lal, Munsif of Ghaziabad, dated the 16th May, 1878.

(1) H.C.R. N.W.P. 1875, p. 55.

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Ganga Ram for two years: that we have received the entire mortgage-amount from the mortgagee, and nothing remains due: that we have put the mortgagee in possession of the thing mortgaged like ourselves: that eight annas has been fixed as monthly [529] interest besides the rent of the house, which we shall pay from our own pocket: that we agree that we shall pay the aforesaid sum in a period of two years to the mortgagee and get the thing mortgaged redeemed: that if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases: that whatever is laid out by the mortgagee in repairing the house shall be paid by us at the time of redemption of mortgage: hence these few presents have been executed by way of a mortgage-deed to serve as evidence." The Munsif allowed the contention of the defendants and dismissed the suit. On appeal by the plaintiff the lower appellate Court also allowed this contention.

The plaintiff appealed to the High Court contending that the instrument of the 6th November 1868 created a mortgage of the house and the suit was therefore cognizable by the Munsif. The appeal was heard by a Division Bench of the High Court composed of Stuart, C.J. and Spankie, J.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondents.

The following judgments were delivered by the Judges of the Division Bench:

STUART, C.J.—In this case it was objected by the defendants, respondents, and both the lower Courts have held, that the claim is one cognizable by a Small Cause Court, and that the Civil Court had no jurisdiction to entertain the case, seeing that, in their opinion, possession of the house for two years, as conditioned by the deed, does not confer such a mortgage-right as would entitle the mortgagee to realize the amount under it from the property. All that the mortgagee is entitled to sue for is Rs. 300, and for that purpose she ought to proceed in the Small Cause Court. On the other hand it is contended by the plaintiff, appellant, that there is a good mortgage of the house to her; and her plaint shows that she has brought the suit for recovery of the Rs. 300, which is the mortgage-money, and interest, besides the rent, by [530] auction-sale of the mortgaged house, and that the suit is therefore cognizable by the Munsif and not by the Small Cause Court. This is her only plea, and it is the sole question before us in this appeal. The following is the mortgage-deed:—(After setting out the deed of mortgage, the judgment continued):—If the first part of this deed stood by itself without reference to anything that was to follow, it might perhaps be fairly argued that what was really mortgaged was not the house itself, but only two years' use of it. But even if so, there was a mortgage—a limited mortgage—and such a transaction is not within the terms of s. 6 of Act XI of 1865. Taken as a whole, however, the transaction bears a wider aspect, for it states that the mortgagors "have put the mortgagee in possession of the thing mortgaged like ourselves," and it goes on to provide, "that we agree," *i.e.*, we intend and promise, "that we shall pay the aforesaid sum in a period of two years and get," *i.e.*, the mortgage-debt being then paid, we shall then get, "the thing mortgaged redeemed," and then comes a very important

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clause showing that the contingency of the debt not being paid within two years was kept in view, for it provided that, "if we fail to pay the mortgage-amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases," that is, he may either proceed against the mortgaged property or against the mortgagor personally, and it is added that, whatever is laid out by the mortgagee in repairing the house "shall be paid by us," not at the end of two years, but "at the time of redemption of mortgage."

It is, therefore, quite clear to me that the deed is an ordinary simple mortgage-deed, by which the mortgagor's house in Ghaziabad is pledged as security for the mortgage-debt, the condition as to payment of the amount within two years pointing to a mere contingency as to the mortgagor's intentions, but in no way altering the legal character of the mortgagee's right under his deed. The precedent referred to by the Judge—*Dulli* v. *Bahadur* (1)—does not appear to me to have any application to the present case. There the defendant failed to carry out his covenant to put the plaintiffs in possession of a zemindari share, in consequence of the estate being in the hands of a lessee who, of course, insisted on [531] his own independent right, and the property itself was not mortgaged to secure the debt. Here we have a simple mortgage which undoubtedly secured the property to the mortgagee until his debt was paid, the two years' condition being merely in the nature of a contingent promise or expectation of releasing the property by payment of the debt within that time, and not otherwise limiting the plaintiff's rights under her security. Both the lower Courts are therefore clearly wrong in holding that the jurisdiction of the Munsif was ousted, and that the case could only be entertained by the Small Cause Court.

I would, therefore, allow the present appeal with costs, setting aside the judgment of both the lower Courts and I would remand the case for disposal on its merits by the Munsif.

SPANKIE, J.—I cannot say that the decision of the lower appellate Court is open to the objection taken by appellant. The terms of the mortgage-deed are not denied, and it appears that the mortgage was for two years, and for those two years the mortgagee was put in possession as security for the interest rather than the principal. The mortgagors put the mortgagee in possession of the subject of the mortgage, and agreed to pay interest at eight annas a month, as well as the monthly rent. If they fail to pay the amount of the mortgage-money within the period of two years, the mortgagee would be at liberty to recover it in any way he pleased, but the deed does not provide that the house at the expiration of two years shall remain hypothecated for the payment of the money. It is admitted that the mortgagee has been put out of possession, and she now seeks to recover the amount of the money due to her by sale of the mortgaged property. The amount in suit is under Rs. 500, and the Courts below have held that there was no real security for the payment of the principal, and therefore that there could be no decree for the sale of the mortgaged property. The claim then became one cognizable by a Court of Small Causes. It was therefore dismissed.

The precedent relied on by the lower appellate Court—*Dulli* v. *Bahadur* (1)—appears to be in point. The judgment is one to which I myself was a party, and I consider myself bound by it. [532] But

(1) H.C.R. N.W.P. 1875. p. 55.

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regretting that I differ from the honourable and learned Chief Justice, I am quite willing, if he should be disposed to refer it, that the case may go before another Judge. At present I would dismiss the appeal and affirm the judgment with costs.

The Judges of the Division Bench differing on a point of law, the appeal was referred under s. 575 of Act X of 1877 to Oldfield and Straight, JJ. The judgment of these Judges was delivered by

JUDGMENT.

OLDFIELD, J.—The question which we have to determine is whether under the terms of the deed. dated the 6th November, 1868, a mortgage was created in plaintiff's (appellant's) favour by reason of which she is entitled to recover the amount she claims by sale of the house alleged to be mortgaged.

In our opinion there can be no doubt that the deed creates a mortgage of the house as security for payment of the principal sum, Rs. 300, lent, and that the plaintiff is in consequence entitled to recover by sale of the mortgaged property. A pledge is created by the terms, " We, Murli Dhar and Sagar Mal, sons of Ram Lal, do hereby declare that we have mortgaged a house situate in Ghaziabad, bounded as below, and possessed by us, in lieu of Rs. 300, half of which is Rs. 150, to Kashi Ram and Ganga Ram for two years," and the deed goes on to stipulate, " if we fail to pay the mortgage amount within the period of two years, the mortgagee shall be at liberty to recover the mortgage-amount in any way he pleases." It is true that a term of two years is entered as the term of the mortgage, but this term is named with reference to the period within which the obligor was bound to satisfy the debt, and before the expiry of which the obligee could not demand payment, and it is obvious that the object of the mortgage would be frustrated if it were held to cease after two years, whether the debt be satisfied or not. The case on which respondents rely and which is referred to in the judgments of the Courts is distinguishable from the one before us. In that case the mortgage was a usufructuary mortgage for a term of years, and no question arose as to the right to bring the mortgaged property to sale in satisfaction of the debt. The only question decided was that the mortgagee could not retain possession of the mortgaged property after the term of the [533] usufructuary mortgage had expired. In the case before us, the deed cannot be held to pledge the house for the payment of interest, and so far the claim to recover interest as secured by the mortgage of the house will fail. An order will be made in the form proposed by the learned Chief Justice for remanding the case for disposal on its merits. The costs of the appeal to this Court and of the Courts below will follow the result.

Cause remanded.

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FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA *v.* SABSUKH AND OTHERS. [5th December, 1879.]

Prosecution for offence against public justice and offence relating to document given in evidence—Sanction—Nature of sanction necessary—Act XLV of 1860 (*Penal Code*), *ss* 193, 471—*Act X of* 1872 (*Criminal Procedure Code*), *ss.* 468, 469, 470—"*Subordination*" *of Revenue Courts to the High Court.*

Held (SPANKIE, J., *doubting*), on a reference to the Full Bench, that a Court of Revenue is a Civil Court within the meaning of ss. 468 and 469 of Act X of 1872.

Held also that the declining by a Court of Revenue to sanction a prosecution under ss. 468 and 469 of Act X of 1872, under a mistaken view of the law and under the impression that sanction was unnecessary, did not constitute sanction.

Held also that under the words "at any time" in s. 470 of Act X of 1872 sanction to prosecute cannot be given after the trial and conviction of the accused person.

Observations by STUART, C.J., on the "subordination" of Courts of Revenue to the High Court within the meaning of ss. 468 and 469 of Act X of 1872.

Held by the Judge making the reference (STRAIGHT, J.), on the case being returned to him, that the accused persons having been prosecuted without the sanction required by ss. 468 and 469 of Act X of 1872, all the proceedings were invalid, and must be quashed, and the accused must be re-tried, sanction to their prosecution having been obtained.

[F., 10 A. 58l; R., 97 P.L.R. 1903.]

THIS was a reference to the Full Bench by Straight, J. The facts out of which the reference arose and the points of law referred are stated in the order of reference, which was as follows:

STRAIGHT, J.—This was an appeal from a judgment of the Court of Session at Farukhabad. The case was argued before me on the [534] 3rd November last by Mr. Leach, for the appellants and the Junior Government Pleader, for the Crown. I took time to consider judgment, not on the questions of fact, as to which I was quite satisfied, but upon the point of law that had been raised, and as upon consideration I feel that the matter is one of very serious importance, I have thought it best to state the following case for the opinion of the Full Bench.

The appellants were prosecuted for and convicted of offences against ss. 193 and 471, Indian Penal Code. The false evidence had been given and the forged document used on the trial of a suit in the Deputy Collector's Court, in which one Imam Khan, a zamindar, sought to recover arrears of rent from the appellant Sabsukh. The Deputy Collector found in favour of the claim, and upon appeal the Collector took the same view, dismissing the appeal in the following words: "I believe the receipt to be a clumsy forgery and now reject the appeal." Thereupon Imam Khan, the before-mentioned plaintiff, presented a petition for sanction of prosecution in accordance with the provisions of ss. 468, 469, Criminal Procedure Code, and upon such petition the Collector made the following endorsement: "There is no rule of practice as to giving sanction in Revenue cases; sanction is being given in criminal cases: the applicant is at liberty to bring the complaint in the Criminal Court separately; there is no need for sanction." Accepting this as a sanction Imam Khan proceeded with his prosecution and ultimately convicted the three appellants. The three

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questions upon which I wish to have the opinion of the Full Bench are as follows:—(i) Is a Revenue Court a Civil Court in the sense of ss. 468 and 469, Criminal Procedure Code? (ii) Can the Collector's endorsement on the petition for sanction, as above set out, be considered a "sanction" within s. 470, Criminal Procedure Code? (iii) Can this Court now, under the words "at any time" in s. 470, Criminal Procedure Code, itself give the required sanction, assuming the second question to be answered in the negative?

Mr. *Leach* and Babu *Jogindro Nath Chaudhri*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENTS.

The following judgments were delivered by the Full Bench:

[535] STUART, C. J.—(After stating the facts and the questions referred): In answer to the first of these questions, I am of opinion that a Revenue Court is a Civil Court within the meaning and intent of ss. 468 and 469, Criminal Procedure Code. The mischiefs against which these sections are directed are the giving of false evidence and using as genuine a forged document. By "Civil Court" here I understand any Court established for the administration of civil justice as distinguishable from a Criminal Court. To hold otherwise would be to give to Revenue Courts and their suitors unlimited powers of prosecution in such cases, for which no intelligible reason has been attempted to be offered, or could possibly be given, the essence of such offences being the perjury or false swearing and falsehood common to all Courts which act upon written or spoken evidence, and it could not for a moment be contended that a Revenue Court is not such a Court. My attention was directed to s. 435 of the Criminal Procedure Code, which provides for contempts of Court in certain cases, and in regard to which the Court before which the contempt has been committed is described as "any Civil, Criminal, or Revenue Court." But these words, so far from demonstrating that the term Civil Court in ss. 468 and 469, Criminal Procedure Code, was intended to be used in its restricted sense as distinguishable from a Revenue Court, to my mind, when attentively considered, lead to the very opposite conclusion. This will clearly appear if we read these two sections along with s. 435, especially in regard to one of the offences mentioned in s. 435, namely, the offence defined in s. 228 of the Indian Penal Code. This offence is also included within the category of offences to be found in s. 468. It will thus be at once seen that, if we exclude the Revenue Court from s. 468, we bring that section into direct collision with s. 435. Section 435 mentions the offences, including that under s. 228, Indian Penal Code, which it contemplates "as committed in the view or presence of any Civil, Criminal, or Revenue Court," and it goes on to provide that "the Court may cause the offender, whether he be a European British subject or not, to be detained in custody, and at any time before the rising of the Court on the same day, may take cognizance of the offence, and adjudge the offender to punishment, by fine not exceeding Rs. 200, and, in default of payment, by imprisonment in the civil jail for a period not exceeding one month, unless such fine be [536] sooner paid. In every such case, the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence. If the offence is under s. 228 of the Indian Penal Code, the record must show the nature and stage of the judicial proceeding in which such public servant was

sitting, and the nature of the interruption or insult offered." Here we have provision made for all the three kinds of Courts, the Civil and Revenue as well as the Criminal, taking notice of, and punishing for without complaint or commitment, the offence mentioned in s. 228, Indian Penal Code, while if the very same offence is prosecuted for under s. 468, there must be a "complaint," but the offence "shall not be entertained except with the sanction of the Court before which it was committed." This, however, is not inconsistent with s. 435, which provides for the case of the Court taking summary cognizance of, and punishing for, the offence committed before itself, for which purpose, it is obvious, no separate or express sanction is necessary, the Court showing its mind in that respect by the summary proceeding provided for. Now, quite consistently with this view, s. 468 contemplates the same offence being entertained, not in the summary form provided for by s. 435, but by complaint and commitment, in which the recorded sanction of the Court before which the offence was committed is necessary, because from the nature of the case that consent cannot otherwise be made to appear, and the same argument of course applies to all the other offences mentioned in s. 468, Criminal Procedure Code. This reasoning appears to my mind to be conclusive for holding that the term "Civil Court" in that section is meant to include those Civil Courts at least mentioned in s. 435 as distinguishable from Criminal Courts, and that therefore we are not driven to what I must call the incongruity—I might go the length of saying the mischievous incongruity—of holding that an offence that can be summarily entertained and punished by a Revenue Court, cannot be entertained or punished by the more deliberate procedure of complaint and commitment under s. 468. It is our duty to make the law as consistent and rational as we possibly can and not to leave its apparent contradictions and inconsistencies unsolved without every effort of explanation and reconcilement being used, and for that purpose to apply such principles of reasonable exposition as will fairly remove these contradictions and [537] inconsistencies, by showing that they are only apparent and not real. And in doing this we simply, in my opinion, fulfil the duty incumbent on us to give such a degree of just expansion to the letter of the law as will effectually satisfy its spirit and intendment, and we would not do that, in the case before us, if we excluded Revenue Courts from the provisions of s. 468, Criminal Procedure Code.

My answer to the second question is that the Collector's endorsement on the petition for sanction was not "sanction" within the meaning of s. 470, Criminal Procedure Code. On the contrary, it appears to me to be rather in thena ture of a refusal to give sanction; for the Collector ends his endorsement with these words: "There is no need for sanction," and he must be taken therefore not to have given it.

As to the third question I entertain considerable doubts, although if we have the power, I do not think we should under the circumstances be justified in giving sanction at this stage of the case. If the Revenue Courts were as a jurisdiction generally subordinate to this High Court we, of course, could give sanction, but whether under the words "at any time" in s. 470 we could now give such sanction so as to validate the trial, conviction, and sentence before the Judge, is a question attended with considerable difficulty. I rather incline to the opinion that the words "at any time" were intended to mean at any time during the trial, seeing that it is for the purpose of such trial that the sanction is required, and without it the trial could not proceed, and that after conviction and

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sentence there is nothing to follow for which the sanction may be asked. The question, however, whether the Revenue Courts are, as a jurisdiction, legally and technically subordinate to this High Court is also a very difficult one. They may be subordinate in a certain sense, *i.e.*, in those cases where there is an appeal to this Court within ss. 189, 190 and 191 of the Rent Act XVIII of 1873, but in regard to all other cases there is no appeal and no subordination. This is shown by the plaint in the revenue suit which is included in the record before us, and from which it appears that the suit was to recover rent, Rs. 36, principal, and Rs. 5-1-0, interest, in all Rs. 41-1-0. It is, therefore, quite clear that so far as this case is concerned there is neither subordination on the part of the Collector nor control on our part. That however, I quite [538] admit is a different question from the general proposition I have indicated, *viz.*, whether in the light of jurisdiction generally the Revenue Court is amenable to the High Court? I rather incline to the opinion that as a jurisdiction the Revenue Court is not subordinate to the High Court. The policy of the Act (upon which I express no opinion) was clearly to exclude all interference whatever by the Civil Courts, and especially by this High Court, for it was in consequence of judgments by this Court which were deemed inconvenient by the Revenue authorities that the Rent Act XVIII of 1873 was passed. Therefore as a general question I should hold that the Revenue Courts were not subordinate to this Court, and that conclusion lends considerable force to the case before us, seeing that it was not one which could by any means be brought under our appellate or revisional jurisdiction. Another difficulty has been stated, *viz.*, whether under s. 15 of the High Courts' Act this Court has any control or superintendence over the Revenue Courts. That again depends upon whether the Revenue Courts are subject to our appellate jurisdiction within the meaning of the Act. But that again depends on what is there meant by "appellate jurisdiction." Does it mean appellate jurisdiction generally, or can it be held to be understood as appellate jurisdiction within the limited meaning and application of the Rent Act? The latter, as it appears to me, cannot be taken as the true construction. The kind of subordination and control given us in certain cases by the Rent Act is something different from, because less than, the "superintendence" mentioned in s. 15 of the High Courts' Act. By these remarks I have indicated the doubts and difficulties which appear to me to stand in the way of a distinct answer to Mr. Justice Straight's third question, although, under any circumstances, I should be opposed to giving sanction in the present case.

PEARSON, J.—I entertain no doubt that a Revenue Court is a Civil Court within the meaning of the term "Civil Court" as used in ss. 468 and 469 of the Criminal Procedure Code. In those sections Civil Courts are broadly distinguished from Criminal Courts. There is no reason to suppose that by the terms "any Civil Court" only the ordinary Civil Court is meant. The object in view is to prevent wanton, groundless or malicious prosecutions of the offences therein mentioned, by requiring the sanction of the [539] Courts in or before or against which those offences may be committed to the prosecution of them. It is impossible to suppose that the restriction thereby imposed on such prosecutions is applicable only to such offences committed in or before or against the ordinary Civil Courts, and not equally to similar offences committed in or before or against the Revenue Courts which, not less than the ordinary Civil Courts try and determine suits of a civil nature.

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I am of opinion that the Collector's order on the petition praying for sanction of prosecution in the case before us cannot be held to have given the sanction prayed for. On the contrary, under a mistaken view of the law, and under an impression that sanction was unnecessary, that officer distinctly declined to give his sanction, and left the petitioner to proceed in the matter of his own motion.

I am further of opinion that sanction cannot now be retrospectively given to the present proceedings, although fresh proceedings may be sanctioned by competent authority. Sanction is an essential preliminary to the institution of proceedings and the entertainment of a complaint.

The foregoing remarks embody my views on the three points referred to the Full Bench.

SPANKIE, J.—I confess that I entertain doubts in answer to the first question whether a Revenue Court is a Civil Court in the sense of ss. 468 and 469 of the Criminal Procedure Code. A Revenue Court has been defined in cl. (9), s. 3 of Act XIX of 1873. In s. 93 (*a*) of Act XVIII of 1873 the Courts of Revenue are distinguished from other Courts, and certain suits are made cognizable by Courts of Revenue and no other Courts, and as Courts they have their own procedure, *vide.* s. 104 of the Act.

In s. 204 (*a*) if the presiding officer of a revenue Court considers that any question or issue involving a point of law is more proper for the decision of a *Civil* Court, such officer is to act in the manner prescribed by the section. Here Civil Courts are distinguished from Revenue Courts. Again in s. 205 (*a*) on a question of a power to take cognizance in any suit instituted or on any appeal presented in a Civil or Revenue Court, the Judge or presiding officer may refer [540] the matter to the High Court. Here again the two Courts are clearly distinguished. Section 435 of the Code of Criminal Procedure in chapter XXXII provides for certain cases of contempt committed in the view or presence of any Civil, Criminal, or Revenue Court. Here are three Courts clearly distinguished. But under s. 467, in all offences under chapter X of the Penal Code, not including those falling within ss. 435 and 436 of the Criminal Procedure Code, no *complaint whatever* (except where the proviso attached to the section applies) can be entertained without the sanction or except on the complaint of the public officer concerned, or of his official superior. When we come to the words of s. 468 of the Criminal Procedure Code, the reference is to the offences under the sections cited before or against a *Civil or Criminal* Court, and in such cases sanction is required, and it is the same with s. 469. If Revenue Courts are included in the word "*Civil,*" why are the three Courts distinguished separately in s. 435? It may be asked why should sanction be necessary in Civil Courts and not in Revenue Courts? This I cannot explain: nor am I bound to explain the reason. But after the recognition by the Code of the Revenue Courts, something more appears to me to be intended than the use of the word "Civil" as opposed to Criminal. I admit that in s. 19 of the Penal Code "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, &c. But a Judge is also a "public servant" (s. 21), and the definition is intended to apply to the sections in the Penal Code which relate to Judges and public servants, and "Civil" is doubtless broadly opposed to "Criminal." The reference in s. 2 of the Rent Act to this section of the Penal Code and the Illustration (*a*) makes the Collector a Judge for the purposes of the Penal Code and no

further. I simply say that s. 435 recognizes the three Courts, and ss. 468 and 469 recognize two only. It may, however, be observed that s. 643 of the Civil Procedure Code, which replaces ss. 16, 17, and 19 of Act XXIII of 1861, provides the procedure in cases pending before any Court (to which of course the Code applies), when there appears to be sufficient ground for sending for investigation to any Magistrate charges of certain offences under the Penal Code. As the Courts have the power to act thus conferred upon them by [541] s. 643 of Act X of 1877, it may be that it was thought desirable that sanction should be given in those cases of complaint in which the Court itself had not taken action, and this with a view to check baseless complaints. But I cannot find any such power given by the procedure in Revenue Courts to the presiding officers of those Courts. In the draft of the new Code of Criminal Procedure as amended, I find that s. 196 amends ss. 467 and 468, by cls. (*b*) and (*c*), so as to prevent any possible doubt arising on the point referred to us, because it refers to offences committed before or "against any Court," and therefore all recognized Courts are included, and sanction of the Court or of some other Court to which it is subordinate is required. In s. 476 of the amended draft Bill the words "any Court" again are used, and any Court is empowered to send an accused to the Magistrate. If this were the wording of the present Code, and s. 467 included all the sections in s. 196 of the proposed amended Act, then we would have easily disposed of the present reference, as any Court could have sent the accused to the Magistrate for inquiry on a charge of giving false evidence. But under s. 478 the words "any Civil Court" are used, and a larger power is given to such Court in cases in which the offence is triable by the High Court or Sessions Court exclusively. Here it may be that, although all Courts may send an accused person to the Magistrate for inquiry into offences, only the regular Civil Courts may in certain cases actually themselves commit the offenders. I may also add that in s. 480, which is to replace s. 435 of the present Code, in respect of certain cases of contempt, the words "Revenue Court" are not used. It is sufficient that the offence is committed in the view or presence of "any Court." I think, therefore, I have shown that there is some room for doubt whether, under the wording of ss. 468 and 469 of the Criminal Procedure Code now in force, any sanction is required before a prosecution for giving false evidence in a Revenue Court is entertained. I say room for doubt, for it does seem anomalous that no provision has been made for such a case as that referred to us in the Revenue, when full provision for similar offences has been made in regard to the Civil Courts. I should have been glad if it had been otherwise and to have concurred with my honourable colleagues on this question as on the others referred to us.

[542] In reply to the second question I do not find that the Collector's endorsement on the petition for sanction amounts to, or can be considered, a sanction within the meaning of s. 470 of the Criminal Procedure Code.

In answer to the third question, I consider that, if sanction is necessary, it is too late for this Court at this stage of the case to grant it. The blot occurs at the outset. There was no jurisdiction to entertain the complaint in the first instance, if sanction was necessary. The error too was not one that occurred after the complaint was entertained, and therefore might be condoned under the terms and subject to the proviso of s. 283 of the Code of Criminal Procedure.

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I may add that I cannot find that the Board of Revenue has ever made any rules under s. 211 of Act XVIII of 1873 and s. 256 of Act XIX of 1873 for the practice and procedure of Revenue Courts on complaints of the nature before me.

STRAIGHT, J.—In reply to the first question submitted by me to the Full Bench for its opinion, I have to say that, in my judgment the Revenue Court is a Civil Court in the sense of ss. 468 and 469, Criminal Procedure Code. I think that the alternative expressions "Civil or Criminal Court" are intended to include all tribunals concerned in the administration of Civil or Criminal Justice, before which "judicial proceedings" are held, as defined in the interpretation clause of the Criminal Procedure Code. I have in vain sought to discover any intelligible reason why a distinction should have been drawn by the Legislative authorities between Revenue Courts on the one hand and Civil and Criminal Courts on the other. Sanction appears to be just as desirable and necessary in either case. Moreover by s. 2 of the Rent Act (XVIII of 1873) it is specially provided that Illustration (*a*) of s. 19 of the Penal Code shall be read as if it applied to that Act, the effect of which is to declare that a Collector exercising powers under Act XVIII of 1873 (as in this case) is a Judge. Therefore you have a "Judge" and a "judicial proceeding," which it must be admitted is of a civil character. It is true that the Rent Act draws a distinction between Revenue and Civil Courts, but that is merely for convenience of expression and to avoid confusion, and in no way interferes with the [543] Revenue Court falling within the generic term Civil Court, as used in ss. 468, 469 of the Criminal Procedure Code. Consequently I think the Collector's sanction to the institution of the prosecution ought to have been given, and that without it the whole of the proceedings before the Magistrate and the Court of Session are void.

In answer to the second question, I am very clearly of opinion that the order endorsed by the Collector on the complainant's petition can by no twisting of terms or distortion of language be construed into a sanction.

As to the third question, I do not think that the words "*at any time*" in s. 470, Criminal Procedure Code, give the Court power, after conviction and upon appeal or revision, to grant a sanction, and so to validate proceedings otherwise invalid from their inception to their close. It appears to me that, for the purpose of determining what those words mean, ss. 468, 469 and 470 must be read together, and so treating them, the construction seems to be that a complaint for any of the enumerated offences shall not be entertained, except when the sanction of the Court before or against which an offence has been committed is previously obtained. In other words, if I take the correct view, the required sanction is a condition precedent to the very first commencement of the prosecution. The term "complaint," as used in the Criminal Procedure Code, has a perfectly intelligible meaning and requires no definition on my part. Apart from this, it appears to me there is a provision of the Code that places any question upon the point I am now discussing almost, if not entirely, beyond dispute. I refer to s. 142, which enacts that nothing in that or the preceding section shall "authorise a Magistrate to *entertain a complaint* of an offence without sanction, where such offence by any law in force may not be entertained without sanction." I may also point out that in s. 466, Criminal Procedure

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Code, the sanction there provided must be given "before the commencement of the proceedings." Under all the circumstances already adverted to, and endeavouring to place a reasonable and practical construction on the words "at any time," I cannot bring myself to give them the enlarged interpretation contended for by the Junior Government Pleader. To do so would appear to me to open the door to [544] the very mischief the Act was intended to guard against, namely, the indiscriminate institution of prosecutions by private persons for offences against public justice committed in contempt of and against Civil or Criminal Courts, for their own ends and objects, without any check. If my view of the section is incorrect, then there is nothing to prevent a person, except the watchfulness of the Magistrate, from putting the criminal law in motion to harass or oppress another with whom he has been unsuccessful in litigation, and to defer obtaining or attempting to obtain the sanction of the Court before which his suit has been tried until the latest possible moment. To my mind prosecutions for the offences enumerated in ss. 468 and 469 must have the stamp and countenance of the offended Court, otherwise they fall to the ground. My answer therefore to the third question submitted is in the negative. Upon receipt of the decision of the Full Bench, I will dispose of the appeal.

OLDFIELD, J.—I quite concur in the view of the law taken by Mr. Justice Straight.

The case having been returned to the Judge making the reference, the following order was made:

ORDER (FINAL).

STRAIGHT, J.—The practical effect of the decision of the Full Bench, upon my reference of this case, is that the whole of the proceedings against the appellants from the commencement must be quashed; the investigation before the Magistrate and the trial in the Sessions Court being invalid by reason of the absence of the Collector's sanction to the institution of the prosecution. The charge is of so serious a character that the matter cannot be allowed to rest, and in the interest of public justice it is essential that the accused, who seem to have been most properly convicted on the facts, should not escape by reason of the technical difficulty that has arisen. There must, therefore, be a re-trial, and I accordingly order that the record be remitted to the Magistrate of the District through the Sessions Judge. Application must be made to the Collector for his sanction to the proceedings, and his attention must of course be called to the judgment of this Court as to the legal necessity for its being given. When the sanction has been obtained the prosecution must be continued in ordinary course to committal, and after that to trial before the Court of Session. Of course should the accused be again convicted, the Sessions Judge will, in inflicting [545] punishment, have regard to the length of time during which they have already undergone imprisonment.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

JAGA NATH PANDAY (*Plaintiff*) v. PRAG SINGH (*Defendant*).*
[5th December, 1879.]

Grant of land exempt from revenue—Grant of land exempt from rent—Regulation XIX of 1793, s. 10 Regulation XLI of 1795, s. 10—Act XVIII of 1873 (N W P. Rent Act), ss. 30, 95—Act XIX of 1873 (N.W.P. Land Revenue Act), ss. 79, 241—Jurisdiction of Civil Court.

The plaintiff in this suit claimed the possession of certain land in virtue of a grant thereof to him, not merely of the proprietary right in such land, but of the rents of the same undiminished by the payment of the revenue assessed thereon, which the grantor took upon himself to pay.

Held by STUART, C J., PEARSON, J, and OLDFIELD, J., that the grant was null and void and liable to resumption, with reference to s. 10 of Regulation XIX of 1793 and Regulation XLI of 1795, and s. 30 of Act XVIII of 1873 and s. 79 of Act XIX of 1873.

Per SPANKIE, J., that the question whether the grant was null and void with reference to those Regulations and Acts did not arise, as the grant, on the facts found by the Court below, was not one within the terms of those Regulations.

Held per STUART, C J, PEARSON, J., and SPANKIE, J., that the suit was cognizable by the Civil Courts.

THIS was a suit for the possession of twenty-nine bighas, ten biswas, of "*krishnarpan*" land. The plaintiff stated in his plaint that the land in suit was granted to him by Rajah Ramadhin Singh, whom the defendant Sheobachan Kuar represented, as "*krishnarpan*," that he had enjoyed the profits of the land, and that on his instituting a suit for arrears of rent, Sheobachan Kuar intervened and denied that he was in possession of the land. Sheobachan Kuar set up as a defence to the suit that Ramadhin Singh had not granted the land to the plaintiff as "*krishnarpan*," that the plaintiff had not obtained possession of the land, and that the grant, even if it were made, was invalid. Prag Singh, who had purchased the rights and interests of Sheobachan Singh in the village in which the land in suit was comprised in the execution of a decree, set up the same defence to the suit. The Court of first instance fixed as issues, (i) Could Ramadin Singh make a grant of the land as [546] "*krishnarpan*," and did he make such a grant in the plaintiff's favour, and has the plaintiff been in possession of the land in virtue of the grant, and (ii) If the grant were made, can Sheobachan Kuar resume the land ? With reference to these issues the Court of first instance found that Ramadhin Singh had made a charitable gift of the land to the plaintiff by way of "*krishnarpan*," that mutation of names had been effected, and that the grantee had received the profits of the land through the agents of the grantor. The Court then made the following observations on the issues : "The reason why the Deputy Collector first refused to enter the plaintiff's name was that it was not represented to that officer what arrangement had been made for the payment of the Government revenue, and it was not until the presentation of an application by the Rajah's agent and the verification of the petitions of both parties that the Deputy Collector gave orders for mutation of names, the aforesaid application being to the effect

* Second Appeal, No. 351 of 1878, from a decree of M. Brodhurst, Esq., Judge of Benares, dated the 6th March 1878, reversing a decree of Rai Bakhtawar Singh, Subordinate Judge of Benares, dated the 11th December 1876.

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that the Rajah had merely made a grant of his own title and the Government revenue would not at all thereby suffer, that the proprietor of the village was responsible for it as formerly, and that the grantee would merely retain the title of the grantor: in these Provinces, charitable grants of lands are generally made to the Brahmins by Rajahs and zemindars out of their estates, and the grantees are allowed to remain in possession and their possession has also been confirmed: now, inasmuch as Sheobachan Kuar's ancestor made a gift to plaintiff of the title to the profits of the land, the said Sheobachan Kuar cannot resume that title: moreover the grant being a charitable gift (*dan*) cannot be revoked, in accordance with the Hindu law: there can be no doubt that the owner of the village had the power to make a gift of whatsoever title he possessed, for his own benefit in the next world." On appeal by Prag Singh the lower appellate Court found that the land had been granted to the plaintiff as "*krishnarpan*," about eleven years before the suit was brought, but that the plaintiff had not been put in possession of the land, that he had not collected the rents of the land from the ryots, but that such rents had been collected, together with the rents of the other lands of the village, by the agents of the grantors, and that such agents occasionally paid a portion of the moneys so acquired to the plaintiff. It held, with reference to [547] s. 10 of Regulation XIX of 1793 and Regulation XLI of 1795, that the grant was null and void, and dismissed the plaintiff's suit. with the following remarks: "I find that Rajah Ramadhin Singh was not empowered to make a grant of '*krishnarpan*' land, and that though Jagan Nath Panday may possibly have sometimes received cash from the Rajah's *karinda*, while that person realized from the ryots who cultivated the land in suit, he, Jagan Nath Panday, was never actually placed in possession of the land, and, with reference to these remarks, I allow the appeal and reverse the judgment of the lower Court."

The plaintiff appealed to the High Court. The appeal came for hearing before a Division Bench composed of Pearson, J., and Oldfield, J., which referred to the Full Bench the question whether the grant was null and void, and whether the suit was maintainable and properly instituted in the Civil Court, the order of reference being as follows:

OLDFIELD, J.—The suit has been brought by the plaintiff to recover possession of certain *krishnarpan*, or rent-free, land, on the ground that a grant thereof, exempt from the payment of rent to the grantor, was made to him by the former owner, Rajah Ramadhin, and that the defendant who has purchased the estate in which the land is situated has dispossessed him. It seems sufficiently shown that there was a complete gift of this land to the plaintiff on the part of the Rajah, his name was entered in the revenue papers in respect of the holding, and the rents, though collected by the Rajah's agent, were collected on the plaintiff's behalf, and for his benefit and enjoyment, but a question arises whether the grant is one of these which are null and void by the express provisions of the law.

The law applicable to the province of Benares is Regulation XLI of 1795, s 10, which, *mutatis mutandis*, re-enacts s. 10, Regulation XIX of 1793, and by it all grants for holding land exempt from the payment of revenue, whether exceeding or under fifty bighas, that have been made since the beginning of the Fasli year 1196, or that may be hereafter made, by any other authority than that of the Governor-General in Council are declared null and void, and no length of possession shall be hereafter [548] considered to give validity to any such grant, either with regard to

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the property in the soil or the rents of it; and every person who now possesses or may succeed to the proprietary right in any estate, or who now holds or may hereafter hold any estate in farm of Government, or of the proprietor, or any other person, and every officer of Government appointed to make the collections from any estate or taluq held khas, is authorized and required to collect the rents from such lands at the rates of the pargana, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or taluq in which it may be situated, without making previous application to a Court of Judicature, or sending previous or subsequent notice of such dispossession or annexation to any officer of Government. The invalidity of these revenue-free grants was affirmed by s. 28, Act X of 1859, the only alteration in the law being that the proprietor was henceforth to dispossess and collect the rents and re-annex the land to the estate by application to the Collector and not on his own authority. Then s. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, were enacted as follows:—"And whereas all grants (whether in writing or otherwise) for holding land exempt from the payment of rent which have been made since the first day of December 1790, by any authority other than that of the Governor-General in Council, were declared by Bengal Regulation XIX of 1793, s. 10, to be null and void, and like provisions have been by divers Regulations applied to the several parts of the territories to which this Act extends, and the said Regulation XIX of 1793 also provided that no length of possession should be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it, it is hereby enacted as follows":—and then follow provisions for the resumption of such grants. It will be seen that the language of the above sections differs from that of the old Regulations to which they refer in this important particular, namely, that whereas the grants in the old Regulations are called grants of land held exempt from payment of revenue, the same grants are referred to in Acts XVIII and XIX of 1873 as grants of land exempt from the payment of rent.

The question which arises in the case before us is whether the grant, which appears to be one of the proprietary right in certain [549] land included in the area of a revenue-paying estate, without any reservation of rent to the grantor, but which is not claimed to be held exempt from payment of revenue to Government, is to be considered to be one of those grants to which the laws above cited apply. Before the enactment of Acts XVIII and XIX of 1873 it was a much vexed question whether the Regulations were not intended to apply only to grants of land exempt from payment of revenue, as something different from rent, and to grants where the land had been separated from the revenue paying area, and therefore not to such a grant as we have before us; and the question will be found fully argued in the case reported in 9 Weekly Reporter, page 1. It was there held by the Calcutta High Court, though some of the Judges dissented, that "the grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid, as against the heir of the grantor or a purchaser from him by private sale of the zemindari, and that under s. 10, Regulation XIX of 1793, such heir or purchaser is not entitled to resume the land." But on the other hand, there is a decision of the Sudder Dewany Adawlat, North-Western Provinces, June 8th, 1865 (1), which appears to hold that grants of land

(1) S.D.A. N.W.P. (1865), 333.

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exempt from the payment of rent are such as were contemplated by the old Regulations, and are null and void, but the current of the previous decisions seems certainly opposed to this view, as also is a reported case of a later date of this Court, No. 1503, March 27th, 1868 (1).

It may be, however, that it was the intention of the Legislature by importing into s. 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, the words "exempt from the payment of rent," in referring to the law of the old Regulations, to set the matter at rest, and to make grants of land exempt from the payment of rent, such as the one in question, null and void, or it may be that a suit of this nature is not now maintainable in a Civil Court, with reference to other provisions of Acts XVIII and XIX of 1873.

The Senior Government Pleader (Lala *Juala Prasad*), Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondent.

JUDGMENTS.

[550] The following judgments were delivered by the Full Bench :—

STUART, C.J.—I am quite clear that the Civil Court could entertain this suit, and on this point I agree with Mr. Justice Pearson that the contention to the contrary is so unreasonable as to be at once rejected. It could not for a moment be argued that the plaintiff's claim comes within the express words either of s. 95, Act XVIII of 1873, or of s. 79, Act XIX of 1873, nor could it be shown to do so within the meaning of these two sections, because under these Acts an application for resumption of a grant of this nature might have been preferred to the Revenue Court by the former owner, Rajah Ramadhin Singh.

As to the subject of the suit itself, I am very much of Mr. Justice Spankie's opinion that the Regulations and Acts mentioned in the referring order do not apply to it, or at least are not necessary to its disposal, for on the facts found by the Judge the plaintiff has in special appeal evidently no case whatever. But assuming that the Regulations and Acts referred to apply, I am clearly of opinion that they must be read so as to render this grant null and void. I must, however, observe that, for the purposes of such a case as this, the difference between the language of the two old Regulations referred to and that to be found in Acts XVIII and XIX of 1873 is in my opinion more apparent than real. S. 10 Regulation XIX of 1793, which is re-enacted by s. 10, Regulation XLI of 1795, enacts and declares that all grants for holding land exempt from the payment of revenue, whether exceeding or under fifty bighas, that have been made since the beginning of the Fasli year 1196 or that may be hereafter made, by any other authority than that of the Governor-General in Council, are null and void," and it then goes on to make the following important and general declaration that "no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil *or the rents of it*" : and further on the Regulation provides that, "Every officer of Government appointed to make collections from any estate or taluq held khas is authorized and required to collect *the rents* from such lands at the rates of the pargana, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or taluq in which it may be situate, without making a previous application to

(1) H. C. R. N. W. P. (1868) 186.

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a Court of Judicature, or sending previous or [551] subsequent notice of such dispossession or annexation to any officer of Government." It appears to me that these enactments destroy every possible right and interest which the grantee might have claimed in the subject of the grant, including not only land exempt from the payment of revenue but land out of which rents might be collected, and that therefore Acts XVIII and XIX of 1873 merely re enact what had previously been the law, by necessary construction, under the Regulations referred to. In my view of the case, therefore, the plaintiff's suit and also the appeal to the Division Bench should be dismissed.

PEARSON, J.—On the first of the two questions referred to the Full Bench, my opinion is that the grant claimed in this suit is null and void. The grant was not merely a grant of the proprietary right in the land, which was the subject of it, but it was intended to convey the grantee the whole yield or rent of the land undiminished by the payment of the Government revenue thereon assessed, which the grantor took upon himself to pay. There was no intention to injure or defraud the Government, but the effect of the arrangement was to shift the payment of the revenue from the land itself on to the shoulders of the grantor. I concur with the District Judge in the view that the grant was illegal under the laws cited by him and is liable to resumption. The Legislature apparently holds every bit of land to be, as it were, hypothecated for the revenue due from it, and will not allow the burden to be shifted elsewhere.

On the second question raised by the referring order, I am not prepared to hold that the suit is not cognizable by the Civil Court. It must be admitted that the loose language of s. 95 of Act XVIII of 1873 affords some ground for the contention that, inasmuch as an application for the resumption of the grant might have been preferred to the Revenue Court by the grantor, therefore this suit by the grantee to be maintained in possession of the grant is excluded from the cognizance of the Civil Courts; but the contention is so unreasonable that one feels bound to reject as unreasonable any construction of the language of the section which would support it.

SPANKIE, J.—The learned Judges who refer this case for the opinion of the Full Bench remark that the question for consideration [552] is whether the grant, which appears to be one of proprietary right in certain land included in the area of a revenue-paying estate, without any reservation of rent to the grantor, but which is not claimed to be exempt from payment of revenue to Government, is to be regarded as one of those grants to which Regulations XIX of 1793 and XLI of 1795 and Acts XVIII and XIX of 1873 apply. We are also asked whether the plaintiff's suit is maintainable and properly instituted in the Civil Court.

The terms of the Regulations are that all grants for holding land exempt from payment of revenue, whether exceeding or under fifty bighas (1), that have been made since the beginning of the Fasli year 1196, by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil or the rents of it. Section 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, recite that: " Whereas all grants (whether in writing

(1) Note by the Judge.—In s. 10, Regulation XIX of 1793, whether exceeding or under one hundred bighas: but Regulation XLI of 1795 is more particularly concerned with this case.

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or otherwise) for holding and exempt from the payment of rent, which have been made since the first day of December, 1790, by any authority other than that of the Governor-General in Council, were declared by the Bengal Regulation XIX of 1793, s. 10, to be null and void, and like provisions have been by divers Regulations applied to the several parts of the territories to which this Act extends, and the said Regulation XIX of 1793 also provided that no length of possession should be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it, it is hereby enacted," &c., &c., &c. Undoubtedly there is a difference between the Regulations and Acts. In the former the grants are spoken of as "exempt from the payment of revenue," and in the latter as "exempt from the payment of rent."

The learned Judges remark that before the enactment of Acts XVIII and XIX of 1873, it was a much vexed question whether the Regulations were not intended to apply only to grants of land exempt from the payment of revenue, as something different from rent and to grants when the land has been separated from the revenue- [553] paying area, and therefore not to such a grant as the one set up in this case. They refer to the decision of the Calcutta High Court in *Muhommad Akil* v. *Asad-un-nisa Bibee* (1), and to a decision of the Sudder Dewany Adawlat, North-Western Provinces, *Raja Dilsukh Rai* v. *Kurban Ali* (2), and to one of this Court in *Ahmad-ullah* v. *Mithoo Lall* (3). In the first cited case it was held that a grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent is valid as against the heir of the grantor or a purchaser from him by private sale of the zemindari, and that under s. 10, Regulation XIX of 1873, such heir or purchaser is not entitled to resume the land. The Calcutta High Court's ruling has all the weight of authority, and the decision of the Chief Justice, Sir Barnes Peacock, appears to me to be unanswerable.

It must, however, be admitted that s. 30 of Act XVIII of 1873 and the corresponding section of Act XIX of 1873 have adopted the view taken by the Sudder Dewany Adawlat of these Provinces in their decision cited above, and have declared that the former Regulations referred to rent and not revenue, and therefore, assuming that the Legislature is authorised to interpret s. 10, Regulation XIX of 1873, as it pleases, we probably are bound to give effect to the law as it is laid down in these later Acts. I do not, however, think that we need consider this part of the case at greater length, for I doubt whether the Regulations or the Acts apply to the particular case before us. The appeal was one from an appellate decree, and I observe that the Judge finds as a fact that Jagar Nath Panday was never put in possession of the land: that the rents of the land in dispute were collected along with the rents of the other lands of the village by the Rajah's agent, by whom a part of the money thus collected was occasionally paid to Jagar Nath Panday. It would also seem that the revenue of the land was paid by the Rajah to Government (this indeed is shown by the proceedings before the Deputy Collector), and the rent of the land in dispute was collected as usual by his agent, and therefore all that the plaintiff acquired by the transaction was a portion of the share of the produce of the land which [554] would otherwise have been retained by the Rajah himself. It was as if a portion of the zemindar's own income was reserved as a charitable allowance for

(1) 9 W.R. 1. (2) S.D.A. N.W.P. (1865) 333.
(3) H.C.R. N.W.P (1868) 186.

Jagar Nath Panday. It was not even assigned by any written instrument. If this was the position, I do not consider that there was any grant within the terms of Regulation XIX of 1793 as extended to Benares by Regulation XLI of 1795, and I, therefore, do not think that those Regulations or the Acts of 1873 would apply to the case. The suit appears to have been one with which a Civil Court had jurisdiction to deal.

1879 DEC. 5. — FULL BENCH. — 2 A. 545 (F.B.).

OLDFIELD, J.—Section 30, Act XVIII of 1873, and s. 79, Act XIX of 1873, declare grants of land exempt from the payment of rent to be null and void and resumable, with the exception of the rent-free grants specially reserved from the application of s. 79 by the provisions of ss. 80, 81, 82, Act XIX of 1873. The plaintiff, therefore, cannot succeed in his suit.

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2 A. 554=5 Ind. Jur. 92.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

SAFDAR ALI KHAN (*Plaintiff*) v. LACHMAN DAS AND OTHERS (*Defendants*).* [11th December, 1879.]

Release - Reception in evidence of Unstamped and Unregistered Document—Appeal—Fraud—Act VIII of 1859 (Civil Procedure Code), s 350—Act X of 1877 (Civil Procedure Code), s. 578—Stamp—Registration—Mortgage.

In June 1875 *L* executed a bond in favour of *S*, in which he mortgaged, amongst other property, a village called Chand Khera, as security for the payment of certain moneys. He subsequently sold such village to *A*, concealing the fact that it had been mortgaged to *S*. On this fact coming to the knowledge of *A*, he threatened *L* with a criminal prosecution, whereupon *L* proposed to *S* in writing that the security of a share in a village called Kelsa, which he alleged was his property, should be substituted for the security of Chand Khera. *S* accepted this proposal by a letter in which he referred to *L*'s proposal in terms. It subsequently appeared that the share in Kelsa did not belong to *L* but to another person. *S* having sued upon his bond, claiming to enforce thereunder a lien upon Chand Khera, *A* set up as a defence to the suit that *S* had agreed to substitute Kelsa for Chand Khera in the bond, producing *S*'s letter as evidence of the agreement. *Held* that such letter operated as a release, and should therefore have been stamped and registered.

[555] *Held* also that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection and may direct that the document be stamped and the penalty imposed.

Held also that *L*'s fraud vitiated *S*'s agreement to substitute the security of Kelsa for the security of Chand Khera in the bond, and *S* was entitled, notwithstanding *A* might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond.

Mark Ridded Currie v. *S. V. Mutu Ramen Chetty* (1), discussed.

[Not Appl., 37 C. 589 (595)=11 C.L.J. 551 (554)=6 Ind. Cas. 159; R., 17 B. 235 (237); 33 C. 613 (622)=3 C.L.J. 576=10 C.W.N. 551; 2 N.L.R. 121 (122).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court to which the plaintiff appealed from the decree of the Court of first instance.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Bishambhar Nath*, Babu *Ratan Chand*, and Shah *Asad Ali*, for the respondents.

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* First Appeal, No. 72 of 1879, from a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Moradabad, dated the 31st March 1879.

(1) 3 B.L.R. 126.

1879 DEC. 11.

APPELLATE CIVIL.

2 A. 554= 5 Ind Jur. 92.

JUDGMENT.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This was a suit brought by the plaintiff, appellant, to recover the sum of Rs. 20,375, principal and interest, on a bond dated the 18th of June 1875, executed by the defendant Afzal Ali. The plaintiff also sued the defendant Lachman Das for the amount under another bond of the same date, whereby he had given security for the loan and interest, and hypothecated certain properties scheduled in the deed, including 20 biswas of mauza Chand Khera, pargana Amroha, the bounds and limits whereof were duly and properly detailed. The plaintiff further prayed for enforcement of lien against the property hypothecated.

The defence put forward by Afzal Ali substantially amounted to this, that he was a mere dummy in the transaction, that Lachman Das was the real borrower, and that the bond on which it was sought to make him liable was fictitiously executed in his name for some motives of expediency. Lachman Das admitted his liability under the security-bond, and that he did in the first instance hypothecate the several properties therein specified, but he went on to allege that, with the consent of the plaintiff to an agreement of the 16th December 1876, the mauza of Chand Khera was withdrawn from the list, and 2½ biswas of mauza Kelsa and a shop, together [556] with a note of hand for the amount of the loan of one Sahu Sham Saran Das, treasurer of Rampur, were substituted.

The Subordinate Judge held that Afzal Ali and Lachman Das were both responsible for the payment of Rs. 20,375, and that the mauza of Chand Khera had been exempted from the operation of the security-bond of the 18th June 1875, with the sanction and consent of the plaintiff. For reasons that will presently appear, when we come to the facts, Sheikh Ali-ud-din had come into the suit as a defendant by making certain objections to the plaintiff's claim, and had formally been made a party to it under an order of the Court of the 6th September 1878, pursuant to s. 32, Act X of 1877. His interference related solely to mauza Chand Khera, and as appears from what has already been stated, he was successful in securing the exemption of that property from the decree. The Subordinate Judge ultimately passed an order in plaintiff's favour for the amount of his claim by enforcement of lien on the property hypothecated in the security-bond of June 1875, excluding mauza Chand Khera and substituting in lieu thereof the 2½ biswas of Kelsa already mentioned. From this decision the plaintiff appealed and the following shortly state his grounds of appeal: (i) That mauza Chand Khera has been exempted on illegal and insufficient evidence: (ii) That a letter of the plaintiff of the 3rd May 1877, being without a stamp and unregistered, ought not to have been received in evidence, as it was put in to prove the relinquishment of an interest in immoveable property above the value of Rs. 100: (iii) That even if there had been any relinquishment by the plaintiff it was only conditional and was so regarded by the defendant Sheikh Ali-ud-din: (iv) That plaintiff was no party to the document of the 16th December 1876, put forward by Lachman Das and never gave his consent to it.

The facts of the case appear to be as follows: The plaintiff is a native gentleman of some position resident at Rampur. The two defendants Afzal Ali and Lachman Das both come from Moradabad or thereabouts, while the third, Ali-ud-din, is a pleader living and practising there and in the district. It seems altogether indifferent to the question we

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have to decide whether the Rs. 20,000 were advanced to and for the use of Afzal Ali or Lachman Das. Certain [557] it is that they are both liable for its repayment, and we accept without hesitation the finding of the Subordinate Judge as to their joint and several responsibility to the plaintiff.

The substantial point for our consideration, as in the determination of it all the other pleas in appeal must be disposed of, is, was the Subordinate Judge right in law and fact in excluding mauza Chand Khera from enforcement of lien and in substituting for it the 2½ biswas of mauza Kelsa and the shop?

The loan had been made and the two bonds executed on the 18th June 1875. At some time after that and before the end of 1876 Lachman Das, under circumstances most strongly indicative of fraud, sold to the defendant Ali-ud-din out and out, for a sum of Rs. 9,500, the mauza of Chand Khera, concealing the hypothecation already made to the plaintiff, and acting as if the property were free and unincumbered and capable of disposal. It is impossible to avoid making the remark in passing, that it seems very strange that the defendant Ali-ud-din, a pleader, who could readily have searched the district register of charges on immoveable property, never took the precaution to do so, though by this simple and to him necessarily well understood proceeding, he might have ascertained, what only came accidentally to his knowledge, namely, that the very mauza he had bought was already incumbered to the plaintiff at the time of his purchase. Naturally Ali-ud-din, when he became aware of the cheat that had been practised on him, was very indignant and threatened Lachman Das with prosecution, who in his alarm to escape from the consequences of one fraud, seems to have thought the best way out of his difficulty was to commit another. For this purpose he opened communications with the plaintiff, the object of which was to induce him to accept 2½ biswas of mauza Kelsa, a shop, and a note of hand of the treasurer of Rampur, in lieu of mauza Chand Khera. A proposal to this effect embodied in writing appears to have been prepared and forwarded by Lachman Das on or about the 16th December 1876, but no formal signature of the plaintiff to it was ever obtained, and it was not till the 3rd May 1877 that a letter was written by the plaintiff to the defendant Ali-ud-din, by the terms of which it is contended the document of December 1876 was accepted and Chand Khera was exempted from the bond of the 18th June 1875. According to Ali-ud-din, this [558] set at rest all his fears, he was content to let his bargain with Lachman Das stand, and abandoned his threatened prosecution. If his mind was so completely set at rest by the plaintiff, it seems strange, to say the least of it, that on the 1st July 1877 he requested Lachman Das to execute a deed of agreement, which, after recapitulating all the circumstances relating to the sale, proceeded to hypothecate certain properties as security for the carrying out the contract. The remaining facts to be enumerated are but few. It turned out that the 2½ biswas of mauza Kelsa, which Lachman Das had put forward as his own, did not belong to him but to his minor nephew, and it is curious to observe, in his judgment, that the Subordinate Judge seems to have studiously kept this—the most important fact—in the back ground. The real struggle now is necessarily between the plaintiff and Ali-ud-din—indeed, as parties to the suit, the other defendants may be dismissed from our consideration.

The suit brought by the plaintiff is on his bond of June 1875, and he claims to enforce the hypothecation against Chand Khera as if the documents of December 1876 and 3rd May 1877 had never been written.

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The defendant Ali-ud-din, who is in possession of Chand Khera under his purchase, put forward those two documents as evidence of his title and showing that the plaintiff released Chand Khera from the bond of 18th June 1875. One of the pleas in appeal sets up a technical objection to the admission of the letter of the plaintiff of the 3rd May 1877, and it was argued before us that, having regard to the terms of the deed of December 1876, to which this referred and expressed its acceptance of this document must be considered a release, or, in other words, an instrument "purporting to extinguish a contingent interest to and in immoveable property" and as such, not only liable to stamp but to registration under s. 17, Act III of 1877. We are of opinion this contention is correct and that the letter does amount to a release. It was in that very sense and for the purpose of fixing responsibility on the plaintiff as to the exemption of Chand Khera from the bond, that the defendant Ali-ud-din tenders it, and indeed without it, it is not very easy to see what sort of defence he could have made. The document therefore ought to have been stamped and registered and should not have been admitted in evidence in [559] the lower Court, though it does not seem that there any objection was taken. But it does not appear necessary to the decision of the case for us to pass any formal or deliberate expression of opinion upon these two questions, so far as they are made matter for objection to the admissibility of the release of the 3rd May 1877 in this Court. As to its acceptance in proof without stamp, there is a judgment of Sir Barnes Peacock in *Mark Ridded Currie* v. *S. V. Mutu Raman Chetty* (1), wherein acting upon the terms of s. 350, Act VIII of 1859, with which s. 578, Act X of 1877, closely corresponds, he held "that the error, if any, of receiving the document without a stamp, did not affect the merits of the case or the jurisdiction of the Court, although it might have affected the Government revenue." It should, however, be noticed that this decision only disposes of the objection within the terms of s. 350, so far as it was a fit ground for appeal from the finding of the lower Court. The difficulty that presents itself to our minds is as to how far this Court, sitting in appeal from an original decree and therefore having to deal with evidence as well as law, can fail to notice an objection to its receiving as proof and taking cognizance of a document which is both unstamped and unregistered? It may be, that so far as it relates to the finding and order of the lower Court it has no force, but "non constat" that when brought under our notice we are not to entertain it. So to the question of registration the same observations apply, only with greater force, for registration can hardly be called a matter "affecting the Government revenue," when it is obviously intended to prevent fraud by parties to instruments of a certain description. Upon this point a decision of West and Pinhey, JJ., in *Basawa* v. *Kalkapa* (2) was quoted, which seems to bear directly upon the whole subject of registration and to treat it from a practical and intelligble point of view. We must not, however, be taken as expressing any definitive opinion upon these two questions, though it is irresistible to remark that at first sight the argument seems a strange one, as has been before remarked, that a Court of Appeal, where it is dealing with fact as well as law, is to accept and treat as evidence that which two Acts have in prohibitory language declared shall not be received. Upon one point, however, we feel no doubt, namely, that an objection may properly be taken in this Court

(1) 3 B.L.R. 126. (2) 2 B. 489.

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to an unstamped document and that [560] we are bound to entertain it. In that case we may direct that the document be stamped and the penalty imposed, but for the unregistered instrument there is no "*locus penitentiæ,*" if the time has run out within which it should have been presented for registration, and we are powerless to give any assistance. We have already said that, for the purpose of our disposing of this appeal, it does not appear to us necessary to express any final opinion upon these two questions—indeed from our point of view and the conclusion at which we have arrived we think it sufficient to deal with the case upon the first ground of appeal. Our judgment would have been the same whether the letter of the 3rd May 1877 be shut out or admitted. But with the object as far as lies in our power, of finally disposing of the litigation, we have accepted that document as part of the evidence in the case, and have accorded to it all the importance and weight requested by the respondent Ali-ud-din. Even had the agreement, as it is called, of the 16th December, 1876, been signed by the plaintiff, it would have made no difference, to our minds, in the result of this appeal, and this for the very simple reason, that the fraud of Lachman Das, by whose misrepresentations and false pretences as to the 2½ biswas of mauza Kelsa, the plaintiff was induced to substitute them for the 20 biswas of mauza Chand Khera, vitiates the whole transaction, documents and all, and restores to operation in its precise terms the bond of the 18th June, 1875, with its appended security. That there was positive, direct, and deliberate fraud, and that it acted immediately and directly on the mind of the plaintiff is a matter beyond all controversy, and how would it be possible for us as a Court of Equity, as well as of Law, to allow such a contract, whether verbal or written, under such circumstances to stand? It is abundantly clear that the plaintiff would never have altered his security had he been aware that he was surrendering 20 biswas for 2½ biswas, as to which his hypothecator had no title, and his whole action in the matter, as deposed to by the witnesses, goes to show that he implicitly believed in the honesty and *bona fides* of Lachman Das. We fail altogether to remark any laches or negligence of any sort on the part of the plaintiff to disentitle him to the relief he asks, on the contrary he appears to have acted in a perfectly straightforward way and to have fallen a victim to the falsehoods of a clever cheat, who was driven to his wit's end to escape from prosecution, and, as it would [561] seem, from well merited conviction. That Ali-ud-din had still some suspicions about Lachman Das, after his receipt of the letter of the plaintiff's of the 3rd May, 1877, is plainly evidenced by the agreement of the 1st July of the same year, but this has in no way affected us in our view of the facts or the decision of the case, though it is a strong indication that the defendant Ali-ud-din had considerable doubt as to the safety of his purchase. That Ali-ud-din has his remedies, either in the Civil, or Criminal Courts, or both, is a matter beyond dispute, but however *bona fide* his purchase, he cannot set it up to defeat the lien of the plaintiff on mauza Chand Khera under his bond of 18th June 1875, in satisfaction of the amount and to the extent, for which, it will, with the other properties hypothecated, share as security. The fraud of Lachman Das towards the plaintiff goes back to the inception of the transaction and renders all subsequent proceedings in reference to the property in suit void and of no effect.

The appeal will therefore be allowed and the decision of the lower Court reversed, so far as relates to its order exempting mauza Chand

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Khera, from the operation of the bond of 18th June 1875. For purposes of convenience and to avoid mistakes we think it best to say in terms, that a decree is passed in plaintiff's favour for Rs. 20,000, and interest to this date, at the rate specified in the bond, against Mir Afzal Ali, Lachman Das, and Ali-ud-din, by enforcement of lien against 20 biswas of mauza Chand Khera, 2½ biswas of mauza Kelsa, and 20 biswas of mauza Ismailpur, as specified and defined in the schedule to the bond of 18th June, 1875, and thereby hypothecated. The whole of the costs in this and the lower Court are to be paid by Lachman Das.

Appeal allowed.

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2 A. 561.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

AUDH KUMARI AND OTHERS (*Defendants*) v. CHANDRA DAI (*Plaintiff*) AND PRAN DAI AND SITA DAI (*Defendants*).* [15th December, 1879.]

Hindu Law—Right of succession of daughters to father's estate.

Held that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. *Bakubai* v. *Manchhabai* (1) and *Poli* v. *Narotum Bapu* (2), followed.

[562] Where, therefore, two of four daughters brought suits claiming each a moiety of their father's estate, to the exclusion of the two remaining daughters, and such remaining daughters resisted such suit on the ground that they were entitled to the whole estate, being poor and needy, while their sisters were rich, and it was found that such remaining daughters were, as compared with their sisters, poor and needy, the Court dismissed such suits.

[Appr., 23 B. 229.]

CHANDRA DAI, a daughter of one Bishan Prasad, deceased, who died without leaving male issue, sued certain persons for the possession of a moiety of her deceased father's separate immoveable property, claiming by right of inheritance. Son Dai, another daughter of Bishan Prasad, also sued the same persons in like manner for the remaining moiety of such property. The defendants set up as a defence to these suits, amongst other things, that Bishan Prasad had two other daughters, Pran Dai and Sita Dai, and that such daughters, being in indigent circumstances, were entitled to the estate of Bishan Prasad to the exclusion of Chandra Dai and Son Dai, who were persons of wealth, and that Bishan Prasad having four daughters, Chandra Dai and Son Dai had no right to moieties of his property. While these suits were pending Pran Dai, who was admittedly a daughter of Bishan Prasad, and Sita Dai preferred petitions to the Court of first instance, in which they respectively claimed to be entitled to the whole estate of Bishan Prasad. The Court of first instance did not make them parties to the suits, but, hearing the suits together, gave Chandra Dai and Son Dai decrees against the defendants in these terms: "That decrees be given in favour of the plaintiffs, but so as not to interfere with the rights of the other daughters." On appeal by the defendants to the High Court, the Court remanded the suits to the

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*. First Appeal, No. 55 of 1878, from a decree of Maulvi Sultan Husain, Subordinate Judge of Gorakhpur, dated the 9th February 1878.

(1) 2 B.H.C.R. 5. (2) 6 B.H.C.R. 183.

Court of first instance, directing it to make Pran Dai and Sita Dai defendants, and to determine whether Sita Dai was a daughter of Bishan Prasad, and whether either Chandra Dai or son Dai had any right of inheritance as against Pran Dai or Sita Dai, and, if any, what was the extent of such rights. Pran Dai and Sita Dai were accordingly made defendants in these suits. Pran Dai set up the same defence to both suits, *viz.*, that she was entitled to succeed to the whole of her father's estate. In her written statement she stated her reasons for being so entitled as follows: "The defendant is utterly indigent and she is a widow: she is so necessitous that she is unable to procure the necessaries of daily life—food and clothing: Chandra Dai and Son Dai are very [563] wealthy, while Sita Dai, who is poor as compared with Chandra Dai and Son Dai, is in better circumstances than the defendant, and her husband is alive; under these circumstances the defendant is, under Hindu law, the sole heir to her father's estate; in her presence Chandra Dai and Sita Dai cannot be regarded as heirs and entitled to their father's property." Sita Dai set up a similar defence to the suits, stating in her written statement as follows: "The defendant is utterly indigent and destitute: as against her Chandra Dai, or Son Dai, or Pran Dai, her sisters, who are wealthy, have no right; Bishan Prasad gave Chandra Dai and Son Dai an estate of considerable value, besides jewels and money: he also gave Pran Dai an annuity of Rs. 25: the defendant alone is destitute, and her husband's family is very poor: under these circumstances the defendant alone is entitled to succeed to her father's estate." The Court of first instance found on the issues remanded to it that Sita Dai was a daughter of Bishan Prasad. With reference to the question whether Chandra Dai or Son Dai were entitled to a share in the estate as against Pran Dai and Sita Dai, the Court observed as follows: "In the opinion of this Court the four daughters have equal rights: the word indigent (*nirdhan*), as understood in the Hindu law, is not applicable to any of the four daughters: Sita Dai and Pran Dai have already been held by this Court not to be paupers: as none of the four daughters is *nirdhan*, it is not necessary for the Court to see that the husband of one is possessed of less property than that of the others: if in determining the question of indigence and wealth regard were had to the amount of money and property possessed comparatively by different parties, and the person who possessed more was regarded wealthy, and one who possessed less indigent, every person would be indigent with reference to the person who was in better circumstances than he, and wealthy with reference to the person who was in worse circumstances; thus there would be hardly any person to whom the words wealthy and indigent would not be equally applicable; therefore the contention that the plaintiffs are wealthy is useless: in the same manner, the allegations of Sita Dai and Pran Dai as to their comparative indigence are undeserving of consideration: the fact is, that none of the four daughters lack the necessaries of life, that is, no one of them is so poor as to be unable to procure food: no one of the [564] four lives by begging, the word *nirdhan* means an indigent person who may have been reduced to starvation."

On the return of these findings the High Court delivered the following judgment in the suit brought by Chandra Dai:

The Senior Government Pleader (Lala *Juala Prasad*), Munshi *Sukh Ram*, and Maulvi *Mehndi Hasan*, for the appellants.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the respondents.

1879 DEC. 15.

APPELLATE CIVIL.

2 A. 561.

JUDGMENT.

PEARSON, J.—We consider it to be well established by the evidence on the record that Sita Dai is the daughter of Bishan Prasad and sister of the plaintiff in the connected suit. The lower Court's finding on the point appears to be quite right, and the objection taken to it by the plaintiff, respondent, is disallowed. It is also well established, in our opinion, that the plaintiff in this suit as well as her sister, the plaintiff in the other suit, are in much better circumstances than their sisters Pran Dai and Sita Dai. The two plaintiffs married two brothers, sons of Bindesri Prasad, Pandey, who was a man of considerable wealth, to shares in which their husbands have succeeded. At the time of their marriage Bishan Prasad made over a valuable estate, known as Situpur, comprising 811 acres, to Bindesri Prasad aforesaid, for their maintenance. It appears, however, that the estate really remained in Bishan Prasad's own possession until his death in 1877, and that the profits of it were given to them. Their husbands possess considerable property and keep horses and elephants. On the other hand it is shown by the evidence that Pran Dai is a widow, whose husband predeceased his father, and who now lives with her mother, and has very scanty means of subsistence. Her husband's father was apparently a poor man. Sita Dai's husband is alive, and has some extremely minute shares in several villages, which yield a profit of about Rs. 21 per annum altogether, and it is in evidence that his shares in nine out of the twelve villages are encumbered with a mortgage. There can be no doubt, we think, that Pran Dai and Sita Dai are, as compared with their sisters, the plaintiffs in these suits, poor and needy. The lower Court has ruled that, inasmuch as they are not beggars, they are not so indigent as to be entitled, under Hindu law, to succeed to [565] the property in suit, the estate left by their father, in preference to and by exclusion of their more affluent sisters. In that ruling we are not prepared to concur. The original Sanskrit word which has been translated indigent has also been translated unprovided and unendowed. Commentators are said to differ as to whether provision or endowment by a father or by a husband is meant. Without deciding the controversy we may observe that the plaintiffs in these suits have abundant provision made for them both by their father and by their husbands, while their sisters have not been similarly provided for. We find that in two cases which have been brought to our notice, decided by the Bombay High Court, *Bakubai* v. *Manchhabai* (1), *Poli* v. *Narotum Bapu* (2), it has been held that comparative poverty is the only criterion for settling the claims of daughters on their father's estate. Accepting the view of the law taken by the Bombay High Court as correct, we have no alternative but to decree the appeal and dismiss the plaintiff's suit with costs.

Appeal allowed.

(1) 2 B.H.C.R. 5. (2) 6 B.H.C.R. 183.

2 A. 565=4 Ind. Jur. 653.

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2 A. 565=
4 Ind. Jur.
653.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

KURAY MAL AND OTHERS (*Defendants*) v. PURAN MAL (*Plaintiff*).*
[15th December, 1879.]

Joint mortgage—Purchase by a mortgagee of a share in mortgaged property—Redemption of mortgage.

Where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share in such estate of one of the mortgagors, thereby breaking the joint character of the mortgage, and one of the mortgagors sued to redeem his own share and also the share of *B*, another of the mortgagors, *held* that he was entitled to redeem his own share, but he could not redeem *B*'s share against the will of the mortgagee.

[F., 28 A. 155 (156)=A.W.N. (1905) 225; 29 A. 262 (263)=A.W.N. (1907), 49=4 A.L.J. 74; 17 Ind. Cas. 837=23 M.L.J. 576=12 M.L.T. 484=(1912) M.W.N. 1168; R., 20 A. 23 (27) (F.B.)=A.W.N. (1897) 163; 21 B. 619 (626); 6 O.C. 223 (227); 6 O.C. 279 (284); D., 5 A. 276 (277)=A.W.N. (1883) 31.]

ON the 27th January 1843, the proprietors of a certain estate jointly mortgaged such estate to one Bhajan Lal. On the 12th July 1871, the mortgagees purchased the share of Durabi, one of the mortgagors, in such estate. The plaintiff in this suit sued the mortgagees, claiming to redeem the share in such estate of one of the mortgagors which he had purchased, and also the share of [566] one Badipan, another of the mortgagors. The defendants contended that the plaintiff was not entitled to redeem the share of Badipan. The Court of first instance held that the plaintiff was entitled to redeem that share, and gave him a decree, as claimed. On appeal by the defendants, the lower appellate Court also held that the plaintiff was so entitled.

The defendants appealed to the High Court, again contending that the plaintiff was not entitled to redeem Badipan's share.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prosad*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

SPANKIE, J.—The judgment of the lower appellate Court appears, I think, open to the objection taken. The pleader for the appellants refers to a decision of the Privy Council which, however, he did not cite in support of his arguments. The precedent of this Court, *Mahtab Singh* v. *Misree Lal* (1), to which we were referred, does not affect the case before us in any direct way. I was at first disposed to consider that the decision in *Nawab Azimut Ali Khan* v. *Jowahir Singh* (2), was one which applied injuriously to the appellant's case. But on looking into the case, in which I was a party to the judgment, I find that the decision of the Judicial Committee of the Privy Council overruled the latter part of the judgment. It further appears that the decision of the Privy Council to which

* Second Appeal, No. 577 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 28th January 1879, modifying a decree of Maulvi Azmut Ali, Munsiff of Bulandshahr, dated the 3rd July 1878.

(1) H.C.R., N.W.P., (1867), p. 88. (2) H.C.R., N.W.P., (1866), p. 3.

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APPELLATE CIVIL.

2 A. 565= 4 Ind. Jur. 653.

appellants refer is that in the case of *Nawab Azimut Ali Khan* v. *Jowahir Singh* (1), which is the very case to which I have alluded above.

I gather from the judgment of the Privy Council on the point now at issue that in respect to shares in which a mortgagee under a joint mortgage has not himself bought the equity of redemption, he retains his character as mortgagee, though he has purchased the equity of redemption in other shares. Thus the plaintiff here, who has become the representative of a mortgagor of a particular share, is entitled to redeem his own particular share in the joint mortgage, of which the joint character has been broken up, but he [567] cannot redeem, against the will of the mortgagee, the share of Badipan, another share-holder. I would therefore decree the appeal and reverse the decision of the lower appellate Court in so far as it relates to the share of Badipan, and I would modify the decree accordingly with costs in proportion to decree and dismissal.

OLDFIELD, J.—I concur in the order proposed by Mr. Justice Spankie. The right of one mortgagor to redeem the whole mortgage rests on the joint character of the mortgage, and when that has been broken, the right ceases, and he cannot redeem more than his share against the will of the mortgagee.

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2 A. 567.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

RAMJAS (*Defendant*) *v.* BAIJ NATH (*Plaintiff*).* [16th December, 1879.]

Hearing of appeal ex parte—*Refusal to rehear appeal—Appeal from Appellate Decree—Act X of* 1877 (*Civil Procedure Code*), *ss.* 560, 584, 588 (*v*).

An appeal was heard *ex parte* in the absence of the respondent (defendant), and judgment was given against him. He applied to the appellate Court to rehear the appeal, and the appellate Court refused to rehear it. He then appealed, not from the order refusing to rehear the appeal, but from the decree of the appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to rehear the appeal, from appealing from the decree of the appellate Court.

[**Appr.**, 8 A. 354 (358) (364) (**F.B.**)=**A.W.N.** (1886) 110; **D.**, 4 A. 387 (405) (**F.B.**)

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondent.

JUDGMENTS.

The judgments of the High Court, so far as they are material for the purposes of this report, were as follows:—

STUART, C. J.—This is a second appeal in a suit brought to recover Rs. 2,926-15-6, principal and interest, from the defendant's person and property under a bond, or rather two bonds, dated respectively the 28th November 1870 and the 8th March 1876. The [568] reasons of appeal

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* Second Appeal, No. 1083 of 1878, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 17th June 1878, reversing a decree of Maulvi Sultan Husain, Subordinate Judge of Gorakhpur, dated the 22nd December 1877.

(1) 13 M.I.A. 395 404.

are exclusively on the legal merits of the case, and there is not in them the slightest allusion to any peculiarity of procedure before any of the Courts below. It is, however, now objected on behalf of the respondent that the present appeal does not lie, inasmuch as the last order by the Judge was one refusing to rehear the appeal before him under s. 560 of the Code of Civil Procedure, against which order the appellant might have appealed to this Court, and not having done so, he cannot now prefer a second appeal from the decree of the Judge on the merits of the case. What actually occurred was this:—The Subordinate Judge, by a decision, dated the 22nd December 1877, dismissed the suit, and the case then went on appeal to the Judge, the defendant not appearing in that appeal. The Judge, nevertheless, heard the appeal *ex parte* on the merits, and by a judgment, dated the 17th June 1878, reversed the decision of the Subordinate Judge, remarking at the end of his judgment that "the respondent had the ordinary notice served on him of the appeal having been made, but he has failed to defend it." Instead of at once appealing to this Court, as he might have done under s. 584 of the Code, against the Judge's order, the defendant applied to the Judge for a re-hearing of the appeal to him, under s. 560, and the Judge, for reasons which do not appear, excepting that the defendant had not attended to the notice of appeal served upon him, refused to re-hear the appeal, and it is argued that by this procedure the plaintiff is prevented from falling back on the Judge's first judgment on the merits of the case and preferring the present second appeal to this Court.

I am, however, clearly of opinion that such an objection is untenable. Section 560 of the Code of Procedure is not mandatory, but permissive and discretionary. It provides that "when an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him (exactly as happened here), he may apply to the appellate Court to re-hear the appeal." The proceeding indeed evidently contemplated by this section is merely an additional privilege or facility given to respondents, who may or may not avail themselves of it, but it in no way interferes with respondents in other respects, nor could it have been intended to deprive them of any other rights of procedure to which under the Code they are entitled, such as their right of second appeal under s. 584 of the Code; and [569] there certainly is not the slightest indication in s. 560 of any such intention. The objection therefore altogether fails. I may add that I have the less hesitation in coming to such a conclusion in the present case, since after a very careful examination of the record I cannot find that the requirements of s. 560 were duly observed by the Judge when he refused to re-hear the appeal to him. There is a proceeding before the Judge, dated the 19th August 1878, reciting the application for a re-hearing, and it does not appear from this proceeding that the respondent was allowed the opportunity provided by s. 560 of proving that he was prevented by sufficient cause from attending when the appeal was called on for hearing, all that the Judge's order states being that he was "satisfied that notice was duly served and that the respondent had received full information regarding the appeal," without a word relating to the important question whether sufficient cause had not been shown by the respondent for not attending when the appeal was called on for hearing. The reason assigned by the Judge was clearly not enough, for although notice had been served and the respondent was fully aware that the appeal was coming on, he yet might have been able to show sufficient cause for his absence, and if so he had a clear right to have the appeal re-heard. It is satisfactory,

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therefore, in the interests of justice, that the present appeal has been preferred, and of its competency I have not the least doubt.

SPANKIE, J.—Pandit Bishambhar Nath, for respondent, took a preliminary objection to the hearing of this appeal. It appears that the case was decided originally *ex parte* on the 17th June 1878 by the appellate Court. Ramjas, defendant (now appellant), petitioned the Court for a re-hearing of the appeal. But the Court held that notice had been duly served upon him, and that he had had full information that the appeal had been filed. The Judge, therefore, refused to re-hear the case. It is urged that the defendant should have adopted the course provided by cl. (*v*), s. 588, Act X of 1877, that is to say, he should have appealed to this Court from the order of the Judge refusing under s. 560 of the Act to re-hear the appeal; as he did not follow this course defendant cannot appeal from the Judge's decision of the 17th June 1878.

[570] The terms of s. 560 of Act X of 1877 are permissive. When an appeal is heard *ex parte* in the absence of the respondent, and judgment is given against him, he may apply for a re-hearing, and if it be proved that the respondent was prevented by sufficient cause from attending when the appeal was called on, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him. From any order refusing to re-hear an appeal there is an appeal under s. 588, cl. (*v*), but the appeal is not from the decree passed in appeal, but from the order of refusal to re-hear it, if a petition to that effect has been filed and rejected. The decree in appeal remains in force, I do not find it anywhere laid down in the Code that there shall be no appeal from a decree passed in appeal *ex parte*. By not appealing from the order rejecting his application for a re-hearing, respondent might have lost the opportunity of getting his case more completely heard by the appellate Court, and thereby he may have placed himself in an unfavourable position before this Court, if he desired to appeal from the lower appellate Court's decree on the appeal, still I do not see that he is debarred from instituting a second appeal, provided he undertakes to show that the decree is open to objection on any of the grounds mentioned in s. 584 of Act X of 1877. I would therefore reject the preliminary objection.

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2 A. 570.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* BHUP SINGH AND ANOTHER.
[31st December, 1879.]

Act X *of* 1872 (*Criminal Procedure Code*), ss. 44, 296—*Discharge of accused persons under* s. 215 *Revival of Proceeding at the instance of the Court of Session—Commitment of accused persons.*

Certain persons were charged under s. 417 of the Indian Penal Code, and were discharged by the Magistrate inquiring into the offence, under s. 215 of Act X of 1872. The Court of Session, considering that the accused persons had been improperly discharged, forwarded the record to the Magistrate of the District, suggesting to him to make the case over to a Subordinate Magistrate, with directions to inquire into any offence, other than the offence in respect of which the accused persons had been discharged, which the evidence on the record showed to have been committed. The Subordinate Magistrate to whom the case was

made over made an inquiry, and committed the accused persons for trial before the Court of Session [571] on charges under ss. 363 and 420 of the Indian Penal Code. It was contended that the Court of Session was not competent to "direct the accused persons to be committed," under s. 296 of Act X of 1872, the case not being a "Sessions case," within the meaning of that section, and that the commitment was consequently illegal. *Held* that there was no "direction to commit" within the meaning of that section, that is to say, to send the accused persons at once to the Sessions Court, without further inquiry, and whether or not the inquiry was made in consequence of the suggestions of the Court of Session was immaterial, and that the inquiry upon the charges under ss. 363 and 420 of the Indian Penal Code was rightly held by the Subordinate Magistrate and the commitment could not be impeached.

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CRIMINAL JURISDICTION.

2 A. 570.

[R., A.W.N. (1882) 105.]

THIS was a reference by Mr. W. C. Turner, Sessions Judge of Agra, under s. 296 of Act X of 1872, for the orders of the High Court. The facts of the case are sufficiently stated in the order of the High Court.

Mr. *Colvin* for the accused persons.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—In this case the two accused persons were originally charged before Mr. Hewitt, Assistant Magistrate of Agra, at the instance of one Bhagwan Singh, under s. 417 of the Penal Code. After investigation the prosecution failed and a discharge was passed under s. 215, Criminal Procedure Code, the Assistant Magistrate at the same time making an order for compensation against Bhagwan Singh, on the ground that his complaint was frivolous and vexatious. Against this order for compensation and of discharge, Bhagwan appealed to the Court of Session, and the then officiating Judge, Mr. Gardner, having made some remarks in writing on the case, remitted the record to the Magistrate of the District, who made the case over to Kedar Nath, Deputy Magistrate, who then proceeded with an inquiry against Bhup Singh and Umrao Singh, based upon ss. 363 and 420 of the Penal Code, ultimately committing them for trial to the Court of Session. On the 11th of October the order for compensation passed against Bhagwan Singh by Mr. Hewitt was quashed by this Court, having been made in a case other than a summons case and therefore being *ultra vires*. The committal of Bhup Singh and Umrao Singh having taken place on the 30th of September, the case came on for hearing at the Sessions Court on the 22nd November, when objection was taken to the jurisdiction of the Judge to try it, on the [572] ground that the commitment was informal and illegal, having been made in consequence of the remarks in writing of the Officiating Sessions Judge of the 26th July, which virtually amounted to a "direction to commit" under s. 296, Criminal Procedure Code, and had been so regarded: this direction the Judge had no power to make, the offences charged against Bhup Singh and Umrao Singh not being "Sessions cases," or in other words "exclusively triable by a Court of Session." Upon this objection, taken "*in limine*," the Sessions Judge declined to proceed with the case and remitted the whole of the proceedings and papers to this Court with the object and intention, I presume, that the commitment should be quashed.

The case for the accused, or in other words in support of my setting aside the proceedings against them, has been very fully and ably argued by Mr. Colvin, though the whole of his contention has been based on an entire misconception of the character of the document of the 26th of

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July. I am clearly of opinion that it is not nor was it ever intended to be a "direction to commit." On the contrary, as far as I understand its terms, the Officiating Sessions Judge carefully guarded himself against making any order of that kind and simply relegated the record to the Magistrate of the District, for him to take such steps in the matter as he might think proper. The Magistrate upon consideration of the facts appearing in the evidence, under s. 44, Criminal Procedure Code, referred the case for investigation to his subordinate Kedar Nath, who had full power to hold the necessary inquiry, and, if he considered the case one that ought to be tried by the Court of Session, to commit it thereto in accordance with the provisions of s. 196, Criminal Procedure Code. Whether that investigation did or did not take place in consequence of the remarks of the Officiating Sessions Judge of the 26th July appears to me quite immaterial: there was no "direction to commit" in the sense of s. 296, Criminal Procedure Code, that is to say, to send the discharged accused at once to the Sessions Court, without further inquiry. The observations of the Judge, which it was quite competent for him to make under the proviso at the end of s. 296, Criminal Procedure Code, even if they did amount to a "direction," seem to suggest, to the Magistrate of the District, that he should, as he properly might, direct the Sub-**[573]** ordinate Court to inquire into any offence, other than that on which the order of discharge had been passed, which the evidence on the record showed to have been committed. It appears to me that the inquiry upon the charges under ss. 363 and 420 of the Penal Code were rightly held by the Deputy Magistrate, and that there is no pretence for impeaching his commitment. The cases of *Queen* v. *Seetul Pershad* (1) and *Petition of Mohesh Mistree* (2), are clearly distinguishable from the present, and my view of this matter in no way involves disagreement with any of the authorities quoted. The records are returned to the Sessions Judge, and he is directed to proceed with the trial of the accused Bhup Singh and Umrao Singh, under ss. 363, 420 and $\frac{109}{420}$, in ordinary course.

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2 A. 573 (F.B.)=5 Ind. Jur. 95.

FULL BENCH.

Before Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Spankie.

SUGRA BIBI (*Plaintiff*) *v.* MASUMA BIBI (*Defendant*).*
[27th August, 1877.]

Muhammadan Law—Dower.

Where a Muhammadan (Shia), on his marriage, being in poor circumstances, fixed a "deferred" dower of Rs. 51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate, *held* by STUART, C.J., (PEARSON, J., dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Muhammadan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death, the

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* Appeal under cl. 10, Letters Patent, No. 3 of 1877. Reported under the special orders of the Hon'ble the Chief Justice.

(1) H.C.R. N.W.P. 1873, p. 168; see also *Empress* v. *Kanchan Singh*, 1 A. 413.
(2) 1 C. 282.

plaintiff was only entitled, under the circumstances, to a reasonable amount of dower. 1877 AUG. 27.

Held, by the Full Bench, on appeal from the decision of STUART, C.J., that a Muhammadan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt. FULL BENCH.

[F., 9 Bom. L.R. 188 (198); R., 33 A. 182=7 A.L.J. 1025=7 Ind. Cas. 497; 13 C.W.N. 153=4 Ind. Cas. 462; 13 Ind. Cas. 73=52 P.L.R. 1912=34 P.W.R. 1912; 13 Ind. Cas. 882=14 O.C. 356.] 2 A. 573 (F.B.)= 5 Ind. Jur. 95.

THIS was a suit in which the plaintiff, the widow of one Tasadduk Husain, deceased, sued *in forma pauperis* the defendants, the mother, brother, and two sisters of the deceased, his heirs, claiming [574] to recover from his estate Rs. 51,000, being the amount of her "deferred" dower. The defendant Masuma Bibi, mother of Tasadduk Husain, set up as a defence to the suit that Tasadduk Husain had settled a dower on the plaintiff "equal to the dower settled on Fatima, *viz.*, ten dirms, or Rs. 107, according to the law of Imamia prevailing among the Shias," to which sect the parties belonged. She alleged in her written statement as follows:—"In fact all the members of the plaintiff's family and that of Tasadduk Husain have acted all along in accordance with this custom: at the time of Tasadduk Husain's marriage his circumstances and those of his father and the family of the plaintiff were not in such a state as to admit of fixing the dower at such a large amount, the payment of which was impossible: if it was fixed it was merely for the sake of show, its payment not being intended." The Court of first instance found as a fact that the amount of dower settled on the plaintiff was Rs. 107, the material portion of its judgment being as follows:—"Although such a large sum of money is said to have been settled on plaintiff as dower, no deed of settlement is forthcoming: it is proved that Tasadduk Husain possessed no independent means at the time of his marriage with plaintiff, and had not commenced practising as a pleader: his father, who was employed as a mukhtar or agent in Azamgarh, although possessed of some property, was not in a position to settle a dower of Rs. 51,000 on his son's bride: nor is there any conclusive evidence to show that this was the proper dower of female members of the family of plaintiff's father: under these circumstances, I am unable to credit the statements of the plaintiff's witnesses, that Tasadduk Husain at once agreed to settle the above mentioned dower on plaintiff, and incline to accept the testimony of defendant's witnesses, who unanimously testify that the dower of Fatima, or about Rs. 107, was settled on plaintiff, an amount which appears to be more reasonable and suited to the then circumstances of the parties: among the plaintiff's witnesses is her maternal uncle, Nisar Husain, whose testimony appears to be very exaggerated, and who declares that similar amounts of dower were invariably settled on each and every female member of the family of the bride and bridegroom, which appears to be absurd and is rebutted by the evidence of defendant's witnesses, who deny his presence at the time of the marriage-contract, and he moreover is shown to be biassed against [575] defendants; I therefore find as a fact that the amount of dower settled on plaintiff was Rs. 107 and not Rs. 51,000, and that the first defendant, who has succeeded to the estate of the deceased, is liable to pay it."

The plaintiff appealed from the decree of the Court of first instance to the High Court. The appeal came for hearing before a Division Bench

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composed of Stuart, C. J., and Pearson, J., by whom the following judgments were delivered:

STUART, C.J.—This is one of those extraordinary and embarrassing cases which the Muhammadan law offers as puzzles to the European mind. The plaintiff, appellant, is a pauper, and as such she sues to recover no less a sum than Rs. 51,000 from the estate of her deceased husband, although that estate, it was well known when the suit was brought, amounted only to something between rupees two and three thousand. Now, in any system of law appealing to one's sense of justice and claiming in that respect, I do not say respectful, but intelligible acceptance among rational beings, one would suppose that as regards the two sums I have named a Court of Law might be permitted to exercise a discretion by means of which the widow's claim might be reduced to the possibilities of the case. But it would appear that we are not allowed so to escape from a hopeless and helpless dilemma, for we are told that we must either give this pauper plaintiff Rs. 51,000, or Fatima's portion of 10 dirms amounting to Rs. 107. There is, it seems, no middle course. We are not even to substitute for the Rs. 51,000 the whole of the husband's estate of two or three thousand rupees, much less to apportion her such a sum as under such circumstances European widows are obliged to be content with. Such a case appears to be beyond the reach of intellectual apprehension, the suggested law is visionary, and the facts are of a somewhat intangible character.

But as to the facts, they appear to be these: The parties and their families were and are Shias. The plaintiff was married to her husband, Tasadduk Husain, on the 7th May, 1843, and the marriage subsisted until the 26th July, 1874, when Tasadduk Husain died. At the time of his marriage with the plaintiff, he settled upon her, according, it is said, to the custom of the family, a dower of Rs. 51,000, [576] although at the time he possessed no independent means of his own, and had even then not been admitted as a pleader, although he afterwards appears to have practised in that professional position with some little success. What was the exact extent and value of the property he left at his death does not very clearly appear. One witness stated that his profits were between four or five hundred rupees a year, and it is not unlikely that by means of professional savings and property inherited from his father, who, it is stated, practised as a mukhtar, Tasadduk Husain may have left behind him some two or three thousand rupees. It is, however, unnecessary to consider these and other figures of a similar kind, for the rule of the Muhammadan law which we are asked to recognise and administer in this case is one that puts the case quite beyond the limits of arithmetic in any aspect. Here is a case in which a woman, herself a pauper, seeks to recover dower to the extent of Rs. 51,000, although when the settlement of this dower was supposed to be made, the husband, the settler, had not a rupee in the world to call his own. Nevertheless the claim is stated to be justified by the Muhammadan law among the Shias, which, it is said, places no limit to the maximum of dower, no matter what the extent of the husband's estate may or may not be, or whether he had any estate at all. Now, even if such were really and undoubtedly Muhammdan law among Shias, I trust I may be pardoned if I hesitate to admit that it would be reasonable to expect the Judges of a High Court to administer such a law. But although it was strongly urged at the hearing that such was unquestionably sound Muhammadan law, I have not for myself been able to discover any rule of the kind so absolutely laid down in any recognised

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authority, whether Shia or Sunni. In Baillie's well-known Digest of Muhammadan law, published in 1865, dower is said to be "incumbent" on a husband; but how can it be incumbent on him that is imposed on him as a duty and obligation if the thing to be done is an impossibility, and that it relates to money and property which have no existence, a state of things which by the way that author himself recognises when he expounds that "when something is mentioned as dower which is not in existence at the time, as, for instance, the future produce of certain trees or of certain land, or the gains of a slave, the assignment it bad, and the woman is entitled to her proper [577] dower," this "proper dower" being explained to be dower appropriate to the wife's family and social position. But it is further stated in the same work that "dower is unlimited in amount," but it is not said that it is unlimited irrespective of the actual extent and value of the husband's property. On the other hand, I find it laid down in a judgment of the Calcutta Sudder Dewany Adawlat, vol. I, page 277, that anything possessing a legal value may be given in dower, that is, of course, a legal value at the time of marriage and settlement. Did the Rs. 51,000 in the present case possess at that time, or did it ever possess, and does it possess now, a legal value? Then in another ruling of the same Court, page 267 of the same volume, it is laid down that the amount of dower is recoverable from the real and personal property left by the husband in preference to the claims of heirs, a ruling which appears to me to disparage and discredit such a dower claim as this. Again in the Tagore Law Lectures of 1873, page 348, it is asserted that property assigned as dower must be specified and in the husband's possession at the time of the assignment, which would otherwise be invalid; a proposition which does not appear to be intended to apply otherwise than to dower generally, whether prompt or deferred. Then in regard to the Shias, we are told by Mr. Baillie in his work on this system published in 1869, page 68, that among them "there are no bounds to the quantity or value of the dower, which is left entirely to the will of the husband and wife, so long as it is capable of appreciation, that is, not totally destitute of value, like a single grain of wheat, for example." But this also is a text which fails to determine the question under consideration within appreciable or intelligible limits. I could understand the doctrine laid down if it meant, or could be understood to mean, quantity or value of dower as a recoverable charge on the husband's estate. Then as to "the will of the husband and wife," such language is surely the idlest verbiage, unless it can be shown that there was something on which husband and wife's will could be exercised upon. The expression, however, that the dower must be "capable of appreciation, *i.e.*, not totally destitute of value like a single grain of wheat," seems to bring the rule within one's powers of apprehension, although there appears to me to be no reason why the appreciation should not be equally applied to visionary or im-[578]possible dower, to the case, for example, of the husband not having himself a single grain of wheat, but yet settling a dower of Rs. 51,000 on his wife. The result, in short, of the authorities appears to be that while some texts might possibly suggest the broad principle contended for in this appeal, it is nowhere laid down absolutely and expressly by any authority on the Muhammadan law that dower, limited or unlimited, is to be regarded without regard to the husband's estate, and that unlimited dower may mean and be accepted as dower of the value, it may be, of ten times the value of that estate, so that her husband at the

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time of his marriage, although not possessed of a single pice, might yet settle as dower upon his wife lakhs and crores of rupees! Now this is not too extravagant an ideal of the principle of Muhamadan law in question, for as a proposition, it must to that full extent be maintained, supported, and affirmed as Muhammadan law before the plaintiff, appellant, can succeed in this case.

As to the custom on this subject among Shia families, I am not satisfied that such a custom has been satisfactorily proved in this case, but even if it were undoubtedly the practice among Shia ladies, I should hesitate to allow such practice to determine so serious a question. Nor can I recognize, as a sufficient reason for such a practice, that among the Shias a childless widow is precluded from taking any share in the estate of her deceased husband, for surely that is a difficulty that could be met by an express settlement which would give the wife, at the time of the marriage, a reasonable share of, or if you please the whole of, her husband's property. This doctrine, in short, contended for, of unlimited dower infinitely transcends the necessity of the case as stated. But again, in excuse of this alleged singular and anamolous rule as to dower, it is suggested that it is intended to protect Muhammadan wives against the facility for divorce, which can be capriciously used against them by their husbands, seeing that dower takes effect from the wife's divorce or the husband's death. But this explanation I am unable altogether to appreciate, for the consequences of divorce might be fully guarded against by allowing the wife her proper dower, or even such dower as may comprise the whole of the husband's then available estate. Again, it has been said that the amount of the husband's estate, out of which the dower might [579] have to be paid, could not be known at the time of the contract. But that does not appear to me to get rid of the difficulty, or I had rather said the preposterous and visionary absurdity of the alleged rule which has no foundation in any rational hope or expectation, but is solely referable to an idle and nebulous fiction which, in the case of parties like those in this appeal, could never be imagined to descend to the earth in the shape of actual cash or property. But it has also been urged that to allow a wife in the name of dower to carry off the whole of the husband's available estate instead of a fixed sum, however large, might have the effect of defeating the rights of the heirs, or, in other words, might finally determine the inheritance of his property. My answer to this, however, is that such a result entirely depends upon the extent of the husband's property, for, as in the present case, a dower might be named so large as hopelessly to absorb the whole property, leaving the heirs with nothing but the mere name of heirs. Altogether I must decline to accept such a view of Muhammadan law, and unless compelled to do so by the supreme ruling of Her Majesty's Privy Council, I must decline to administer or apply it in any case.

In conformity with the tenor of the remarks I have offered, I might have felt disposed to have given the plaintiff reasonable dower out of her husband's estate—say one-third or even half of all the property he left—but that it appears I am not permitted to do. On the other hand, her claim and contention in the suit is so visionary and intangible that I feel unable to reduce her dower to any palpable character or amount beyond the minimum given by the Subordinate Judge. I would therefore affirm the judgment of the Subordinate Judge and dismiss this appeal, but, under the circumstances, without costs.

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PEARSON, J.—In my opinion the evidence adduced by the plaintiff is better entitled to credit than the evidence adduced by the defendant, respondent, and the reasons assigned by the Subordinate Judge for his decision of the issue relating to the amount of the dower in question are not valid. Deeds of settlement are not usual, but it is not unusual to settle a dower out of proportion to the means of the husband; probably not many Muhammadans at the time of their marriage are possessed of much independent estate or means. [580] The absence of a deed of settlement in this instance, and the circumstance that Tasadduk Husain was not possessed of large means at the time of his marriage, are insufficient grounds for discrediting the claim and the averments on which it is based. Tasadduk Husain would naturally be expected to fix a dower for his wife similar in amount to the dower which had been usually fixed for the ladies of her family on the occasions of their marriage; and that amount is shown to be Rs. 51,000. The plaintiff's witnesses are mostly her relations, but they are persons who are likely to know the real facts in question, *viz.*, what was the usual dower in the family, and what was the dower actually agreed to be given by Tasadduk Husain. Inasmuch as, according to the doctrine of the Shia sect, a childless widow is precluded from taking any share in the estate of her deceased husband, it is not surprising that the relatives of ladies about to be married should stipulate for the settlement on them of a dower that would constitute an adequate provision for them in the event of their surviving their husbands. It may be that the estate of Tasadduk Husain will not furnish more than such a provision for the plaintiff, his widow. I would reverse the lower appellate Court's decree, and decree the claim and appeal with costs recoverable from the estate left by Tasadduk Husain aforesaid.

The plaintiff appealed from the judgment of Stuart, C.J., to the Full Bench, under cl. 10 of the Letters Patent.

Munshi *Kashi Prasad* and *Shah Asad Ali*, for the appellant. Munshi *Hanuman Prasad*, Mir *Akbar Husain*, and Maulvi *Mehdi Hasan*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench: —

PEARSON, J.—The first two grounds of the appeal appear to be incontrovertible. The plaintiff is doubtless entitled to the whole of the dower which her late husband agreed to give her, and which was fixed not in reference to his means at the time of marriage, but to the value which she possessed in the matrimonial market, that value being mainly determined by the local position and traditions, the surroundings and antecedents of her family. The contract cannot be set aside or treated as a nullity because he was compara-[581]tively poor when he married, or has not left assets sufficient to pay the debt, but on the contrary may be enforced so far as is possible. But in this instance it happens that, if a dower of Rs. 51,000 had not been agreed to by him, she would have been entitled to a dower of that amount, because such an amount has been customarily fixed as dower for ladies belonging to the family of which she is a member. Her claim is maintainable irrespectively of any contract on the part of her husband, but I nevertheless allow in full the third ground of the appeal, and would only add that, as the estate left by Tasadduk Husain is probably not worth Rs. 5,000, it was wholly needless for the plaintiff to have falsely represented her dower as amounting to Rs. 51,000. All that she can gain

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would be equally gained by representing the amount to have been Rs. 5,000. There is, however, no reason to doubt that her real dower is Rs. 51,000, although she will be unable to realize more than a small portion of it.

With these additional remarks I adhere to my judgment of the 30th April last, and would decree the claim and this appeal with costs in all the Courts.

TURNER, J.—However great the objections which may be taken to it, it is unquestionably the practice for Muhammadan gentlemen to settle on their wives dowers without regard to the extent of their own incomes, and when satisfactory proof is adduced that a settlement of dower has been made *bona fide*, a lady is entitled to enforce her claim for the whole amount, although it may be in excess of the fortune which on her marriage the husband possessed or could have been expected to acquire. No doubt when a large sum is claimed on account of dower, the lady is bound to meet the improbability suggested by the quantity of the claim, but if the evidence produced by her is sufficient to establish the claim, the Court cannot reduce her dower to an amount which it deems reasonable, nor can it refuse her a decree altogether for any sum in excess of the amount which her opponents are willing to concede her. Regard being had to the usage in this country, the dower claimed by the appellant is not preposterously large, that we could on this ground only refuse credit to her witnesses. It is true that large dowers are less common among Shias than among Sunnis, [582] but even among the former they are occasionally settled: the usage of the lady's family is perhaps more regarded than adherence to the advise of some of the doctors of the laws.

In the case before us, we consider the appellant's witnesses are more reliable and generally of better position in life than the witnesses called by the respondent. They have sworn, and we see no reason to doubt their evidence, that the appellant's dower was fixed at Rs. 51,000, and in corroboration of their statements on this point they also appear to be stating the truth in asserting that this dower was not in excess of the sum usually settled on ladies of the appellant's family. We would therefore decree the appeal, and reversing the decrees of the Division Bench and of the Court of first instance, decree the claim, with costs.

SPANKIE, J.—I agree with the opinion expressed by Mr. Justice Pearson, delivered when the suit was heard by the Division Bench. It appears that there is nothing to add to it. If we believe the evidence for the plaintiff, then the dower was specified, and there was no doubt or uncertainty about it. The weight of evidence is in favour of the plaintiff's case, since the amount fixed is stated by the witnesses, members of the family and others likely to know, to be Rs. 51,000. I would therefore decree the appeal with costs.

Appeal allowed.

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Before Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson and Mr. Justice Oldfield.

BABU LAL AND OTHERS (*Defendants*) *v.* ISHRI PRASAD NARAIN SINGH (*Plaintiff*).* [23rd July, 1878.]

Res judicata—*Mortgage—First and second mortgagees.*

In 1870, *M* granted a certain person a lease of a certain zemindari share, for a term of years at an annual rent, *L*, as the lessee's surety, hypothecating a mauza called *A* as security for the payment of such rent. In 1871, *L* gave *B* a bond for the payment of certain moneys, hypothecating mauza *A* as security for their payment. In 1872, and again in 1873, *M* obtained a decree in the Revenue Court against his lessee and *L* his surety for arrears of rent. In execution of the decree of 1872 *M* caused *L*'s rights and inter-[583]ests in mauza *A* to be put up for sale, and purchased them himself. In 1874 *B* sued *L* and *M* to enforce his lien on mauza *A*. *M* defended this suit on the ground that he was the holder of prior lien on the property. The Court gave *B* a decree in 1875, holding that he was entitled to an order for the sale of the property, but that it would be competent to *M* to sue to enforce his lien, and that, when he did so, the purchaser under *B*'s decree would have the option of discharging the first incumbrance. The property was accordingly put up for sale in execution of *B*'s decree, and was purchased by *B* himself. In 1876 *M* sued *L* and *B* to enforce his lien on the property, claiming to recover by the sale thereof the amount of the arrears of rent awarded by the decrees of 1872 and 1873, together with the costs awarded him in the Revenue Court, and interest. *Held*, affirming the judgment of STUART, C.J., that the decree of 1875 did not preclude *M* from claiming to enforce his lien on mauza *A*, nor was his claim affected by the circumstance that he had brought to sale in execution of the decree of the Revenue Court the rights and interests of *L* in the mauza. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by *M*. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* to the satisfaction of the sums secured by the first incumbrance, but *M* by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

Held also that *M* could not enforce his lien for the recovery of the costs incurred by him in the Revenue Courts, as the surety-bond did not provide for the payment of such costs; that he could enforce his lien for the recovery of interest, as that bond did provide for the payment of interest; and that the moneys realized by the sale of the equity of redemption of the property in the execution of the Revenue Court's decree of 1872 must be applied, in the first place, in satisfaction of the costs of the suit in which that decree was made, and then in satisfaction of the arrear sued for in that suit, or the balance of that arrear, and of the arrear sued for in the second suit, with interest at the rate agreed upon in the surety-bond from the date of the accrual of those arrears until realization.

[R., 14 B. 31 (39); 35 M. 216 = 10 Ind. Cas. 75 = 21 M.L.J. 344 = 10 M.L.T. 533; 37 M. 70 = 17 Ind. Cas. 445 = 23 M.L.J. 543 = 12 M.L.T. 500 = (1913) M.W.N. 1.]

ON the 11th May, 1870, the Maharajah of Benares granted a lease of a five annas share in taluqa Kulmayi, in the Allahabad district, to one Bindesri Bakhsh, for a term of eight years to commence from the end of 1277 fasli, at an annual rent of Rs. 14,725 payable by instalments. One of the conditions of this lease was that the lessee should furnish security for the performance of the conditions of the lease. One Lalta Bibi agreed to furnish such security, and as surety executed a deed on the 4th July, 1870, by her husband as her attorney, hypothecating mauza Asravi in

* Appeal under cl. 10, Letters Patent, No. 2 of 1878. Reported under the special orders of the Hon'ble the Chief Justice.

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pargana Barah, and a mud-built house in mauza Naini in pargana Arail. On the 30th November, 1871, Lalta Bibi joined with her husband in executing a bond for the payment of certain moneys to Babu Lal, Kanhaiya Lal, Shankar Lal, and Ram Charan, and hypothecated mauza Asravi as security for [584] such payment. On the 24th September, 1872, the Maharajah of Benares obtained a decree in the Revenue Court against Bindesri Bakhsh, his lessee, and Lalta Bibi, the surety, for Rs. 2,472-12-3, being arrears of rent for 1279 fasli, and Rs. 266-6-4, costs of the suit; and on the 19th December, 1873, he obtained a second decree against them in the Revenue Court for Rs. 1,008-13-3, being arrears of rent for 1280 fasli, and Rs. 131-8-0, the costs of the suit. The rights and interests of Lalta Bibi in mauza Asravi were attached and put up for sale in the execution of the decree dated the 24th September, 1872, and were purchased by the Maharajah for Rs. 1,800. On the 17th September, 1874, Babu Lal and the other obligees of the bond dated the 30th November, 1871, sued Lalta Bibi and her husband on that bond in the Court of the Subordinate Judge of Allahabad, claiming to enforce their lien on mauza Asravi. To this suit they made the Maharajah of Benares a defendant. The Maharajah defended this claim on the ground that he held a prior lien on the property, and that his deed contained the condition that during the continuance of the mortgage the mortgagee would not mortgage the property. On the 28th June, 1875, the Subordinate Judge overruled these pleas, deciding that the second mortgagees were entitled to an order for the sale of the property, but that it would be competent to the Maharajah to sue to enforce his lien, and that, when he did so, the purchaser under the decree obtained by the second mortgagees would have the option of discharging the first incumbrance. The second mortgagees consequently obtained a decree for the sale of mauza Asravi, and it was put up for sale, and was purchased by them.

On the 15th June, 1876, the Maharajah of Benares instituted the present suit to enforce his lien on mauza Asravi and the house in mauza Naini, impleading Lalta Bibi, and the second mortgagees. He claimed to recover the amounts of the arrears of rent awarded by the decrees dated the 24th September, 1872, and the 19th December, 1873, respectively, together with the costs awarded to him in the Revenue Court, and interest on the whole sums decreed at the rate of twelve per cent. per annum from the date of those decrees respectively. The District Judge of Allahabad, who tried the suit, dismissed the claim to enforce the lien on mauza Asravi, on the ground that the plaintiff had elected to proceed in the Revenue [585] Court, and had obtained a money-decree therein, and he was not entitled to enforce his remedy against the purchasers under the decree obtained by the second mortgagees-defendants; and he also dismissed the claim to enforce the lien on the house at mauza Naini on the ground that the power-of-attorney given by the defendant Lalta Bibi to her husband did not authorize him to mortgage that property.

The plaintiff appealed to the High Court. The appeal came for hearing before a Division Bench composed of Stuart, C.J., and Oldfield, J., by whom the following judgments were delivered:

STUART, C. J —Mr. Justice Oldfield has correctly stated the facts and proceedings in this case, and I quite agree with him that the decree of the Revenue Court against the surety was without jurisdiction. It is in fact absolutely null and void—mere waste paper. But I am extremely unwilling to cast the plaintiff by applying to him the principle of *res judicata*. I do not know when or in what way this plea was taken. It

is not to be found in any part of the record, and I am not aware that it was taken or suggested at the hearing; but, as Mr. Justice Oldfield has allowed it to govern his judgment on the appeal, I feel bound to consider it.

I have in several cases in this Court taken occasion to express my regret that the law on this subject as recognized by English Courts should have been so inconsiderately imported, as I conceive it has been, into the practice of the Courts of this country, where there are few, if any, of the safeguards which render this plea a reasonable one in a European Court; and there are even judgments of the Privy Council in appeal from the High Courts of India which carry the principle of this plea so far, that I would hesitate to apply the doctrine they lay down although approved by so august a tribunal, unless the facts were precisely the same. It should be remembered that there is not here that *copia peritorum*, that resource of skilled appliance afforded by the presence of a thoroughly trained and experienced bar that there is in England (or rather I should say in Great Britain and Ireland, for the legal practice on this subject is the same in all parts of the United Kingdom, and that to introduce into the practice of the District Courts of India a legal principle which, especially as recently developed and ex-**[586]**pounded, is the result of a high degree of legal refinement, is not considerate towards suitors who form part of such a population as we have to deal with, if it is not tantamount to a denial of justice to them. These poor people avail themselves of the best professional assistance they can get in the zila within which their villages are situate; but that is often poor indeed, if it is not generally unreliable; and to refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit is surely a proceeding of doubtful wisdom.

We were referred to several cases in support of this plea, three in particular: *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1), *Baldeo Sahai* v. *Bateshar Singh* (2), and *Woomatara Debia* v. *Unnopoorna Dassee* (3). None of these cases, however, appear to me to apply to the present. But after what I have suggested on the general character of the plea, I may be allowed to say that I cannot withhold my sympathy from the views of Sir Richard Garth, the Chief Justice of the Calcutta Court, in the long and elaborate judgment he gave in the first of these cases, dissenting from the other members of the Court, and in which he refers to the inconvenience and unreasonableness of applying the principle of this plea to the litigation of the natives of this country.

The plea, however, is taken in a different manner in the present case, and what occurred was this: there had been another suit between the same parties, certain of the present defendants being therein plaintiffs, in which a decree was made in their favour. In that suit the plaintiff pleaded all his pleas, and among others the prior lien under which he now claims. He brought his position and contention fully before the Court, and yet the Subordinate Judge refused to adjudicate upon the prior lien, and referred the plaintiff to another suit for that purpose. The words of the judgment are these:—"The Maharajah may sue in a proper Court to establish his lien, and then claim the benefit as against a subsequent hypothecation. When he does so, the plaintiff, or the purchaser under his decree, will have the option of paying off the first incumbrance."

(1) 2 C. 152. (2) 1 A. 75. (3) 11 B.L.R. 158.

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And this advice the plaintiff followed, and because he did so and ac-[587]quiesced in and obeyed the judgment, we are told that he is barred by the plea of *res judicata*. Now, even assuming that the Subordinate Judge was wrong, and had failed to satisfy the legal requirements of the case by his order, still the plaintiff was guilty of no neglect of his duty as a litigant in such a case, nor of anything that could reasonably be called *laches* on his part. He simply did as he was told by the judicial authority to which he owed obedience in his suit, and I trust he is not in consequence ousted of his right by the plea in question, for a more unjust—I had almost said a more mischievous—use of this plea I cannot conceive.

But I may be permitted to doubt whether the plea of *res judicata* is relevant to the present suit as against the plaintiff, or that it in any way applies so as judicially to raise any question calling for determination respecting the Maharajah's prior lien. In the first place, Babu Lal and others, the plaintiffs in the former suit, are not defendants in the present case in that litigious character, but simply as auction-purchasers of the property which had previously been transferred in security to the Maharajah. But in the second place, even if it had been otherwise, the Maharajah's security-bond was not in any way disputed in the former suit, and therefore did not call for any adjudication in the present case on the part of the Subordinate Judge. Again, the Maharajah's title as purchaser was not only legally bad but absolutely void, and his rights under his bond could only be determined in a suit with a distinct issue on the subject between him and Lalta Bibi. But such a question was altogether beside the legal requirements of the first suit, and it was competent to the Subordinate Judge to do as he has done in the present case by restoring the Maharajah to his original place under his security, and, as a consequence, allowing him to enforce it by a separate suit. There, therefore, seems to have been no place for such a defence in the former suit.

Nor do I consider the plaintiff was bound to apply for a review of judgment, for the presumption on which he was entitled to act was in favour of the Subordinate Judge's judgment; and the plaintiff ought not be prejudiced because he did as he was directed by it, instead of applying for a review of judgment, which would have been a proceeding under an opposite presumption altoge-[588]ther—*viz.*, a presumption that made him bound to assume that the judgment was wrong. I do not consider that he was bound so to assume, but was entitled to adopt the course recommended to him by the Court, and that he is entitled to our judgment on his lien, and, as that lien is prior to that of the defendants, I would allow the third reason of appeal, decree the plaintiff's claim for enforcement of the hypothecation in his security-bond, dated the 4th July, 1870, and reverse the decree of the Court below, with costs in both Courts.

I may add that the provisions relating to the plea of *res judicata* in the new Procedure Code (Act X of 1877), and which carry the principle of the plea further than I approve in this country, do not appear to cover such a case as the present, where the Subordinate Judge does not decide on the plea one way or another, but by express order leaves it for determination in another suit; the plaintiff simply obeying the order, and the defendant recording no plea to the contrary or objection thereto.

OLDFIELD, J.—The plaintiff sues to recover a sum of money representing instalments of rent for 1279 and 1280 fasli, due by a lessee, by enforcement of an hypothecation in a registered security bond, dated 4th

July, 1870, executed by defendant No. 1, in which she became surety for the lessee, and hypothecated mauza Asravi and a house in mauza Naini as security for the payment of the rent.

The plaintiff obtained two decrees in the Revenue Court against the lessee and the surety (defendant No. 1) for these instalments, and in execution of one of these decrees he caused to be sold the surety's rights and interests in mauza Asravi, and purchased them on 20th July, 1874, for Rs. 1,800, being less than the amount of the decrees. The defendants Nos. 2 to 5 held a bond, dated 30th November, 1871, from defendant No. 1, in which mauza Asravi was hypothecated to them, and they brought a suit against defendant No. 1, and this plaintiff set up his purchase and the lien under his bond, and it was held, on 28th June, 1875, that his purchase did not give him a lien since it was made under a decree of a Revenue Court, which was only a personal decree against the surety and did not declare the lien, nor had plaintiff in the Reve-[589]nue Court claimed to enforce the lien, and he was referred to a regular suit to establish his lien. The defendants Nos. 2 to 5 have since purchased the property at auction-sale in execution of their decree.

Plaintiff now brings this suit, and its object is to have his lien under his security-bond enforced, and the property declared liable to sale under it for realisation of the unsatisfied balance of the instalments which were decreed to him in the Revenue Court. The lower Court has held that, as the plaintiff elected to proceed against the surety in the Revenue Court for a money-decree, he gave up his lien, which he cannot now enforce in another suit; and that the fact that the Revenue Court had no jurisdiction to give a decree against a surety does not affect the case, as he made his purchase in execution of the Revenue Court's decree with full knowledge of the lien claimed by these defendants. The Court further held that there was no valid hypothecation of the house under the bond. The plaintiff has now appealed.

There is no doubt, under rulings of this Court, that the suit in the Revenue Court against the surety for rent on the bond was not maintainable, and that the decree against the surety was made without jurisdiction. The Revenue Court, moreover, was not a Court which could have entertained a claim for enforcement of the hypothecation under the bond. These proceedings in the Revenue Court will not, therefore, operate to bar this suit. Nor is the present claim affected by the sale of the property to plaintiff under the Revenue Court's decree, for that sale was made without authority, being in execution of a decree of a Court not having jurisdiction. The sale could confer no valid title, nor invalidate any previous title by way of lien which the plaintiff may have by reason of the security-bond.

The case which has been brought to our notice (1) is not in point. In that case the Court which made the decree and ordered the sale was a Court of competent jurisdiction, although the decree was reversed by a superior Court. It appears to me, however, that this suit cannot be maintained with reference to the suit between the same parties decided on 28th June, 1875. In that [590] suit the defendants in this case Nos. 2 to 5 sued this plaintiff to enforce their lien under their bond dated 30th November, 1871, and they obtained a decree in their favour, and have had the property sold in execution of their decree, and have bought it. This plaintiff was bound in that suit to set up all his defences, and he

(1) *Jan Ali* v. *Chowdhry*, 1 B.L.R. A.C. 56.

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should have set up the prior lien he now claims under his bond against the enforcement of the defendant's bond by sale of the property. Indeed, he appears to have done so, and the question of the validity of the prior charge he claims should have been determined, and he should not have been referred to a separate suit as appears to have been the case. This plea, to the best of my recollection, was raised at the hearing before us, and appears to me to fall within the scope of the 2nd and 8th objections taken by the defendants Nos. 2 to 5 in their written statement of 4th July, 1876. He may possibly have a remedy by review of judgment, but not by a separate suit. I concur with the Judge in considering that the power-of-attorney dated 19th July, 1870, executed by defendant-respondent Lalta Bibi in favour of Mahesh Pershad, did not empower him to hypothecate the house which is the other property sued for. I would dismiss the appeal with costs.

The defendants appealed from the judgment of Stuart, C. J., to the Full Bench, under cl. 10 of the Letters Patent.

Pandit *Bishambhar Nath* and Munshi *Ram Prasad*, for the appellants.

Munshi *Hanuman Prasad* and Babu *Sital Prasad*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

TURNER, O. C. J.—(After stating the facts continued) ;—In appeal to the Full Court several pleas are urged. It is contended that the Maharajah's right to insist on his incumbrance on Asravi was put in issue in the suit brought by the second mortgagees and determined against him and that it cannot now be enforced. This objection proceeds on a misapprehension of the judgment pronounced in that suit. It was not there held that the Maharajah had not the right to enforce his lien, but that he could not enforce it until by bringing a suit he had obtained an order for sale, and [591] that the second mortgagees were entitled to an order for sale subject to the first incumbrance, which a purchaser under the decree would be at liberty to discharge. The right which the Maharajah now asserts was not disaffirmed by the Subordinate Judge but declared, and a first mortgagee cannot resist the claim of a second mortgagee to bring the mortgaged property to sale subject to the first mortgage. The decree of 1875 does not therefore preclude the Maharajah from claiming to enforce his incumbrance on mauza Asravi. Nor is the claim affected by the circumstance that the Maharajah brought to sale in execution of the decree of the Revenue Court the rights and interests of Musammat Lalta Bibi in Asravi. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by the Maharajah. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* for the satisfaction of the sums secured by the first incumbrance, but the Maharajah by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

It must be admitted that some issues were left undetermined by the judgment of His Honor the Chief Justice. It is clear that the power-of-attorney did not wrrant the hypothecation of the house in Naini and the claim to bring to sale this property must be dismissed. The decree then must in any case be limited to the sale of mauza Asravi. An oral objection was taken to this part of the claim that there was no consideration for the execution of the surety-bond, seeing that the bond was executed

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on the 4th July 1870, whereas the lease had been executed on the 11th May 1870. But the circumstance that the two documents were not executed on the same date does not necessitate the conclusion that the execution of the one was not the consideration for the execution of the other. It is not always convenient for the several parties to assemble at one place and at one time. We see no reason to doubt that the lease would not have been executed except on the understanding that the surety-bond was in fact given in consideration of the execution of the lease. It was a part of the original contract for the lease that a surety should be procured and the Musammat consented to be the surety. It remains to be determined for what sums the incumbrance may be enforced. It is contended [592] that the costs incurred in the Revenue Courts cannot be recovered. This plea must be allowed, for there is no stipulation in the bond to provide for the payment of such costs. It is again contended that the Maharajah cannot claim to recover in this suit interest on the arrears decreed by the Revenue Court, but the bond does provide for the payment of interest and therefore this plea must be disallowed. Lastly, it is contended that the claim for the arrears decreed on the 24th September 1872, should be reduced by the amount recovered by the sale of the equity of redemption. On the part of the Maharjah this claim is resisted on the ground that the decree obtained by him in the Revenue Court was a nullity, inasmuch as that Court had no jurisdiction to entertain a suit against the surety. At the time the suit was brought it had not been ruled that the Revenue Court could not entertain such suits. It may, however, be assumed that, had the surety appealed, the decree obtained against her in the Revenue Court would have been set aside. It may also be allowed that a sale under a decree which on the face of it has been passed without jurisdiction is voidable. Whether a sale would be set aside at the instance of the person who had procured it is open to question, but in fact the Maharajah did not disavow the sale nor were any proceedings taken to set it aside. The Maharajah took possession and realized profits until he was ousted by the purchasers under the second mortgage. The sum realised by the sale must then be applied, firstly, to the satisfaction of the costs incurred in the suit in the Revenue Court, and the balance will go in reduction of the arrear sued for in that suit, or the balance of that arrear, and for the arrear sued for in the second suit with interest at the rate agreed from the date of the accruing of the arrears respectively until realisation. The Maharajah is entitled to an order for the sale of Asravi unless in the meantime the second mortgagees bring into Court the amount found due together with the balance of costs which may be due to the Maharajah in the present proceedings. The residue of the claim should be dismissed. Each party will pay and receive costs in all Courts in proportion to the amount of the claim decreed and dismissed: the costs of the second mortgagees being estimated in respect of the claim to bring to sale Asravi and the costs of the Musammat being calculated on the value of the house in Naini. The decree of the Division Bench will be modified accordingly.

[593] PEARSON, J.—Concurred.

OLDFIELD, J.—Having reheard the arguments in this case, I modify the opinion expressed in my former judgment, and concur in the order proposed by my colleagues.

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PRIVY COUNCIL.

2 A. 593 (P.C.) = 6 C.L.R. 257 = 7 I.A. 51 = 4 Ind. Jur. 257 = 4 Sar. P.C.J. 100 = 3 Suth. P.C.J. 708.

2 A. 593 (P.C.) = 6 C.L.R. 257 = 7 I. A. 51 = 4 Ind. Jur. 257 = 4 Sar. P.C.J. 100 = 3 Suth. P.C J. 708.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colville, Sir B. Peacock, Sir M. E. Smith and Sir R. P. Collier.

[*On appeal from the High Court for the North-Western Provinces at Allahabad.*]

BADRI PRASAD (*Plaintiff*) *v.* MURLIDHAR AND OTHERS (*Defendants*). [27th November, 1879.]

Usury laws under Regulation XXXIV of 1803—*Obligation on mortgagee to file accounts.*

In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.*, Rs. 565 per annum, was to be retained by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of the mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Regulation XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bona fide* agreed should be allowed to the mortgagee for the costs of collection, it was *held* that the agreement had been rightly treated as a sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the Rs. 565, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Regulation XXXIV of 1803; and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection.

[R., 5 A. 419 = A.W.N. (1883) 43; **D.**, 34 A. 261 = 9 A.L.J. 131 = 13 Ind. Cas. 963.]

[594] APPEAL from a decree of the High Court for the North-Western Provinces at Allahabad, dated the 25th November 1876, affirming a decree of the Subordinate Judge of Aligarh, dated the 18th September 1875.

This suit was for the redemption of a mortgage of *malikana* received from five villages in a taluqa called Gubrari, in the Aligarh district. The total rent payable to the *mukaddam biswadaran* of these villages, under the settlement of 1836, was Rs. 9,870, of which they had to pay Government revenue to the amount of Rs. 7,649, retaining the difference, Rs. 2,221, as their *malikana*. On the 16th January 1852 they mortgaged this *malikana* to a Gokal Das, agreeing to place him in the same position as they were themselves as regards the right to collect the whole *jama* from the malguzars. That part of the instrument of mortgage which was material to the question in this suit is set forth in the judgment on this appeal. In August 1864, the son of Gokal Das sold the interest of the

1879 Nov. 27. — PRIVY COUNCIL. — 2 A. 593 (P.C.) = 6 C.L.R. 257 = 7 I.A. 51 = 4 Ind. Jur. 257 = 4 Sar. P.C J. 100 = 3 Suth. P.C.J. 708.

mortgagee, which had descended to him, to the respondents; and in 1874 and 1875 this appellant purchased from the mortgagors or their successors, their interest in the mortgaged *malikana*. In June 1875, the plaintiff sued for redemption, attempting to show that, allowing the actual cost of collection from May next after the execution of the mortgage, when the first collections were made, with interest at the rate of 12 per cent. per annum, the whole debt, principal and interest, would have been paid off in 1863-64. For the defence it was insisted that the plaintiff was bound by the stipulations of the mortgage. On an issue as to whether the sum of Rs. 565 was a fair allowance for the costs of collection, the Subordinate Judge found that it was so; and that "the biswadars from whom the mortgagee lambardar had to collect rents are numerous in each village: in mauza Rothipura the biswadars are 90 and in Harduari 200, and the mortgagee has to collect very small items from them." He concluded that the plaintiff was not entitled to any reduction of the mortgage-money, as the contract had been *bona fide* made, and dismissed the suit. The High Court, on an appeal urging that the Rs. 565 must be regarded as a usurious addition to the legal interest, declared as follows:—

[595] "We are of opinion, however, that the above stipulation in the mortgage is not in the nature of a contract for interest. When the parties agreed that Rs. 565 should be allowed for expenses without an account, there was no evasion thereby of the law, or any contract to give usurious interest. This item was *bona fide* for the cost and risk of collections. It is an item in the accounts based on the footing of a distinct contract quite apart from the question of interest, and when we look at the position of the mortgagees, there was nothing unusual or unfair about it. They had to collect Rs. 9,870 from the biswadars, and were responsible for the payment of the revenue, and they had moreover to see that the biswadars made the collections from the tenants. Their position was certainly one of some risk, and the percentage allowed to them for the expense and risk of collecting was certainly not exorbitant or unusual. It may or may not be that their actual expenses fell short of the sum allowed, but this consideration will not render the arrangement a contravention of Regulation XXXIV of 1803, and therefore one to be set aside. The view here taken is, we find, supported by decisions of the Courts, cited by Mr. Macpherson in the 5th edition of his work on Mortgages, pages 51 and 53. We affirm the decision of the lower Court and dismiss the appeal with costs."

On appeal against this decision,

Mr. *Doyne* appeared for the appellant.

Mr. *Leith*, Q. C., and Mr. *Ernest E. Wilt*, for the respondents.

Mr. *Doyne* for the appellant contended that the respondents as mortgagees were bound by law to produce accounts, and that without the production and verification of the accounts no satisfactory conclusion could be arrived at on the question whether the allowance of Rs. 565 was a reasonable stipulation, or an evasion of the laws against usury.

The respondents were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and **[596]** assignees of the mortgagee's interest. The mortgage-deed between the original parties was dated 16th January 1852. It was a mortgage

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of what was called the *malikana* interest of certain taluqdars; the amount of that *malikana* being, during the pendency of the then settlement, a fixed and known sum. The mortgage-deed contained this stipulation: "We hereby make a written agreement that the said mortgagee having taken possession of the mortgaged villages, with all the powers enjoyed by us, may on his own authority collect the *jama* fixed by the Government from the villages of the *ilaka*, and himself pay the revenue to the Government, instalment after instalment, according to the usage in the pargana; that he may bring to his own use the income of the *malikana* due to us, crediting every harvest Rs. 1,656 per year as interest on the amount of consideration on this mortgage, at the rate of one per cent. per mensem, and take the remainder, Rs. 565, the surplus of the *malikana*, as his own collection fee and pay of the agent and peons employed for making collections in the villages; that is, he may credit the income of the *malikana* to the payment of two items—one, the interest on the mortgage amount, and the other the expenses incurred in making collections in the villages: for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the *malikana* profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. Doyne at the bar, is whether this agreement is sufficient to deprive the plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV of 1803, to call upon the defendants to render the account mentioned, in those two sections. A preliminary question however arises as the legal validity of the agreement. There can be no doubt that such a contract would previous to that Regulation have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from [597] having to account for them. But there can be, on the other hand no doubt that at the time when this mortgage was made the law by which the contract was governed was otherwise; that the Regulation had limited the rate of interest to twelve per cent., and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore if the stipulation in question had been made in evasion of the usury law introduced by the Regulation, and as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present case, however, both the Indian Courts have found in favour of the legal validity of the stipulation as will presently be more fully stated. It has however been contended that, however this may be, a mortgagee cannot by contract relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not only, point raised by the appellant.

Their Lordships are of opinion that this contention is not well-founded. There is nothing in the Regulation which says expressly that the accounts must be filed whether they are required for the determination of the rights of the parties in the suit or not. On the other hand the 15th

section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice." It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bona fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about $5\frac{3}{4}$ per cent. was certainly neither exorbitant nor unusual. Having so[598]found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied, if the accounts were taken, contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove had been actually expended by them in respect of the costs of collection.

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Their Lordships must by no means be taken to decide that if the amounts received by the mortgagees had been fluctuating they might not have been bound to file the statutory accounts. Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit which must ultimately fall on the plaintiff.

Their Lordships therefore see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondent: Messrs. *Pritchard* and *Sons.*

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2 A. 598=5 Ind. Jur. 151.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

COHEN (*Defendant*) v. THE BANK OF BENGAL (*Plaintiff*).*
[2nd January, 1880.]

Bill of Exchange—Exclusion of Evidence of Oral Agreement—Act 1 of 1872 (*Evidence Act*), *s.* 92.

It was agreed between the Bank of Bengal at Calcutta and *C* and *Co.*, who carried on business there, that the Branch of the Bank at Cawnpore should [599] discount bills to a certain extent drawn by *C*, who carried on business at Cawnpore, on *C* and *Co.* against goods to be consigned by rail to *C* and *Co.*, and

* Second Appeal, No. 318 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 13th November 1878, modifying a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th September 1878.

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that the railway receipts for such consignments should be forwarded to *C* and *Co.* through the Cawnpore Branch of the Bank. *C* accordingly drew a bill on *C* and *Co.*, payable twenty-one days after date, which the Cawnpore Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to *C* and *Co.* *C* and *Co.* having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against *C*, on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to *C* and *Co.* until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, J. (SPANKIE, J., *dissenting*) that evidence of such oral understanding was not admissible even under proviso 3 of s. 92 of Act I of 1872.

[F., 25 C. 401 (405).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

Messrs. *Conlan* and *Colvin*, for the appellant.

Messrs. *Hill* and *Howard*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

SPANKIE, J.—The liability of appellant under ordinary circumstances is not denied, and it may be said that his entire case stands or falls with the allegation, that the railway receipt which accompanied the bill was not to be parted with to Cohen Brothers until they had paid the amount of the bill, and it is urged that the Bank did part with the receipt before the bill had been discharged, and therefore the appellant was no longer liable. It is admitted by appellant in his third plea that the determination of this point was the true issue in the suit.

I did not understand that it was seriously contended that appellant was not at liberty to offer evidence of the agreement or understanding set up by him. But I am disposed to hold that the oral agreement set up is not one that contradicts, varies, adds to, or subtracts from, the terms of the contract, and that both provisos 2 and 3 of s. 92 of the Evidence Act might apply to his case.

I do not, however, think that it is necessary, to consider this point at any length, because it appears to me that both the lower Courts have disposed of the averment, which raises a question of fact. Was or was there not any such oral agreement? The first Court found **[600]** that the railway receipt was taken from appellant for the satisfaction of Cohen Brothers, on whose letter of credit the amount of the bill was advanced to appellant, and for no other reason. The lower appellate Court must be regarded as having the issue before it in the words of the second plea in the memorandum of appeal below, "that the conduct of the plaintiffs debarred them from recovering in the suit against defendant." The Judge sets out in his judgment the contention of defendant that plaintiffs had failed to recover the value of the bill, and made over the railway receipt to Cohen Brothers without realising upon their acceptance, and therefore he was not liable. The lower appellate Court refers to the finding of the first Court, that it was at the request of Cohen Brothers, and for their satisfaction, that the railway receipt was taken by the plaintiff and forwarded with the bill of exchange for acceptance. The Judge then observes, that on a full consideration of the facts elicited he sees no cause to distrust the finding, and that he agrees with the lower Court as to the facts. The finding seems to me to dispose of the plea as to any separate oral understanding between the parties

that the railway receipt was not to be given up until the amount of the bill had been paid.

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The appeal having come as a second appeal, we cannot interfere with the finding of fact on the point, and so the legal admissibility of the evidence to prove the understanding does not arise so far as the appellant is concerned, for he relies upon it. I would therefore dismiss the appeal and affirm the judgment with costs.

STRAIGHT, J.—This was a suit brought to recover the sum of Rupees 2,500, with a further amount for interest and protesting charges, due upon a bill of exchange, dated 2nd August 1878, drawn by the defendant, appellant, upon and accepted by Cohen Brothers and Co. of Calcutta, in favour of the respondent Bank, and payable twenty-one days after date. The defendant pleaded in substance, that the bill was not discounted by the Bank upon any security of his, but upon the strength of a letter of Cohen Brothers and Co., and a certain railway receipt for goods, which two documents will be more particularly adverted to presently. He also alleged an understanding between himself and the Bank, that the railway receipt was not to be parted with to Cohen Brothers and Co., until they had paid the [601] amount of the bill to the Bank. The defendant further pleaded, that as the Bank had already brought a suit against Cohen Brothers and Co. and obtained a decree, there should be no second suit against him for the amount of the bill. Both the lower Courts found in favour of the plaintiff Bank, and decreed the claim. The defendant now appeals and his pleas raise the same questions as those already detailed.

The facts of the case would appear to be as follows :—The defendant, Mr. A. M. Cohen, resides and carries on business at Cawnpore. The Bank of Bengal, whose head offices are in Calcutta, has a branch at Cawnpore under the management of a Mr. Sterndale. On the 13th June 1878, the following letter was received from the firm of Cohen Brothers and Co., then carrying on business in Calcutta, by the secretary and treasurer of the Bank of Bengal :—

"Dear Sir : We request the favour of your instructing your Cawnpore agency to take Mr. A. M. Cohen's drafts on us, to the extent of Rs. 5,000, from time to time as may be required, which we undertake to honor and pay till we countermand this. Mr. A. M. Cohen is an old resident of Cawnpore and no doubt well known there. The drawings will be against hides and other produce to our consignment. As requested we will advise him when sending railway receipts to us to do so through your Bank."

The authorities at the head-office of the Bank appear to have acceded to this arrangement, and instructions were given to the Cawnpore branch to honor the drafts of Mr. A. M. Cohen on Cohen Brothers and Co. On the 2nd August 1878, the bill for Rs. 2,500, on which the suit is based, was drawn by Mr. Cohen, and discounted by the Bank at Cawnpore, and was handed over with a railway receipt for goods, valued at Rs. 2,800, for transmission to Calcutta, and acceptance there by Cohen Brothers and Co. In due course, namely, on the 5th August, the bill was accepted by them, and thereupon the railway receipt was handed over to them, and in ordinary course, no doubt, the goods were obtained and disposed of in the ordinary way of their business. Before the twenty-one days of the bill had run Cohen Brothers and Co. would seem to have got into financial difficulties, and when it matured and was presented for payment, they were unable to meet it. A suit was consequently

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[602] brought against them in the Calcutta High Court upon the bill and judgment was recovered, but no satisfaction by execution or otherwise was obtained. Consequently the present suit was brought against the defendant, as drawer, and he being resident at Cawnpore, it was instituted in the Court of the Subordinate Judge there.

It has been argued on the part of the defendant, appellant, that the bill was in reality discounted on the faith of Cohen Brothers and Co.'s letter of June 13th, already set out; that it was only handed over to the Bank on the distinct undertaking that the railway receipt, which accompanied it, was not to be parted with to Cohen Brothers and Co., until they had paid the amount of the bill, and that the Bank by committing a breach of this condition had determined the liability of the defendant.

It is impossible to accept this contention. It is more than doubtful whether any such defence as that which has been set up is properly admissible, even under cl. 3, s. 92 of the Evidence Act. The whole argument for the defendant has proceeded upon a somewhat loose view of the law relating to contracts, as far as it affects negotiable instruments, and the relative position of drawer, payee, and acceptor of a bill of exchange seem to have been entirely lost sight of. S. 92 of the Evidence Act was no doubt framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a written contract, and this Court must take care, in placing a construction upon it, not to create a precedent, that would open the door to indiscriminate parol proof of transactions, where written documents have recorded what has passed between the parties. It is perfectly intelligible why there are authorities which go to show, that a defence may be set up to an action on a bill of exchange to the effect, that there was no consideration for it, but it is equally plain, that a defendant may not allege, an oral agreement, that contradicts or operates in defeasance of a clear contract, which appears upon the face of a written instrument. The law upon this point may be found fully discussed in *Alrey* v. *Crux* (1), the circumstances of which case are not altogether unlike those involved in the present suit. If the contention of the defendant is correct, that he drew [603] the bill and handed it to the Bank on the understanding that the railway receipt was not to be given up to Cohen Brothers and Co., till they had paid the Rs. 2,500, his position as drawer would have involved no liability, and the instrument itself would in reality not be what it purports. What necessity was there, under such circumstances, to make it run twenty-one days, when it was intended practically to be a draft payable on demand, and how could the acceptors, who were ignorant of any such arrangement, be bound by it? Had the Bank refused to deliver the railway receipt to Cohen Brothers and Co., when they had accepted the bill on the 5th August, and damage or loss had been sustained by such refusal, it is difficult to see what defence there would have been to an action at their instance. The defendant was the consignor of the hides, the firm of Cohen Brothers and Co., the consignees, and any conditions or terms, such as those set up by the defendant as having been agreed to between himself and the Bank, cannot in an action on a bill of which the consignees, who knew nothing of any such conditions or terms, were the acceptors, be prayed in aid by him to escape his liability. If the defence is worth anything it must be taken to its fullest extent, the effect of which must be to render the bill

(1) L.R. 5 C.P. 37.

of August 2nd absolutely inoperative, except against an acceptor, who is in entire innocence of the circumstances under, and the condition upon which, it was drawn. This position is irreconcilable not only in law, but according to all commercial practice and custom. The Bank of Bengal would, indeed, be carrying on a strange business, if, at the ordinary rate of discount, it made advances and acted as an intermediary in the fashion suggested by the defendant. This version of the transaction is altogether at variance with common knowledge and ordinary mercantile procedure, while the position taken up by the Bank is in accordance with all well-understood and commonly practised mercantile custom. It is perfectly obvious, that at the time the letter of June 13th was written the Bank authorities had requested, as an earnest of the *bona fides* of the transactions, that in discounting the bills of A. M. Cohen the railway receipts should pass through their hands, and to suggest that they even intended to be or ever were bailees for A. M. Cohen is absurd. In the most usual and well understood fashion he, as consignor, was drawing on his consignees against his consignment, [604] and was obtaining discount to very nearly the full value of the goods. What profit, proportionate to the risk, the Bank was to make, if it was merely acting as agent for the defendant, in the manner suggested by him, it is not very easy to see. Nor is it at all comprehensible, why Cohen Brothers and Co. were to go through the form of accepting a bill, if the goods in respect of which their acceptance was to be given were only to come into their hands upon payment of cash. The whole case set up by the defendant appears to be untenable and impossible, and I am of opinion that each and all of his pleas fail. Although I differ with Mr. Justice Spankie, as to the admissibility of the defence set up to this claim in point of law, this will in no way interfere with or prevent our decision of this case. The lower Courts have effectually and fully disposed of the questions of fact raised in issue upon all the pleas put forward, and with their findings we cannot interfere, though I may say I entirely agree with them. The appeal must be dismissed with costs.

Appeal dismissed.

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2 A. 604 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

BANS BAHADUR SINGH AND OTHERS (*Objectors*) *v.* MUGHLA BEGAM AND OTHERS (*Decree-holders*).*

CHUNNI BAI (*Objector*) *v.* NAROTAM DAS (*Decree-holder*).†

[3rd January, 1880.]

Appeal to Her Majesty in Council—Security for the costs of the respondent—Execution of decree against surety—Act X of 1877 (*Civil Procedure Code*), *ss.* 253, 610.

An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and *B* and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council

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* First Appeal, No. 38 of 1879, from an order of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 14th January, 1879.

† First Appeal, No, 65 of 1879, from an order of H. D. Willock, Esq., Judge of Azamgarh, dated the 29th March, 1879.

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2 A. 604 (F.B.).

dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against *B* and the other persons as sureties. *Held* by STUART, C.J., PEARSON, J., and OLDFIELD, J., that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties.

Per SPANKIE, J., and STRAIGHT, J., *contra.*

[Diss., 12 C. 402 (405); 15 C. 497 (502); F., 17 A. 99 (102)=A.W.N. (1895) 19; A.W. N. (1888) 13; R., 3 A. 809 (811); 25 B. 409 (414); 31 B. 128 (133); 13 M. 1 (2); 2 Bom. L.R. 203 (205); Cons., 15 M. 203 (211, 212); D., 7 M. 284; 32 C. 494 (499)=1 C.L.J. 118=9 C.W.N. 372.]

[605] NUR-UL-LAH KHAN obtained a decree for money against Mughla Begum and certain other persons on the 9th April, 1872, which was reversed by the High Court on the 17th March, 1873. Nur-ul-lah Khan desiring to appeal from the decree of the High Court to the Privy Council, the High Court called upon him to furnish security for the costs of the respondent. Accordingly he filed a security-bond, dated the 8th July, 1873, in which Bans Bahadur Singh and certain other persons jointly hypothecated certain immoveable property as security for such costs. On the 22nd February, 1878, the Privy Council dismissed Nur-ul-lah Khan's appeal, directing him to pay the costs of the respondent. On the 18th July, 1878, the decree-holder applied for execution of this order against the judgment-debtor and the sureties, seeking to recover the costs incurred by him in the Privy Council by the attachment and sale of the property hypothecated by the sureties as security for such costs. The sureties objected, contending that the order of the Privy Council could not be executed against them. This objection was disallowed by the Court of first instance. The objectors appealed to the High Court.

The Court (OLDFIELD, J., and STRAIGHT, J.) referred to the Full Bench the following question:—"Whether the decree-holders can recover the costs of the appeal to the Privy Council, which have been decreed to them, by executing their decree against the sureties, who, before the passing of the decree of the Privy Council, have become liable as sureties for the payment of such costs" A similar question was raised in another case which subsequently came before Spankie, J., and Straight, J., who ordered that it should also be laid before the Full Bench, and the two cases were heard and disposed of together by the Full Bench.

The Senior Government Pleader (Lala *Juala Prasad)*, for the appellants.

Lala *Lalta Prasad* and Munshi *Mehdi Hasan*, for the respondents, in No. 38.

Mr. *Conlan* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for appellant.

[606] Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondent, in No. 65.

JUDGMENTS.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—In my opinion our answers to these two references ought to be in the affirmative. I have looked into the records for the terms of the surety-bonds in both cases, and I find that in one the bond absolutely secures the costs of the Privy Council to the extent of Rs. 4,000, and in the other case the surety bond is not limited to the costs of the Privy Council appeal, but covers the whole decree appealed against, including the decretal amount of Rs. 11,853-7-10 and the costs. The

legal question, however, is the same in both references, and must be answered in the same way. 1880 JAN. 3. — FULL BENCH. — 2 A. 604 (F.B.).

The sections of the Code of Procedure to be considered are ss. 610 and 253. Section 610 provides that :—" Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." It will be observed that the words here employed are large and general, ordering execution of decrees of the Privy Council according to the rules, that is, *all* the rules, applicable to the execution of original decrees, and there is no exception from them of sureties or of s. 253, or of any other sections or provisions in the entire chapter. Now these rules for the execution of original decrees are comprised in Chapter XIX of Act X of 1877, and they begin with s. 223 and end with s. 343. By s. 253, which thus forms part of the rules applicable to the execution of original decrees, it is provided that: " Whenever a [607] person has, before the passing of a decree in any original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant." To my mind the plain effect of this provision, which is thus made part of the law provided by s. 610, is that sureties for the execution of decrees of the Privy Council are placed in precisely the same position, and have precisely the same liability, as sureties for the performance of decrees in original suits, and may be proceeded against in the same summary manner, for under s. 253 sureties have no litigious and contentious rights, but simply become liable for whatever may be decreed against their principals. There appears to me to be no difficulty whatever in applying this section to the execution of Privy Council decrees, and the effect of it when read with s. 610 is that the words in s. 253, " before the passing of a decree in an original suit," mean, under s. 610, " before the passing of a decree in an appeal to the Privy Council."

It appears to me not unimportant to observe that s. 610 is immediately preceded by provisions dealing with the subject of security for the costs of the respondent, and for the security to be taken for the due performance of Privy Council decrees and of orders made by that supreme tribunal. Thus by s. 602 it is provided that, if the certificate for an appeal to the Privy Council be granted, the appellant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date, " give security for the costs of the respondent," and by s. 603 it is provided that, when such security has been completed, the Court may, among other things, declare the appeal admitted. Section 604 provides that, at any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon. Then s. 605 provides for other and further security being taken for the expense of translating, transcribing, printing, &c., certain portions of the

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record; and by s. 606, if the appellant fails to comply with the order of the Court directing such security to be found, it is provided that "the proceeding shall be stayed, and the appeal shall not proceed without an order on this behalf of Her Majesty in [608] Council, and in the meantime execution of the decree appealed against shall not be stayed." This section is, as I view it, very relevant to the question before us, showing, as it evidently does, the great importance attached in the mind of the Legislature to compliance with the pecuniary and necessary conditions attached to the privilege of appeal to Her Majesty in Council, the object plainly being to prevent the time of the Privy Council being taken up with idle and frivolous appeals. Section 608 again provides for security being taken, under other and further circumstances, from the respondent or the appellant in the Privy Council; and s. 609 is so important and germane in my view to the question involved in these references that I give it at length: "If at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security. In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, *issue execution of the decree appealed against as if the appellant had furnished no such security*. And if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit."

It is thus abundantly evident that the subject of security for costs in the Privy Council was very much and very anxiously in the mind of the Legislature when it enacted s. 610, and the conclusion appears to me irresistible that, by the use of the words "in the manner and according to the rules applicable to the execution of original decrees," the intention beyond all doubt was to import into the procedure for the execution of Privy Council decrees the provisions of s. 253; although irrespective of these sections immediately preceding s. 610 I should have held that by force of its direction the liability of sureties under s. 253 was distinctly applicable to sureties under s. 610. And indeed without such a reading s. 610 would appear to be of little use, even if the term "original suit" was meant solely to apply to the proceedings in the first Court. [609] But I agree with my colleagues Mr. Justice Pearson and Mr. Justice Oldfield that the term "original suit" includes the proceedings in the appellate Court, the suit being the same throughout, and I also agree with them that the expression "decree in the original suit" is not necessarily the same thing as a decree of the Court of first instance. Indeed, having regard to the course litigation generally takes in this country, the words "before the passing of a decree in an original suit" apply not merely to the first decree in a suit, but to a final decree in an original suit after the whole course of procedure by appeal has been exhausted, including even the decree by the Privy Council. And when to this is added the express provision of s. 610, there seems to be an end to all doubt, that the true intent and meaning of the law is to place parties who have undertaken the more limited liability of being sureties before the passing of a decree by the Privy Council, in the same position as sureties who have become liable before the passing of a decree in an original suit. To say the least the law in question is capable of such a reading, and there seems

to be no intelligible reason in justice or in legal policy against its practical application.

My colleagues Mr. Justice Spankie and Mr. Justice Straight, who dissent from the majority of the Court, after noticing the course of decision under s. 204, Act VIII of 1859 (which undoubtedly supports the opinions I am now expressing), wind up their views on this part of the case with the observation that it is plain that the whole current of opinion went to regard a surety as a party to the suit, but that under existing legislation execution is limited to suretyship undertaken before the passing of a decree in an original suit. My answer to these suggestions, however, is that, so far as the execution of a decree is concerned, a surety is as much now as he was under the former law of procedure a party to the suit, although that may be in a very limited sense, for, as I have already remarked, sureties have no litigious or contentious rights of their own, but simply offer their direct liability for whatever is decreed against their principals. My honorable colleagues further, with reference to the argument as to the expediency of sureties being in every stage liable, and the anomaly of refusing to extend the operation of s. 253, suggest that these are matters of which upon a simple question of construction [610] no notice can be taken. But with the greatest deference to them the argument *ab inconvenienti* is of the greatest importance and ought not to be disregarded, and its force, added to the other considerations I and my colleagues who agree with me have urged, reasonably if not irresistibly, lead to the conclusion at which we have arrived.

Concurring therefore with Mr. Justice Pearson and Mr. Justice Oldfield my answer to these references is in the affirmative in both cases.

OLDFIELD, J.—It appears that in these cases, appeals having been preferred to Her Majesty in Council from decrees of this Court, the appellants before us became sureties for the costs of the respondents, and the appeals having been dismissed with costs, the question arises whether the respondents can recover their costs by proceeding to execute their decrees against the sureties or should proceed against them by regular suits. Section 610, Act X of 1877, provides the procedure for enforcing orders of Her Majesty in Council; it runs as follows: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees." We have therefore to ascertain the manner and rules applicable for the execution of original decrees, and we find these in Chapter XIX, treating "of the execution of decrees," under the heading *E*, "Of the mode of executing decrees," and among them in s. 253 is the following rule, "Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner [611] as a decree may

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be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

We have here clearly a rule and manner laid down for enforcing a decree of an original Court against a person who has, before passing of the decree in the original suit, become liable for the performance of the same or any part thereof, and we must apply the above rule and manner to the enforcement of the order or decree of Her Majesty in Council in the case of a person who has, before the passing of the decree of Her Majesty in Council, become surety for its performance. By the terms of s. 610 the rules applicable to the enforcement of original decrees are made applicable to the enforcement of the orders and decrees of Her Majesty in Council, and amongst them clearly those which apply to sureties for costs of a decree. This was undoubtedly the course laid down in s. 204, Act VIII of 1859, and has been followed by this and other Courts. The only material difference between the terms of s. 204, Act VIII of 1859, and s. 253, Act X of 1877, is that the terms of the former section are, " whenever a person has become liable as security for the performance of a decree," whereas in the latter they are, " whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, " the material addition being the words " in an original suit," and these words were probably added to show (possibly with reference to certain decisions under Act VIII of 1859, s. 204,—*Ram Kishen Doss* v. *Hurkhoo Singh* (1), *Gujendro Narain Roy* v. *Hemanginee Dossee* (2), *Chutterdharee Lall* v. *Rambelashee Koer* (3) that the provision applies only to persons who have become sureties for the performance of a decree in the course of the suit and prior to the decree, and not afterwards, and was not intended to draw any distinction between persons becoming sureties before passing of decrees of a Court of first instance, and those becoming sureties after passing of the decree of the Court of first instance and before that of the appellate Court. The term "original suit" includes the proceedings in the appellate Court, the suit being the same throughout, and the [612] term " decree in the original suit " is not the same thing as "decree of the Court of first instance." Could the term, however, be so interpreted, I should still be disposed to hold that the operation of s 610 will be to make the provisions of s. 253, " mutatis mutandis," applicable to execution of decree of Her Majesty in Council in cases of persons becoming before the decree surety for its performance. I may add that no reason has been shown why the Legislature should intend to make a difference in the manner of execution between the case of persons becoming sureties for the performance of the decree of a Court of first instance, and those becoming sureties for the performance of the decree of the appellate Court or that of Her Majesty in Council. I would answer the question referred in the affirmative.

PEARSON, J.—For the reasons stated by my honorable colleague Mr. Justice Oldfield, I concur with him in answering in the affirmative, the question referred to the Full Bench.

STRAIGHT, J. (SPANKIE, J., concurring)—The question submitted to the Full Bench in this, as well as the kindred reference in First Appeal from Order, No. 38 of 1879, is substantially identical and may, for the purposes of brevity and convenience, be discussed and disposed of in a single judgment. The main point for our consideration is, can sureties

(1) 7 W.R. 329. (2) 13 W.R. 35. (3) 3 C. 318i

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2 A. 604 (F.B.).

for an appellant in an appeal to the Privy Council, which is dismissed, be directly proceeded against in the execution department in the same manner as the judgment-debtor? In order to reply to this inquiry it is necessary very closely to examine the provisions of ss. 253 and 610 of Act X of 1877. Applying the attention first of all to s. 610, that will be found to regulate the procedure to enforce orders of the Queen in Council, and the following directions are given as to the procedure to be followed by a person who wishes to carry into execution any such order. He must apply to the Court from which the appeal to the Privy Council was immediately preferred, by petition, to which should be attached a certified copy of the decree and order sought to be enforced. Then the Court is to send the order to the lower Court which passed the *first decree* in the suit, and this latter Court is specifically directed to "enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of [613] its original decrees." It is next necessary to see what these rules are to which reference is here made. They may be found in Chapter XIX of Act X of 1877, which is intelligibly headed "*Of the execution of decrees*" and under several heads treats of the following incidental matters:—

1.—The Court by which decrees may be executed.
2.—Application for execution.
3.—Staying execution.
4.—Questions for Court executing decree.
5.—Mode of executing decrees.
6—Attachment of property.
7.—Sale and delivery of property.
8.—Resistance to execution.
9.—Arrest and imprisonment.

Now it is argued by those, who contend for a reply in the affirmative to the question under consideration, that s. 253 of this chapter, providing as it does for the execution of a decree against a surety, supplies one of the rules "in the manner and according to which" the enforcement of orders of the Queen in Council under s. 610 is to be carried out. In other words, that the effect of the two sections, when read together, is to put surety and judgment-debtor on precisely the same footing in execution. Upon a careful examination we find it quite impossible to adopt any such view. We must take the words as they are and not wander afield to try and reconcile suggested inconsistencies in the Act, or drop out a sentence, introduced, as we will show, intentionally into a clause, for the purpose of securing uniformity. What are the terms of s. 253? "Whenever a person has, before the passing of a decree in an original suit, become liable as a surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant. Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety."

The corresponding provision of the former Civil Procedure Code, VIII of 1859, contained no such words as "before the passing of a decree in an original suit;" on the contrary the language [614] of s. 204 was of the most general kind and fixed no point of time at or before which a person becoming a surety fixed his liability and rendered himself liable to all the consequences to which his principal was subject. The decisions that were quoted in the course of the argument were upon cases, that had arisen under this earlier Act and to us appear clearly distinguishable from

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the present. Though under s. 204, Act VIII of 1859, the Courts held, that it did not apply to parties who became sureties after a decree, they nevertheless were unanimous or nearly so in declaring, that the word decree was not confined to that made in the original suit, but that the security given might be enforced against a surety in execution of an appellate decree. In fact it is plain, that the whole current of opinion went to regard a surety as *a party to the suit*, under s. 11 of Act XXIII of 1861, the corresponding section to which of Act X of 1877 is 244.

Under existing legislation, however, execution is limited to a suretyship undertaken "before the passing of a decree in an original suit." Though s. 583 provides for the execution of appellate decrees and s. 610 of orders passed by the Queen in Council according to the rules prescribed in Chapter XIX, there is not to be found in the whole of its 120 clauses one word that authorises enforcement of execution against a surety, except when he has taken upon himself that character "before the passing of a decree in an original suit." The argument, as to the expediency of sureties being in every stage liable and the anomaly, the existence of which it is argued we are countenancing, by refusing to extend the operation of s. 253, are matters of which upon a simple question of construction we can take no notice. Still as to this latter point we can well understand why a difference may fairly be drawn between a surety who undertakes his liability before the passing of the decree in the original suit, and so to speak identifies himself with and becomes a party to it, and another who comes upon the scene at a later stage, when litigation has proceeded a considerable distance on the road either to the lower appellate Court, the High Court, or the Privy Council.

The decree in the *original suit* practically passes against the surety, and so far as he is liable under it, it is that decree, which is [615] enforced against him, and not any security-bond he may have entered into subsequent to the passing of that decree. The ss. 583 and 610 do not confer any greater power on the Court that made the decree appealed, than it already possesses under Chapter XIX of the Code. If that Court extends the action of s. 253, and drags within its operation a surety who has not become liable before the passing of an original decree, it is acting "*ultra vires*" and any order passed to that effect would in our judgment be illegal and void. For it would not only be enforcing a liability undertaken after the passing of its own decree, but one created under a surety-bond, the responsibility upon which no Court had definitely determined in any decree or order.

Now it should be observed, that s. 253 has a twofold character. First, it continues in mitigated shape a personal liability to execution without process originally introduced in a novel and somewhat startling form in s. 204 of Act VIII of 1859, and next it details the machinery by which such liability is to be enforced without the ordinary intervention of a suit, in summary fashion. The only reservation made in the surety's favour is that he is to have sufficient notice. The words of s. 610, however, seem simply to provide for the enforcement of decrees or orders of the Queen in Council according to the same method as original decrees are executed by the Court passing them, but they create no liability, and establish no specific responsibility in the surety. In the argument for the respondent upon s. 253 it is ingeniously sought to mix up liability and machinery and to treat them as one and the same, but the decree is one thing, the mode of executing it another. At any rate having regard to the fact that the phrase "before the passing of the decree in the original suit" is not to be found

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in s. 204 of Act VIII of 1859 but appears for the first time in s. 253 of the Act now in force, we must assume that it was introduced for some good purpose, and that purpose, if words mean any thing, would seem to be to limit a new and somewhat arbitrary liability, existing outside the actual parties to the suit, to those persons who from its institution had *qua* guarantors so to speak, vouched for its *bona fides* by becoming sureties before the passing of the first decree. It is the decree of the original Court determining the liability of plaintiff or defendant, as the result may [616] be, that by special provision carries also with it the liability of the surety against whom it may be executed, but the decree of the appellate Court or the order of the Queen in Council is not declared to have attaching to it any such contingency, and while it is perfectly intelligible, that to put in force s. 610 the machinery of s. 253 may be used, it seems equally clear to us, that the words "before the passing of a decree in an original suit" are prohibitory to an extended application of the section for the further purpose of establishing an exceptional liability.

For the reasons and upon the grounds we have adverted to we are of opinion that the question raised in this reference must be answered in the negative.

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2 A. 616.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

NAND RAM AND OTHERS (*Defendants*) v. MUHAMMAD BAKHSH (*Plaintiff*).* [7th January, 1880.]

Dismissal of appeal for appellant's default—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 556, 558, 588—*Act XII of* 1879, *s.* 90 (27).

Where an appeal is dismissed, under s. 556 of Act X of 1877, for the appellant's default, the order dismissing it is not appealable.

[F., 3 A. 519 (521); A.W.N. (1892) 2; R., 15 A. 359 (361); 16 B. 23 (25); 121 P.R. 1907 (F.B.)=51 P.W.R. 1907.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Nand Lal*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the High Court:

STUART, C. J.—We cannot entertain this appeal. The Judge having proceeded under s. 556 of the Civil Procedure Code, the defendants ought to have applied to the Judge of the District for the re-admission of the appeal to him under s. 558, and the only further procedure open to the defendants was by an appeal to this Court from the Judge's order under s. 588 as amended by Act XII of [617] 1879, s. 90 (27), but not having proceeded before the Judge under s. 558, there is no appeal to us, and the order of the Judge made under s. 556 is now final.

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* Second Appeal, No. 511 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 18th February, 1879, affirming a decree of Rai Lachman Singh, Assistant Collector of Bulandshahr, dated the 28th August, 1878.

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The Judge must be assumed to have done his duty according to law and the course of his Court, and with the exception of a vague suggestion as to the defendant not having known when his appeal to the Judge was coming on for hearing, nothing is stated to us against such an assumption, which we feel assured in this case is a very just one. In any case the appeal to this Court, being wholly incompetent, must be rejected with costs.

STRAIGHT, J.—In this case an appeal was preferred to the Judge of Meerut from a decision of the Assistant Collector of Bulandshahr. The 26th November, 1878, was fixed for the hearing, but though the parties attended Court on that day the case was not called on. It was ultimately disposed of on the 18th February, 1879, the Judge owing, to the absence of the appellant, dismissing the appeal under s. 556 of Act X of 1877. The matter now comes to this Court in second appeal.

I am of opinion that no such appeal lies to this Court. The order made by the Judge was, as has been remarked, passed under s. 556 of the Civil Procedure Code, and the course the appellant should have pursued was to make an application under s. 558 for re-admission of his appeal within thirty days from the date of the Judge's decree. All the points now urged in his behalf would have gone far to establishing the " sufficient cause " mentioned in that section, and had the Judge improperly or unreasonably refused such an application, his order would then, under s. 588 of Act X of 1877, have been appealable. This appeal is dismissed with costs.

Appeal dismissed.

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2 A. 617=5 Ind. Jur. 154.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

JUALA PRASAD (*Paintiff*) *v.* KHUMAN SINGH (*Defendant*).*
[8th January, 1880.]

Bond—Interest.

Held, where a bond for the payment of certain money within a certain time did not contain any agreement fixing the rate of interest to be paid after the [618] date it became due, that the question as to the amount of interest to be allowed after that date should be treated as one of damages, and that, having regard to the length of time that had elapsed since the bond ran out (February, 1870), to the date on which the suit thereon was instituted (26th November, 1878), interest at the rate of eight annas per cent. per mensem was an equitable rate to allow after the date the bond became due.

Held also that but for the plaintiff's laches the rate agreed by the defendant to be paid under the bond (one rupee per cent per mensem) was a reasonable basis on which to estimate the subsequent damages.

[Appl., 8 A. 466 (490) = A.W.N. (1886) 216 ; **D.**, 21 C. 274 (277).**]**

ON the 4th February, 1866, the defendant gave the plaintiff a bond in which he promised to pay him Rs. 600, with interest at the rate of one rupee per cent. per mensem, within the period of four years, and to pay

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*Second Appeal, No. 692 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 18th April 1879, modifying a decree of Babu Sanwal Singh, Munsif of Etawah, dated the 14th December, 1878.

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such interest annually. He further agreed that if he failed to pay such interest annually the obligee should be at liberty to recover the amount of the bond at once without waiting for the expiry of the four years, and he hypothecated certain immoveable property as collateral security for the payment of the amount of the bond. The bond did not contain any stipulation regarding the interest to be paid after the bond became due. In November, 1878, the plaintiff sued upon this bond, claiming interest from the date of the bond to the date of suit at one rupee per cent. per mensem. Both the lower Courts held that, in the absence of any stipulation regarding the interest to be paid after the bond became due, the plaintiff was entitled to such interest at a reasonable rate, in the way of damages, and having regard to the great delay in the institution of the suit, they determined that eight annas per cent. per mensem was a reasonable rate, and accordingly awarded the plaintiff interest from the date the bond became due to the date of the suit at that rate.

On appeal to the High Court the plaintiff contended that he was entitled to interest from the date the bond became due at the rate agreed to be paid before that date, *viz.*, one rupee per cent. per mensem.

Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondent.

JUDGMENT.

The judgment of the High Court (OLDFIELD, J. and STRAIGHT, J.) was delivered by

[619] STRAIGHT, J.—The question as to the amount of interest to be allowed to the plaintiff, subsequent to the expiration of the four years for which the bond was given, has been properly treated by the lower appellate Court as one of damages. Upon consideration we think that, having ragard to the length of time, that has elapsed since the bond ran out, to the date on which this suit was instituted, the sum decreed by the Subordinate Judge is equitable and his decision must stand. But for the plaintiff's laches we should have thought the amount agreed by the defendant to be paid under the bond was a reasonable basis on which to estimate the subsequent damages (1). The appeal is dismissed, but each party must pay his own costs.

Appeal dismissed.

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2 A. 619.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

SHIBBAN LAL (*Plaintiff*) *v.* TILOKE CHAND AND OTHERS (*Defendants*).*
[8th January, 1880.]

Partition—Act XIX of 1873 (*N.W.P. Land Revenue Act*), *ss.* 113, 114.

Where, in the course of carrying out an order for a partition and of assigning the lands to each co-sharer, certain co-sharers claimed certain plots of land as

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* Second Appeal, No. 694 of 1879, from a decree of S. S. Melville, Esq., Judge of Meerut, dated the 25th February, 1879, affirming an order of C. F. Hall, Esq., Collector of Meerut, dated the 25th September, 1878.

(1) See also *Baldeo Panday* v. *Gokal Rai*, 1 A. 603.

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2 A. 619.

belonging to them in severalty and demanded that the same should be assigned to them, and the Collector decided that some of such plots were held in severalty and one was held in common, held that his decision was not passed under s. 113 of Act XIX of 1873, and was therefore not appealable under s. 114 of that Act.

ONE Shibban Lal applied for the perfect partition of his share in a certain mahal. The Assistant Collector notified the application and served notices on the other co-sharers in the mahal in the manner required by s. 111 of Act XIX of 1873. None of the other co-sharers objected to the partition. On the 19th December, 1877, the Assistant Collector decided to make the partition, and on the following day the partition was sanctioned by the Collector. On the 7th June, 1878, while the partition was being completed, certain co-sharers applied to the Collector objecting to the division of certain lands, claiming them as their separate property. On the 27th September, 1878, the Collector decided that all these [620] lands except one plot were the separate property of one of the objectors, Bhagirath by name, the plot excepted being common land. Shibban Lal appealed to the District Judge from the order of the Collector. The District Judge held that an appeal did not lie to him from that order and dismissed the appeal. Shibban Lal appealed to the High Court from the District Judge's decision contending that the Collector had determined a question of title, under s. 113 of Act XIX of 1873, and that under s. 114 of that Act his order was appealable to the District Judge.

Pandit *Nand Lal* and Shah *Asad Ali*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the High Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

OLDFIELD, J.—Shibban Lal made an application, under s. 108 of Act XIX of 1873, for a perfect partition of his share in Pasvara. The Assistant Collector issued the usual notification and served notices as required by law, requiring co-sharers who may object to the partition to appear before him on a specified day, and no objectors appearing he directed that the partition should be made and gave the necessary directions for carrying his order into effect. In the course of carrying out his order for a partition and of assigning the lands to each share-holder, Tiloke Chand and others claimed certain plots as belonging to them in severalty and demanded that those should be assigned to them, and the Collector decided that some of these plots belonged to one of the objectors and one was held in common. Shibban Lal appealed from this decision to the Judge, who has dismissed the appeal, holding that no appeal lay to his Court. The question in second appeal is, whether the Judge's order is correct. It appears to us to be so.

The only provision which allows appeals from decisions of a Collector in course of partition proceedings is contained in s. 111 of Act XIX of 1873, and by that section it is only orders and decisions passed by the Collector of the District or Assistant Collector under s. 113 for declaring the rights of parties which are held to be deci-[621]sions of a Court of Civil Judicature of first instance, and open to appeals to the District or High Court under the rules applicable to regular appeals to those Courts. Now the orders and decisions passed under s. 113 are those on any question of title or proprietary right which arises out of objections preferred by co-sharers in possession in reply to the notice served on them under s. 111, by which they are required to state their objections to the partition

taking place, that is, orders and decisions on a question of title or proprietary right arising properly out of objections preferred before any order has been made for effecting a partition, and referring to general questions of right and title affecting the right of the parties to claim partition, and not to such questions as have been decided in the case before us, which relate to the ownership of particular plots of land in the mauza, and which have arisen out of objections made after a partition has been ordered, and in proceedings taken for carrying it out, and which relate to details as to the distribution of the lands which form the subject of partition. In no way can it be held that the Collector's decision was passed under s. 113 so as to give a right of appeal. We therefore affirm the order of the judge and dismiss this appeal with costs.

Appeal dismissed.

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2 A. 621=5 Ind. Jur. 154.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

TEJPAL, GUARDIAN OF KUNDAN LAL, MINOR (*Plaintiff*) *v.* KESRI SINGH (*Defendant*).* [9th January, 1880.]

Bond—Compound interest—Penalty.

Held that a stipulation in a bond that the interest on the principal sum lent should be paid six-monthly, and, if not paid, should be added to the principal and bear interest at the same rate was not one of a penal nature.

[F., 1 N.L.R. 9 (12).]

THIS was a suit instituted in December, 1878, on a bond executed by the defendant in favour of the plaintiff on the 1st April, 1869. The defendant stipulated in this bond to pay Rs. 150 to the plaintiff on demand, and to pay interest on that amount every six months at the rate of Re. 1-8-0 per cent. per mensem, and in [622] default that the interest should be added to the principal amount and should bear interest at the same rate. The plaintiff sought to recover Rs. 798-8-3, principal and interest, by the sale of the immoveable property hypothecated in the bond. The Court of first instance gave the plaintiff a decree for the principal amount and for an equal amount of interest, or for Rs. 300, in all. On appeal the lower appellate Court gave the plaintiff a decree for the principal amount, together with interest from the date of the execution of the bond to the date of the institution of the suit at Re 1-8-0 per cent. per mensem, but refused to allow any compound interest on the ground that the stipulation in the bond for the payment of such interest was of a penal nature, which the Court was justified in refusing to enforce.

The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukarji*, for the appellant.

The respondent did not appear.

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* Second Appeal, No. 715 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 29th March, 1879, modifying a decree of Maulvi Matin-ud-din, Munsif of Sahaswan, dated the 10th February, 1879.

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JUDGMENT.

The judgment of the Court (PEARSON, J. and SPANKIE, J.) was delivered by

PEARSON, J.—A stipulation in a bond that the interest on the principal sum lent shall be paid six-monthly, and, if not paid, shall be added to the principal and bear interest at the same rate, has never been held to be one of a penal nature. We are, therefore, constrained to allow the plea in appeal and to modify the lower appellate Court's decree by decreeing the claim in full with costs in all Courts.

Appeal allowed.

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2 A. 622.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Oldfield.

RAM SUBHAG DAS (*Plaintiff*) *v.* GOBIND PRASAD AND ANOTHER (*Defendants*).* [10th January, 1880.]

Computation of perid of limitation—Act XV of 1877 (*Limitation Act*), s. 14.

On the 26th August, 1878, *R* and *B* joined in instituting a suit in the Court of the Subordinate Judge the period of limitation of which expired [623] on the 21st September 1878. This suit was transferred to the District Court, which, on the 16th September, 1878, returned the plaint to the plaintiffs on the ground that they should have sued separately. On the 23rd September, 1878. *R* presented a fresh plaint to the District Court, which, on the 1st October, 1878, made an order rejecting it on the ground that he should have instituted the suit in the Court of the Subordinate Judge. *R* appealed from this order to the High Court, which affirmed it on the 28th January, 1879, but observed that the plaint should be returned to *R*. On the 10th April, 1879, *R*'s plaint was returned to him, and on the same day he presented it to the Subordinate Judge. *Held* that, in computing the period of limitation, *R* could not claim to exclude any other period than from the 23rd September, 1878, to the 10th April, 1879, for from the 26th August, 1878, to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of that Court to entertain it did not arise from defect of jurisdiction or any cause of the like nature, but from misjoinder of plaintiffs a defect for which he must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and could not claim to have that period excluded.

[Overr., 22 A. 248 (255) (F.B.) = A.W.N. 1900, 69; N.F., 10 C. 86 (88); Appr., 12 A. 207 (208) = A.W.N. 1890, 76.]

ON the 26th August, 1878, one Bhawani Prasad and one Ram Subhag Das jointly instituted a suit against one Gobind Prasad and one Ram Das in the Court of the Subordinate Judge of Azamgarh. They stated in their plaint in this suit that the defendants had publicly assaulted them on the 21st September, 1877, thereby injuring them in reputation, mind, and body, and they claimed Rs. 5,250 as compensation for such injuries. The District Court transferrred this suit to its own file for trial, and, on the 16th September, 1878, at the first hearing of the case, it held that the plaintiffs were improperly joining in respect of distinct causes of action, and ordered the plaint to be returned to them for amendment within a fixed period. On the 23rd September, 1878, Bhawani Prasad and Ram Subhag Das presented separate plaints to the District Court together

* First Appeal, No. 80 of 1879, from a decree of H.D. Willock, Esq., Judge of Azamgarh, dated the 5th May 1879.

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with their original plaint, separately claiming Rs. 2,625 from the defendants. On the 1st October, the District Court admitted Bhawani Prasad's plaint, and ordered that of Ram Subhag Das to be returned to him on the ground that it should have been presented in the Court of the Subordinate Judge. Ram Subhag Das appealed to the High Court from the order of District Court returning his plaint, and the High Court on the 28th January, 1879, disallowed the appeal as inadmissible under Act X of 1877, s. 588 (c), and observed that Ram Subhag Das might apply to the District Court for the return to him of the plaint with a view to its presentation in the proper Court. On the 8th [624] February, 1879, Ram Subhag Das applied to the District Court for the return of the plaint, and obtained an order directing its return. On the 4th April, 1879, the High Court returned the record of Ram Subhag Das' case, which contained his plaint, to the District Court. On the 10th April, 1879, his plaint was returned to Ram Subhag Das by the District Court, and on the same day he filed it in the Court of the Subordinate Judge. The suit, was transferred by the District Court to its own file, and, was eventually dismissed as barred by limitation. Ram Subhag Das appealed to the High Court.

Mr. *Chatterji* and Lala *Lalta Prasad*, for the appellant.

Mr. *Spankie* and Mr. *Conlan*, for the respondents.

JUDGMENT.

The judgment of the High Court (STUART, C. J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The question with which we have to deal in this appeal is whether the suit has been instituted within the term allowed by the Law of Limitation. The cause of action accrued to the plaintiff on the 21st September, 1877, and it appears that he and his brother jointly instituted a suit against defendants in the Court of the Subordinate Judge on the 26th August, 1878, and it was removed for disposal to the Court of the Judge, and the plaint was returned to the plaintiffs on the ground of misjoinder of plaintiffs on the 16th September, 1878. A plaint was then filed by plaintiff in the Court of the Judge on the 23rd September, 1878, and the Judge rejected it on the 1st October, 1878, on the ground that it should be filed in the Court of the Subordinate Judge, and the plaintiff was directed to file it accordingly. The plaintiff appealed to the High Court from this order, and the order was affirmed on the 28th January, 1879. On the 8th February the plaintiff applied to the Judge for a return of the plaint in order that he might file it in the proper Court, and having obtained it on the 10th April he filed it in the Court of the Subordinate Judge on that day. Now as the cause of action accrued on the 21st September, 1877, the time allowed by law for instituting the suit would expire on the 21st September, 1878, and calculating to the 10th April the suit will be six months and twenty [625] days after time, unless the plaintiff can show that the excess period should be excluded in computing the period of limitation under the provisions of s. 14 of the Law of Limitation. But looking to the proceedings taken it is clear that at most the only time which plaintiff might claim to exclude under the provisions of s. 14 would be from the 23rd September, 1878, to the 10th April, 1879, when he was prosecuting the suit in the Court of the Judge and in the High Court. But assuming that he could satisfy us that the whole of that period should be excluded, the present suit instituted on the 10th April, 1879, will still be beyond time. The plaintiff cannot claim to exclude from the computation any other period, for from

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the 26th August, 1878, to the 16th September, 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of the Court to entertain it did not arise from defect of jurisdiction or other cause of a like nature, but from misjoinder of plaintiffs, a defect for which plaintiff must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and cannot claim to have that period excluded. The appeal fails, as there is no reason to interfere with the order as to costs, and we dismiss it with costs.

Appeal dismissed.

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2 A. 625.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson and Mr. Justice Spankie.

HASAN ALI AND OTHERS (*Plaintiffs*) *v.* MAHRBAN (*Defendant*).*
[12th January, 1880.]

Muhammadan Law—Missing person— Act I of 1872 (*Evidence Act*), s. 108—*Act VI of* 1871 (*Bengal Civil Courts Act*), s. 24.

F, one of the heirs to the property of his parents (the family being Muhammadans), was "missing" when they died, and subsequently when the other heirs to such property sued his daughter *M* for the possession of a portion of such property. *M* set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion. *Held* by STUART, C. J., and SPANKIE, J., that the suit, being one to enforce a right of inheritance, must be governed by the Muhammadan law relating to a "missing" person. *Parmeshar Rai* v. *Bisheshar Singh* (1), distinguished.

[626] *Held* by STUART, C.J., that, according to Muhammadan law, ninety years not having elapsed from *F*'s birth, his share could not be claimed by the plaintiffs, but must remain in abeyance until the expiry of that period or his death was proved.

Held by PEARSON, J., and SPANKIE, J., that *F* being a "missing" person when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee.

ONE Kamar Ali died leaving two sons, Kurban Ali and Nisar Ali. Kurban Ali died leaving a son, Hasan Ali. Nisar Ali died in June, 1868, leaving his wife, Faiz-un-nisa, a son, Niaz Ali, two daughters, Niaz-un-nisa and Imtiaz-un-nisa, and a grand-daughter, Mahrban, the daughter of his son Farzand, who at the time of his father's death had not been heard of by his family since 1857. On the death of Nisar Ali, his son Niaz Ali was recorded in the revenue registers as the proprietor of his landed estate. Faiz-un-nisa, Niaz-un-nisa, Imtiaz-un-nisa, Sahib-un-nisa, the wife of Farzand, and Mahrban, all resided together in a house belonging to Faiz-un-nisa, and were supported out of that estate. Faiz-un-nisa died in 1873, Farzand being still missing, and Naiz Ali died subsequently in the same or the following year. On the death of Niaz Ali, by the consent of all the parties interested, Sahib-un-nisa was recorded in the revenue registers as the proprietor of 16 bighas, 18 biswas of the land

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* Second Appeal, No. 179 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 14th November, 1878, modifying a decree of Muhammad Mir Badshah, Munsif of Bulandshahr, dated the 24th December, 1877.

(1) 1 A. 53.

owned by Nisar Ali, and on her death her daughter, Mahrban, was recorded as the proprietor of the same. In June 1877, Farzand being still missing, Hasan Ali and the daughters of Nisar Ali instituted the present suit in which they claimed to recover possession from Mahrban of the 16 bighas, 18 biswas of land and of the house belonging to Faiz-un-nisa. The plaintiffs alleged that, inasmuch as Niaz Ali died without leaving issue and Farzand was missing at the death of his father and his mother, the property of Nisar Ali and Faiz-un-nisa descended to them, and the defendant had no right therein. The defendant set up as a defence to the suit that Farzand was alive, and that during his lifetime the plaintiff Hasan Ali had no right in the property of Nisar Ali or Faiz-un-nisa. She admitted the right of the other plaintiffs, the daughters of Nisar Ali and Faiz-un-nisa, to a moiety of the property in suit. The Court of first instance, expressing its opinion that Farzand was in all probability dead, held that, inasmuch as he was missing at the death of his parents, he had forfeited his right to succeed to a share in their [627] estates, and the defendant could claim no right through him, and it gave the plaintiffs a decree. On appeal by the defendant, the lower appellate Court held, on the question whether in this case the Muhammadan law relating to a missing person should be applied, or whether it should be presumed with reference to s. 108 of Act I of 1872 that Farzand had predeceased his parents, that, under the provisions of s. 24 of Act VI of 1871, Muhammadan law was applicable, distinguishing the present case from the case of *Parmeshar Rai* v. *Bisheshar Singh* (1). Applying Muhammadan law, the Court held that, inasmuch as a period of ninety years had not elapsed from the date of Farzand's birth, it could not be presumed that he was dead, and that until that period had elapsed, or his death was proved, the daughters of Nisar Ali and Faiz-un-nisa were only entitled to a moiety of the estates of their parents, and Hasan Ali was not entitled to share in the estate of Nisar Ali.

The plaintiffs appealed to the High Court, contending that the lower appellate Court should, with reference to s. 108, Act I of 1872, have presumed that Farzand had pre-deceased his parents, and that if this were the case the defendant could claim nothing through him.

Pandit *Nand Lal*, for the appellants.

Mir *Akbar Husain*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—I generally concur in the view taken in this case by the Subordinate Judge, who, however, appears to have very unnecessarily occupied himself with the consideration of the Evidence Act, and with the remarks of the select committee of the Legislative Council thereon. The suit is brought by the plaintiffs for the establishment of their rights to property on the allegation that the inheritance to them has opened by the disappearance and death, during his father's lifetime, of one Farzand Ali. With respect to this Farzand Ali the facts appear to be these:—He left his home and his family in 1857, the year of the mutiny, at which [628] time he would appear to have been about 30 years old, and therefore, if alive when this suit was instituted, his age would then have been about 51 years. He has not since been heard of, but there is nothing on the record to prove his death. Under these circumstances the first question

(1) 1 A. 53.

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is what is the law to be applied to the case? The parties are Muhammadans, and the question raised in the suit being one regarding succession and inheritance, the 24th section of the Bengal Civil Courts Act VI of 1871 immediately applies, and the Muhammadan law must, in the words of s. 24, form "the rule of decision," and the Evidence Act has no application whatever. The only question therefore is, what, on the facts stated, is the Muhammadan law on the subject? This question may be answered without doubt or difficulty, and it is simply this, that for ninety years from the date of his birth the property of a missing person is kept in abeyance, the principle of Muhammadan law appearing to be that, in the absence of proof to the contrary, the missing person is presumed to be alive. This rule of the Muhammadan law appears to be the result of all that is to be found in the leading authorities on that law,—Macnaghten, Baillie, and others. Now, applying this rule of Muhammadan law so stated, it is clear that the property of Farzand Ali cannot be claimed by the plaintiffs, but must be in abeyance until the expiry of ninety years from his birth, that is, for about forty years yet to come, unless in the meantime evidence is obtained proving his death. The Subordinate Judge appears to have correctly applied this rule of Muhammadan law to the facts of the case, and I would therefore affirm his order and dismiss the present appeal with costs.

I should add that the Full Bench case of *Parmeshar Rai* v. *Bisheshar Singh* (1), is quite consistent with the view I have taken of the facts in the present case. There the suit was brought for the avoidance of a deed of mortgage executed to the detriment of the plaintiff's reversionary rights, and it was therefore held that the provisions of s. 108 of the Evidence Act should be applicable. I was absent from the Court when this judgment was given and I express no opinion as to whether I consider it right or wrong. But the opening sentences of the judgments of Turner, J., who was acting **[629]** for me, and of Pearson, J., clearly support the view I have taken in the present case. This portion of the judgment of the Full Bench is as follows:—" The plaintiffs in this suit are not claiming the estate of Janki Rai, the missing person, by right of inheritance; were they claiming it, inasmuch as Janki Rai has been missing for only eight or nine years, their claim might be inadmissible under Hindu law. But they are claiming nothing belonging to him." And the judgments of Spankie, J., and Oldfield, J., are to the same effect.

SPANKIE, J.—This being a suit for inheritance under the Muhammadan law, that law will apply to it, in regard to the missing person, Farzand Ali. The Full Bench ruling in *Parmeshar Rai* v. *Bisheshar Singh* (1) of this Court is not in conflict with this opinion. The lower appellate Court therefore was not wrong in holding that the case must be governed by Muhammadan law. These remarks dispose of the first plea.

On the second plea it appears to me that the judgment of the lower appellate Court is wrong and that the Munsif was right.

According to the Muhammadan law of inheritance, a missing person is considered as living in regard to his own estate, so that no one can inherit from him, and dead in regard to the estate of another, so that he does not inherit from any one, and his estate is reserved until his death can be ascertained, or the term for a presumption of it has passed over. I find a summary of the law quoted from well-known authorities and cited in the Madras edition of Macnaghten's Muhammadan law, referred to by

(1) 1 A. 53.

Babu Shama Charan Sirkar in his printed Tagore Lectures.—"Thus, if he (the missing person) had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age, but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person, to whom he is an heir, he is so far considered to be alive, that his share is set aside, but such share is not reserved [630] in trust for him and his heirs, but delivered to the other heirs, who would have taken it if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return, it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person." Again: "If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus, in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case, the daughters will take half the estate immediately, as that must be their share at all events, but the grandchildren will not take anything, as they are precluded on the supposition of their father being alive."

Farzand Ali became lost during the lifetime of his parents, and his daughter, the defendant, according to the view of the law expressed above, could not, under the circumstances, inherit.

For these reasons I would decree the appeal and reverse the judgment of the lower appellate Court and restore that of the Munsif with costs.

Stuart, C. J., and Spankie, J., differing on a point of law, the appeal was referred, under s. 575 of Act X of 1877, to Pearson, J., by whom the following judgment was delivered:

JUDGMENT.

PEARSON, J.—The property in suit did not belong to Farzand Ali, the missing man, but would have been more or less inherited by him, had he survived his parents. The plaintiffs are his sisters, and a cousin, who married one of them; the defendant is his daughter and, if she be not entitled to the property, they are. Her contention is that her father is still alive, and, if the contention be true, it is apparent from the rules of Muhammadan law cited by my learned colleague Spankie, J., that she is not entitled to hold the property either as heir or trustee, although Farzand Ali may be entitled to it should he return. The plaintiffs do not assert that he is dead, but nothing has been heard of him since he disappeared in 1857, and the strong probability is that he died in the lifetime of his parents, in which case his daughter could not inherit, through him any portion of their estate. This being so, in concurrence with [631] Spankie, J., I decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

Appeal allowed.

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2 A. 631.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

MAYA RAM AND OTHERS (*Defendants*) *v.* LACHHO (*Plaintiff*).*
[12th January, 1880.]

Pre-emption—Wajib-ul-arz.

The greater portion of the lands of a certain village were divided into "thokes," each thoke comprising a certain amount of land, and the rest of the lands were held in common according to the interests of the co-sharers in the village. The *wajib-ul-arz* contained the following provision regarding the right of pre-emption: "Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." *Held*, in a suit by a sharer in one thoke to enforce a right of pre-emption, under the *wajib-ul-arz*, in respect of a share in another thoke, that the fact that the plaintiff in common with all the sharers of the different thokes was a sharer in the common lands did not make her a sharer in the vendor's thoke and she had therefore no right of pre-emption under the *wajib-ul-arz*.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Bishambhar Nath* and Munshi *Sukh Ram*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banerji*) and Babu *Oprokash Chander Mukerji*, for the respondent.

JUDGMENT.

The judgment of the High Court (SPANKIE, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The property in this suit, comprising the share in mauza Tholai belonging to Muhammad Ibrahim Khan, was sold by him to the defendants under a deed of sale dated 1st March 1878, and the plaintiff claims the same by right of pre-emption under the *wajib-ul-arz*. The lower Court decreed the claim, and one of the objections taken in appeal is that, under the pre-emption clause in the administration-paper on which the plaintiff relies as her ground of action, she is not entitled to recover the property. The clause is as follows:—"Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer **[632]** should be effected by him in favour of his own brothers and nephews who may be sharers, and in case of their refusal in favour of the other owners of the thoke: if they refuse to make the purchase, the transfer may be effected in favour of any one." The plaintiff does not come under the first description of persons named who have a right of pre-emption, and it only remains to be seen if she is a sharer in the vendor's thoke. It is shown from the record-of-rights, and there is no dispute on this point, that there are three thokes in this mouza, namely, the thoke of Ibrahim Ali Khan, vendor, the thoke of Mussammat Lachho, plaintiff, and the thoke of Mussammat Bhawani. Each of these thokes comprised a certain amount of the land of the mauza, which has been divided and formed into separate thokes. Thus thoke Ibrahim Ali Khan comprises 316 bighas, 5 biswas, that of Mussammat Bhawani 99 bighas, 17 biswas, and that of the plaintiff 316 bighas, 4 biswas. Besides the lands thus

* First Appeal, No. 25 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 11th December 1878.

divided into thokes, there are some lands in the mauza left undivided and held in common by the sharers of the different thokes in which they have an interest in proportion to their fractional shares, but these lands do not form part of the thokes, but were left undivided when those thokes were formed. That this is the constitution of the mauza is clearly shown by a reference to the record-of-rights, where the total of land divided and comprising each thoke is first given, and then is entered the common land, as something outside the thokes.

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Now plaintiff is not a sharer in the vendor's thoke, that is, in the divided land held by him separately, but she is, in common with all the sharers of the different thokes, a sharer of the common lands left undivided, and it is contended that on this ground she has a right of pre-emption. But this contention fails; the thoke as already stated is not composed of the common lands but of those divided, and a sharer in the former will not from that circumstance become a sharer in a thoke. The plaintiff not having shown that she is a sharer in the vendor's thoke has no right of pre-emption under the clause in the administration-paper. We therefore decree the appeal, and reverse the decree of the lower Court, and dismiss the suit with all costs.

Appeal allowed.

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2 A. 633.

APPELLATE CIVIL.

[633] *Before Mr. Justice Pearson and Mr. Justice Spankie.*

GOBAR DHAN DAS (*Defendant*) v. GOKAL DAS (*Plaintiff*).*
[15th January, 1880.]

Parol Conditional Mortgage—Regulation XVII of 1806.

K made over to *G*, from whom he had borrowed certain moneys, certain land on the oral condition that, if such moneys were not repaid within two or three months, such land should become *G's* absolutely. *Held* that as there was no deed of conditional mortgage the provisions of Regulation XVII of 1806 were not applicable to *G*, and he became the owner of such land after the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him.

[N.F., 50 P.R. 1906.]

ON the 11th February 1862, one Kishen Das purchased certain premises used as a stable, the vendor executing a deed of sale in his favour. In the beginning of 1869 Kishen Das, being indebted to one Gokal Das in the sum of Rs. 1,000, gave possession of the premises to Gokal Das and made over to him the deed of sale, on the oral understanding that if the debt were not paid in two or three months the premises should become the absolute property of Gokal Das. In July 1869, Kishen Das became insolvent, and in the schedule of immoveable property filed by him in the Insolvent Court at Calcutta he stated as follows:—"I received the sum of Rs. 1,000, in the month of Phagun, Sambat 1925, as a loan from Gokal Das, Gujrati, and for the repayment thereof deposited the title-deeds of a piece of land at Muttra, in the North-Western Provinces, with this

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* Second Appeal, No. 714 of 1879, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 20th March 1879, affirming a decree of Maulvi Mubarak-ulla, Munsif of Muttra, dated the 3rd December 1878.

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creditor, and I also agreed that in case I was not able to pay the amount the land would absolutely belong to him." In the statement of his immoveable property filed in the same Court he stated:—"A piece of land at Muttra, in the North-Western Provinces, mortgaged to my creditor No. 34 (Gokal Das) for Rs. 1,000, on condition that in case I am not able to pay the amount within two or three months he will be absolutely entitled to the land." Gokal Das remained in undisturbed possession of the premises until the 10th February, 1877, when Jagan Nath, the son of Kishen Das, executed a deed of sale of the premises in favour of Gobar Dhan Das, who thereupon interfered and prevented Gokal Das' tenant from paying rent to him as he had theretofore done. Gokal Das thereupon instituted the present suit in which [634] he claimed, amongst other things, a declaration of his proprietary right to the premises, and to be maintained in possession thereof, and the cancellation of the deed of sale dated the 10th February, 1877. The Court of first instance gave him a decree. On appeal the lower appellate Court held, in respect of the contention by the defendants that the possession of the plaintiff of the premises was only that of an equitable mortgagee, and that consequently he could not impugn the sale to Gobar Dhan Das by Jagan Nath, as follows:—"In the case of *Goordyal* v. *Hunskoonwer* (1) the High Court said,—'It has been settled that a conditional sale may by the agreement and acts of the parties become absolute without (foreclosure) proceedings under the Regulation'—and this appears to me to be the case here: I accordingly find that Gokal Das acquired the proprietary title to the property in suit in 1869, and that he has therefore the right to sue for the avoidance of the sale made by Jagan Nath to Gobar Dhan Das."

The defendant Gobar Dhan Das appealed to the High Court contending that the lower appellate Court had erred in holding that the conditional sale to the plaintiff did and could become absolute without the issue of the notice of foreclosure required by s. 6 of Regulation XVII of 1806, and that the plaintiff was still only a mortgagee and could not therefore sue for the proprietary possession of the property.

Mr. *Conlan* and Babu *Ratan Chand*, for the appellant.

Mr. *Howard* and Lala *Harkishen Das*, for the respondent.

JUDGMENT.

The judgment of the High Court (PEARSON, J., and SPANKIE, J.) was delivered by

PEARSON, J.—The provisions of Regulation XVII of 1806, to which the first ground of appeal refers, are only applicable to the holders of deeds of conditional mortgage. The plaintiff, appellant, was not the holder of such a deed; and the provisions of the Regulation aforesaid were not therefore applicable to him. This being so, we must hold that according to the condition on which the property was made over to him he became the owner of it after [635] the expiry of three months from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him. It thus appears that he had acquired a full proprietary right and title to the property before Kishen Das' insolvency. Accordingly we affirm the decree of the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

(1) H.C.R.N.W.P. 1867, p. 176.

2 A. 635=5 Ind. Jur. 212.

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APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

GANGA BISHESHAR (*Defendant*) v. PIRTHI PAL (*Plaintiff*).*
[19th January, 1880.]

Hindu Law—Power of the father to alienate ancestral property.

D, in pursuance of a promise to give his daughter a dowry, about two years after her marriage, made a gift of joint ancestral property to *G*, her father-in-law. *P*, *D*'s son, sued his father and *G* to have the gift set aside as invalid under Hindu law. *Held* that the gift, not having been made with the plaintiff's consent, and not being for any purpose allowed by Hindu law, was invalid, and that the plaintiff was entitled to have it set aside, not to the extent only of his own share in such property, but altogether.

[F., 16 M. 84 (85); 4 Bom. L.R. 883 (890) ; R., 29 B. 51 (54) ; 20 Ind. Cas. 921.]

ON the 25th April, 1872, about two years after the marriage of his daughter, one Debi Prasad executed a deed of gift of a certain share in a certain village, being the ancestral property of his family in the favour of the defendant Ganga Bisheshar, the father-in-law of his daughter. The property purported to be transferred as the marriage portion of the daughter. In July, 1878, Pirthi Pal, the plaintiff, the son of Debi Prasad, sued his father and the defendant Ganga Bisheshar to have this deed of gift cancelled, on the ground that the alienation was invalid under Hindu law. The defendant Ganga Bishesbar set up as a defence to the suit, amongst other things, " that the deed of gift had been executed not only with the consent and knowledge of the plaintiff, but also with his aid, and the defendant had obtained possession by means of mutation of names, to which the plaintiff never took any exception," and that the plaintiff was not entitled to claim the cancellation of deed of gift in respect of the whole property, but in respect only of his own share. The Court of first instance determined that [636] the plaintiff had not consented to the gift, observing as follows:—" The consent of the plaintiff has not been proved in any way; had he consented he would have been made to affix his signature to the deed of gift ; no documentary evidence is forthcoming to establish his consent." It further determined that the deed of gift should be cancelled altogether. The lower appellate Court concurred in the opinion of the Court of first instance, observing as follows :—" I do not consider it is proved that the deed was executed with the consent and admission of the plaintiff ; it was so necessary a point to legalise the father's action in this particular, that if the son, the plaintiff, had been a consenting party, it is scarcely credible that this should not have been clearly shown at the time by some entry in the body of the deed or by making the son a witness to the deed ; this is the finding of the lower Court and I concur in it ; I quite acknowledge that the oral testimony in this point is decidedly better for the defendant, appellant, than for the plaintiff, respondent, but I cannot credit it sufficiently against strong probabilities and the absence of all documentry evidence, nor can I accept the copy of a deposition of Pirthi Pal, dated 24th July, 1874, as sufficient to prove his knowledge and acquiescence : it is too roundabout a story, and even if allowed that the

* Second Appeal, No. 706 of 1879, from a decree of R.G. Currie, Esq., Judge of Gorakhpur, dated the 17th March 1879, affirming a decree of Hakim Rahat Ali, Subordinate Judge of Gorakhpur, dated the 24th December 1878.

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plaintiff did know at that time, I cannot admit that by the law-texts quoted, he can be held to have ratified the act and to be barred from bringing this suit: the first quotation is from Tagore Law Lectures, 1871, p. 7:—'He can interdict acts of waste, but if he does not do so and is cognisant of the transaction, and specially if he derives any benefit from it, he will be held to have impliedly consented to it.'—Well, he most certainly did not derive any benefit, and the force of the passage, I take it, turns upon that, as does also the quotation in the case of *Gopal Narain Mozoomdar* v. *Muddomutty Guptee* (1)—'of which he is aware and of which he has had the benefit.' The appellant making so great a point of the son's consent and admission virtually acknowledges that without such consent and admission the act of the father is illegal, and the quotations and precedents,—Tagore Law Lectures, 1871, p. 12, 'As early as 1824, the question, &c.': Woodman's Digest of Bengal Law Reports, p. 284, 16: Vyavastha Chandrika, vol. i, pp. 35 and **[637]** 36, s. 31—put forward by the respondent are, I think, conclusive and definitive, this being undeniably joint undivided property; but the appellant does deny it or attempts to throw doubt on the applicability of the above quotations and precedents by quoting the cases—*Venkataramayyan* v. *Venkatasubramania Dikshatar* (2) and *Deendyal Lal* v. *Jugdeep Narain Singh* (3). But these are special cases relating to forcible sales not to free-will transactions, and in the heading of the latter is this—'*Quære.*—Whether, under the law of the Mitakshara, in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid'? I hold these precedents as irrelevent and the latter telling rather against than for the appellant who put it forward."

The defendant appealed to the High Court.

Lala *Lalta Prasad*, for the appellant.

The Senior Government Pleader (Lala *Juala Prasad*) and Shah *Asad Ali*, for the respondent.

JUDGMENT.

SPANKIE, J.—The appellant before us was the appellant before the Judge, and he urged, first, that the deed impeached had been executed with the consent and admission of the plaintiff, respondent, who had remained silent from 1872 to 1878, having thus ratified his father's act; secondly, that the plaintiff could not sue under any circumstances to set aside the gift save with respect to his own share, *viz.*, two annas and two pies in the property in suit. The Subordinate Judge held that there was no proof of consent on the part of the plaintiff and no sufficient evidence of acquiescence in what was done by the father. He also appears to hold that the plaintiff could sue to set aside the deed altogether, and not only in regard to his own share. We must not lose sight of these objections which the Court below had to determine. Before us the first plea goes beyond the objections urged before the lower appellate Court and contends that, as the transfer was not made for any illegal or immoral purposes, the suit was not maintainable. The other pleas go to the plea of consent and acquiescence and **[638]** that of the limitation of plaintiff's right to sue to the extent of his own share only.

With respect to the plea of consent and acquiescence, I do not think that we can interfere with the Judge's finding. The admission of the

(1) 14 B.L.R. 32. (2) 1 M. 358. (3) 3 C. 198.

Judge that the evidence on his point on the part of appellant is preferable to that on the part of defendant does not extend beyond the parol evidence. He assigns reasons for not crediting this evidence, and on the entire evidence before him he arrives at the same conclusion at which the first Court had arrived. The finding therefore is not one with which we could interfere on this appeal. I understand the finding of both the lower Courts to be that the transfer was not made for any necessary purpose allowed by the Hindu law. The deed of gift appears to have been made by the father in performance of a promise to give a dowry to his daughter. But I am not aware that the performance of such a promise can be regarded as a lawful purpose justifying alienation under the Hindu law. It was not necessary for the support of the daughter, it was not for any religious or pious work, nor was it a pressing necessity. Daughters must be maintained until their marriage and the expenses of their marriage must be paid. But in this case the gift was not made at the time of the marriage. It was not executed until two years after the marriage. There is, I think, force in the Subordinate Judge's observations that the great stress laid upon the alleged consent, acquiescence, and aid of the plaintiff in effecting the transfer, is a circumstance going to show that without such consent the transfer was illegal. The first plea, upon the Subordinate Judge's finding, in my opinion, fails.

I have already given my opinion regarding the second plea. As to the third, the property being admittedly joint and undivided, and the gift not having been made with the consent of the plaintiff, and not being for any purpose allowed by the Hindu law, the plaintiff was at liberty to set it aside altogether ; and in arriving to this conclusion the lower appellate Court does not appear to have misunderstood any of the precedents cited before him. I would dismiss the appeal and affirm the judgment with costs.

PEARSON, J.—I concur.

Appeal dismissed.

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2 A. 639=5 Ind. Jur. 214.

[639] APPELLATE CIVIL

Before Mr. Justice Spankie and Mr. Justice Oldfield.

MATHURA PRASAD (*Plaintiff*) v. DURJAN SINGH AND ANOTHER (*Defendants*).* [19th January, 1880.]

Bond—Interest.

D gave *M* a bond for the payment of certain moneys on a certain date and for the payment of interest on such moneys at Re. 1-12-0 per cent. per mensem, stipulating to pay the interest six-monthly, and in default "to pay compound interest in future." *Held* (i) that the stipulation to pay compound interest could not be regarded as a penal one, and (ii) that the bond contained an agreement to pay interest after the due date at the rate payable before that date, and that if it had been otherwise, the obligee was entitled to interest after that date at that rate, such rate not being unreasonable.

[R., 1 N.L R. 9 (12).]

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*Second Appeal, No. 792 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 5th April, 1879, modifying a decree of Hakim Rahat Ali, Munsif of Mainpuri, dated the 9th November, 1878.

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On the 12th December, 1872, one Gopal Singh executed a bond in favour of one Jogal Kishore, in which, after promising to pay him Rs. 200 on the 4th November, 1873, and to pay him interest on that sum at Re. 1-12-0 per cent. per mensem, and hypothecating certain immoveable property as collateral security for the payment of such moneys, he promised and agreed as follows: "Until the loan is repaid I shall not alienate the said property by sale, mortgage or otherwise: if I do, the alienation shall be invalid: I shall pay the interest every six months, and if I do not pay it every six months, I shall in that case pay compound interest in future: if I fail to pay the loan with interest at the stipulated time, the creditor shall be at liberty on the expiry of the period to realise his money from me and my property in the best way he can." On the 3rd September, 1878, the obligor not having paid anything on the bond, the plaintiff, the assignee of the bond, sued upon it, claiming the principal amount, Rs. 200, and Rs. 425-8-0, compound interest, from the date of the bond to the date of the suit at Re. 1-12-0 per cent. per mensem. The Court of first instance held that the stipulation in the bond regarding compound interest was of a penal nature, and awarded the plaintiff compound interest at the rate only of eight annas per cent. per mensem. It also held that there being no stipulation in the bond fixing the rate of interest to be paid after the date the bond became due, the plaintiff was only entitled to interest after that date at the prevailing rate, [640] *viz.*, one rupee per cent. per mensem. On appeal by the plaintiff the lower appellate Court held that no compound interest at all could be awarded to him, but gave him interest from the date the bond became due at the rate stipulated to be paid before that date, *viz.*, Re. 1-12-0 per cent. per mensem, with reference to the case of *Baldeo Pandey* v. *Gokal* (1).

The plaintiff appealed to the High Court contending that under the terms of the bond he was entitled to compound interest.

Pandit *Nand Lal*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

SPANKIE, J.—The first condition of the deed was that the money borrowed should be repaid with interest at the rate of Re. 1-12-0 per cent. per mensem on Katik Sudi Puran Mashi, Sambat 1930. The next condition is that for the further satisfaction of the creditor the debtor hypothecates certain property until repayment of the loan, promising not to alienate the same in any form or shape. The third condition is that the debtor will pay interest every six months, and if he fails to do so, he will pay compound interest in future. Then comes the fourth condition that if he fails to pay the loan with interest at the stipulated time, the creditor shall be at liberty to realise the money from the debtor personally and from his property in the best way he can. The case appears to me to be very similar to that of *Baldeo Pandey* v. *Gokal* (1) to which I was a party. If the debtor was unable to repay the money at the stipulated time, the creditor would allow it to remain out with the debtor on the understanding that the property hypothecated remained hypothecated for principal and interest until repayment. The stipulation regarding the payment, not the rate, of interest is perhaps rather a declaration as to the mode of payment than a condition. But there is the condition in case of failure "to pay compound interest for the future," that is to say, until repayment.

(1) 1 A. 603.

I fail to perceive on what principle it should be assumed that the creditor would allow his money, payable at a particular date, to remain unpaid, but would content himself with less interest than that at which he originally lent the money. I hold that the deed [641] contains a contract for the payment of interest after due date at the rate of Rs. 1-12-0 which was payable before due date, and that on any default compound interest might be charged. If I did not hold this view, I should then be of opinion that the plaintiff was entitled to the interest claimed, as there does not seem to be anything unreasonable in the rate agreed upon as interest for the money lent or in the arrangement provided in case of default.

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The Subordinate Judge has found that the covenant to pay compound interest must be regarded as a penal clause in the deed. I do not think that it is so, and there is nothing in the law which forbids a decree for such interest when there has been an agreement to pay it. I would modify the judgment and allow compound interest which has been disallowed by the Subordinate Judge, thus decreeing the appeal with costs.

OLDFIELD, J.—I concur in the proposed order.

Appeal allowed.

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2 A. 641 = 5 Ind. Jur. 261.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

NAND RAM (*Defendant*) v. RAM PRASAD (*Plaintiff*).*
[19th January, 1880.]

Suit for money on accounts stated—Act IX of 1871 (*Limitation Act*), *sch. ii, art.* 62—*Note or memorandum whereby an account is expressed to be balanced—Act XVIII of* 1869 (*Stamp Act*), *sch. ii, No.* 5—*Stamp—Limitation.*

On the 9th October, 1875, the book containing the accounts between the plaintiff and the defendant, kept by the plaintiff, was examined by the parties, and a balance was struck in the plaintiff's favour which was orally approved and admitted by the defendant. On the 2nd April, 1877, the plaintiff sued the defendant for the amount of this balance "on the basis of the account-book." *Held* that the suit was in effect one on accounts stated falling within art. 62, sch. ii of Act IX of 1871, and could be brought within three years from the 9th October, 1875, for the total balance struck, and being so brought was within time.

Held, also that the entry of the balance struck, not being signed by the defendant, was not a note or memorandum of the kind mentioned in No. 5, sch. ii of Act XVIII of 1869, and did not therefore require to be stamped.

[Not F., 23 A. 502 (504) = A.W.N. (1901), 150.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

[642] Munshi *Hanuman Prasad* and Pundit *Bishambar Nath*, for the appellant.

Pundit *Ajudhia Nath*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STRAIGHT, J.—This was a suit brought by the plaintiff, respondent, to recover the sum of Rs. 4,765, principal and interest, on the basis of an

* Second Appeal, No. 745 of 1879, from a decree of W. C. Turner, Esq., Judge of Cawnpore, dated the 3rd April, 1879, affirming a decree of Babu Ram Kalli Chaudhri, Subordinate Judge of Cawnpore, dated the 28th March 1878.

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account-book. The plaintiff carries on business at Cawnpore under the style of Nand Ram and Babu Ram, while the defendants trade at Shikohabad as Nand Ram and Golab Chand. As far back as the year 1869 there were dealings between the plaintiff and defendants, the latter forwarding goods for sale to Cawnpore, drawing on the plaintiff against such goods, and occasionally making purchases through him for the purposes of their business at Shikohabad. On the 9th of October, 1875, Mohan Lal, one of the defendants, was at Cawnpore, and upon that day the accounts between the two firms were gone into and a balance was struck, the amount ascertained as being due from the defendants to the plaintiff being Rs. 4,198-4-9. Upon a promise of Mohan Lal to pay Rs. 3,598-4-9 of this amount within two weeks the plaintiff undertook to forego the other Rs. 600, which were, however, to be recoverable, if the debt was not paid within the time specified. The Rs. 3,598-4-9 were not paid according to promise, and ultimately upon the 2nd April, 1877, the present suit was brought. For the purposes of this judgment it is sufficient shortly to say that the pleas of the defendant Nand Ram were to the effect, that the claim was barred by limitation, that Mohan Lal had no authority to bind his firm at the adjustment of accounts; and in this and the lower appellate Court the further ground was taken, that the entry in the plaintiff's books of the balance struck was in the nature of a note or memorandum of the character contemplated by No. 5, sch. ii, Act XVIII of 1869, and that not being stamped it was inadmissible in evidence to take the claim out of limitation. Further, that as such a note or memorandum, being liable to only a one anna stamp, and not having been stamped at the time of execution, it was useless according to the provisions of s. 28 of the Stamp Act of 1869. The first Court decreed the plaintiff's claim and that decision was upheld by the Judge.

[643] It has been found as a fact that Mohan Lal had full authority on the 9th of October, 1875, to act on behalf of the defendant's firm in the adjustment of the accounts, and the only points to be considered by us in special appeal appear to be, first, is the plaintiff's claim barred by limitation? secondly, Is the entry in the books of the plaintiff, striking the balance, one that requires a stamp, as provided by No. 5, sch. ii of the Stamp Act of 1869?

The matter was very fully argued before us on the part of the appellants, but the contentions of their learned pleader were based upon a misconception of the nature of the claim. The form of action "on accounts stated" is a perfectly well understood one, and the use of the term "on account-book" in the present plaint is only another way of describing a suit of such a description. It must be taken as proved that upon the 9th October, 1875, the accounts of the transactions between the plaintiff and the defendants were submitted to Mohan Lal, and that the items were checked and the balance struck was approved by him upon that date. In effect it comes to this, that upon such day the sum of Rs. 4,198-4-9 was found to be due from the defendants to the plaintiff on accounts stated between them. Consequently, I am of opinion that the form of the plaintiff's present claim properly falls within cl. 62 of the second schedule of Act IX of 1871; that it was competent for the plaintiff to bring his suit within three years of that date for the total balance struck; and that having instituted the present proceedings on the 2nd April, 1877, he is within time.

As to the second point taken on behalf of the appellants, I do not think that the entry in the ledger of the plaintiff stating the balance on

the debit side of the defendants' account, which was approved and admitted by Mohan Lal, is a note or memorandum of the kind mentioned in No. 5, sch. ii of the Stamp Act of 1869. As I intimated at the time of the hearing, I think that the writing therein contemplated is intended to be signed by the person to be charged with it, admitting that an account due to him has been balanced, or that a debt payable by him is due. Such entry as we have in the present case is no evidence of the admission of liability, but it is evidence of the debt being due and of the **[644]** account having been stated. This latter fact being proved it was competent for the lower Courts to accept Mohan Lal's acknowledgment, oral though it be, and they would appear most properly to have found the liability of the defendants established. I would dismiss the appeal with costs.

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STUART, C.J.—I entirely approve and concur in my honourable and learned colleague's examination of this case. It is quite clear that the three years' limitation had not run and that the suit was within time, and that being so, perhaps the question respecting the admissibility of the note or memorandum which was argued to fall within the terms of No. 5, sch. ii, Act XVIII of 1869, is not very material. But I may observe that I agree with Mr. Justice Straight that this is not such a note or memorandum, and that to be liable to stamp-duty it ought to be signed or otherwise proved as a note or memorandum separate and distinct in itself, and not as here, as a mere summing up in the way of a continued account without any special acknowledgment. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 644 = 5 Ind. Jur. 262.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. AJUDHIA. [19th January, 1880.]

Trial of more than one offence—Joinder of charges—Limit of conviction—Act X of 1872 (*Criminal Procedure Code*), ss. 314, 452, 454, 455—*Act XLV of* 1860 (*Penal Code*), s. 71.

Held that, where in the course of one and the same transaction an accused person appears to have committed several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interest of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved.

Where, therefore, a person who broke into a house by night and committed theft therein was charged and tried for offences under ss. 380 and 457 of the Penal Code, and was convicted of both those offences, and punished for each with rigorous imprisonment for eighteen months, the Court convicted him of the offence under s. 457 and sentenced him **[645]** to rigorous imprisonment for the three years, and acquitted him of the offence under s. 380.

[F., 8 C.P.L.R. 7 (8) (Cr.); L.B.R. (1872—1892) 390; R., 10 A. 58 (66); 10 A. 146.]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. On the night of the 4th September, 1878, the petitioner broke into the dwelling-house of one

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Hem Raj and stole certain property therein. On the 21st March, 1879, he was convicted by Mr. J. W. Muir, Magistrate of the first class, under s. 380 of the Indian Penal Code of the offence of theft in a dwelling-house, and under s. 457 of that Code of the offence of house-breaking by night in order to the commission of theft, and punished for the former offence with rigorous imprisonment for one year, and for the latter with rigorous imprisonment for the same period. On appeal by the petitioner to the Court of Session that Court enhanced the punishment that had been awarded, sentencing the petitioner to rigorous imprisonment for eighteen months in respect of each offence.

Mr. *Chatterji*, for the petitioner.

JUDGMENT.

STRAIGHT, J.—I must accept the findings of fact. The accused within a very short period of the theft was in possession of the stolen property, and I cannot say the Magistrate was wrong or that the evidence was insufficient in point of law to justify him in convicting. A question has been raised before me on the part of the applicant that his conviction on ss. 380 and 457 of the Penal Code for one and the same offence is illegal, and that he has been improperly sentenced to two distinct and excessive sentences. Although I am not disposed to hold at the present moment that this contention is sound to the full extent urged, yet I think that the spirit of the Criminal Procedure Code, ss. 314 and 452, 454, and 455, taken with s. 71 of the Penal Code, as well as convenience of practice, are best consulted by a different course being pursued to that adopted in the present case. It is true that the facts disclosed are consistent both with a charge of "theft in a dwelling house" under s. 380 and to one of "lurking house-trespass and house-breaking by night with intent to commit theft" under s. 457, but the latter is the more serious and aggravated form of crime involving all the elements of the former, and if the proof is sufficient to justify a conviction, it should in my judgment be passed and the punishment inflicted [646] for the graver offence of the two of which the accused is found to be guilty. It is a common practice in England in framing indictments to vary the description of the crime in several counts, *e.g.*, a man is charged with wounding with intent to murder, to do grievous bodily harm, to commit a felony, or to resist or prevent his lawful apprehension and detainer, but the conviction would only be recorded on one of the counts and of course upon that for the most serious offence proved, which would dispose of or include all those subordinate and negative the others superior to it. Equally the sentence would only be passed upon the one count, that substantially representing and containing within its four corners the real offence committed, as to the more or less aggravated character of which the amount of punishment would have to be calculated. Where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved. This I think should have been done in the present case, and I accordingly direct that the following amendment be made in the record. The applicant, Ajudhia, is convicted

on s. 457 of the Penal Code of "house-breaking by night in order to commit theft," and is ordered to be rigorously imprisoned for the period of three years from the 21st March, 1879. For formal purposes I order that judgment of acquittal be entered upon the charge under s. 380 of the Indian Penal Code.

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2 A. 646=5 Ind. Jur. 263.

APPELLATE CRIMINAL.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* MULU. [19th January, 1880.]

Trial by the Court of Session—Admissibility of evidence given at preliminary inquiry by absent witness—Confession made by one of several persons being tried jointly—Act X of 1872 (*Criminal Procedure Code*), *s.* 249—*Act I of* 1872 (*Evidence Act*), *ss.* 30, 33.

[647] *Held*, that it is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with, and the evidence given by him before the committing Magistrate referred to.

Held also, where a person being tried jointly with other persons made a statement deprecating any guilty knowledge and seeking to clear himself at the expense of such other persons, that such statement could not be taken into consideration under s. 30 of Act I of 1872 against such other persons. *Queen* v. *Belat Ali* (1) and *Empress* v. *Ganraj* (2), followed.

[F., A.W.N. (1881), 38 ; R., L.B.R. (1893 —1900) 70, 71.]

THREE persons, named severally Mulu, Deodat, and Khilla, were committed for trial before the Court of Session charged with dishonestly receiving certain property stolen in the commission of a dakaiti, an offence punishable under s. 412 of the Penal Code. The Sessions Judge, Mr. F. E. Elliot, considered that the charge upon which the accused persons had been committed was improper, and altered it to one under s. 411 of the Code of dishonestly receiving the property, knowing it to be stolen. Ganga Prasad, the owner of the property, was absent at the trial, and the Sessions Judge referred to the evidence given by him before the committing Magistrate to prove that the property was stolen property, and eventually convicted the accused persons under s. 411 of the Penal Code. Mulu appealed to the High Court.

Mr. *Niblett*, for the appellant, contended that the conviction was improper, there being no evidence that the property was stolen, inasmuch as the evidence of Ganga Prasad taken before the committing Magistrate was inadmissible.

JUDGMENT.

STRAIGHT, J.—I had at one time the intention of disposing of the case in its present condition, but upon carefully going over it I feel that to do so would be to countenance an irregularity of procedure that ought not to be passed over. I refer to the reading of the deposition of Ganga Prasad in the Sessions Court to prove the loss and identity of the articles found in the possession of the accused. It was absolutely inadmissible under s. 249 of the Criminal Procedure Code, and there is no evidence upon the record, nor do I believe was there any taken, to permit the

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(1) 10 B.L.R. 453. (2) 2 A. 444.

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application of s. 33 of the Evidence Act. As to s. 249, that has no applicability to a case like the present, and is intended to provide for the contingency, [648] that may arise, when a witness, who is *produced* before the Court of Session holds back information and evidence and tells a different story to that which he gave in the preliminary inquiry before the Magistrate. With regard to s. 33 of the Evidence Act, it is true that it makes a statement " given by a witness in a judicial proceeding relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states," in the following emergencies: (i) When the witness is dead: (ii) when he cannot be found: (iii) when he is incapable of giving evidence: (iv) when he is kept out of the way by the adverse party: (v) when his presence cannot be obtained without an amount of delay or expense which under the circumstances the Court considers unreasonable. But in my opinion it was intended that the provisions of the section as to emergency (v) were only to be sparingly applied, and certainly not in a case like the present, where the witness was alive and his evidence reasonably procurable. Assuming, however, that there were reasons why the Court of Session thought fit to dispense with Ganga Prasad's personal attendance, and circumstances were disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reasons and to prove such circumstances should have been formally and regularly taken and recorded. It is only in extreme cases of expense or delay that the personal attendance of a witness should be dispensed with, and there is an entire absence, as far as I can see in this case, of anything to establish those grounds for applying s. 33 of the Evidence Act. The reading of the evidence of Ganga Prasad as given by him in the Magistrate's Court was therefore irregular and improper. I further remark in his judgment that the Sessions Judge has allowed his decision to be influenced by the statement of Deodat, and that under s. 30 of the Evidence Act he has " taken it into consideration " against the two other accused. In this respect I think he was also in error. The account of the transaction given by Deodat is in no sense a confession, on the contrary he deprecates altogether any guilty knowledge, and seeks to clear himself at the expense of his co-prisoners. The case of *Queen* v. *Belat Ali* (1) deals very fully [649] with this point, and I have also myself had at some little length to discuss it in the case of *Empress* v. *Ganraj* (2). Therefore the statement of Deodat should have had no weight against Mulu or Khilla.

Much as I regret to have to do so, I must send this case back for further inquiry before the Sessions Judge without the assessors, such inquiry to be conducted in the presence of the three accused, who are to be afforded every opportunity for cross-examination, and the further proof is to be directed to establish the loss of the several articles and their identity by Ganga Prasad. In addition to this I desire fuller evidence of what was said by Mulu and Khilla, each individually, as to the property found in the well both before and at the time of its being found, whether both or which of them went down the well, and what the date was on which Mulu gave any intimation that he could restore some of the property. When this evidence has been taken it must be returned certified to the Court, which will then proceed to dispose of the appeal.

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(1) 10 B.L.R. 453. (2) 2 A. 444.

2 A. 649.

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APPELLATE CIVIL.

APPEL-LATE CIVIL.

2 A. 649.

Before Mr. Justice Oldfield and Mr. Justice Straight.

BACHCHU (*Plaintiff*) *v.* MADAD ALI (*Defendant*).* [26th January, 1880.]

Act X of 1877 (*Civil Procedure Code*), *s.* 210—*Decree for money.*

There is nothing in s. 210 of Act X of 1877, or elsewhere in that Act, authorising a Court to direct that the amount of a decree should be paid within a fixed time from its date. *Semble* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the "*nankar*" allowance hypothecated by such bond.

[F., 7 B. 332 (335).]

THE plaintiff sued to recover Rs. 177 on a bond, from the defendant, personally, and by the sale of a "*nankar*" allowance of Rs. 106-2-0, which was paid annually to the defendant by certain lessees of his, and which allowance the defendant had hypothecated [650] in the bond as security for the payment of the amount thereof. The Court of first instance gave the plaintiff a decree for the amount claimed by him against the defendant and against "the mortgaged property," and directed that "the defendant should pay the amount of the decree within two years as stipulated by him." On appeal by the plaintiff from the decree of the Court of first instance the lower appellate Court observed: "The Court finds that though the lower Court has not stated in writing its reasons for ordering payment by instalments, yet there are good and sufficient reasons for the order: the value of the property sought to be brought to sale is out of all proportion to the sum decreed: secondly, it appears that the defendant is willing and has endeavoured to meet his engagements." The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad*, for the appellant.

The respondent did not appear.

JUDGMENT.

The judgment of the Court (OLDFIELD, J, and STRAIGHT, J.) was delivered by

OLDFIELD, J.—The defendant borrowed from the plaintiff the sum of Rs. 125 at one per cent. interest per mensem, pledging as security an annuity of Rs. 106-2-0, called "*nankar*" allowance, which the defendant received from the firm of Sadaranji and Jairamji, and the plaintiff has brought this suit to recover the money lent with interest, by enforcement of the lien on the annuity pledged in the bond and against the defendant personally. The Court of first instance decreed the claim, with costs and interest at eight annas per cent. per mensem, but in the decree allowed the defendant a period of two years for payment of the amount decreed. The lower appellate Court affirmed the decree. The plaintiff in second appeal has objected to that part of the decree allowing the defendant the option to pay within two years, and there is no doubt the objection is valid.

The effect of the order of the Court is that the decree-holder is debarred from taking out execution of his decree or having it satisfied till the

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* Second Appeal, No. 1897 of 1879, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 19th May 1879, affirming a decree of Munshi Madho Lal, Munsif of Mirzapur, dated the 18th January 1879.

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expiry of two years from date of the decree, and there is [651] no authority in the Civil Procedure Code for a Court to make such an order. Under s. 210 in all decrees for the payment of money the Court may for sufficient reason order that the amount shall be paid by instalments, but this section is inapplicable, for the decretal order is not for payment by instalments, and it is doubtful whether the section will apply to a decree of the nature of the decree made in this suit, which is for something more than the payment of money. Moreover, it cannot be held that any sufficient reason is shown in this case for allowing defendant time for payment. We decree the appeal with costs, and modify the decrees of the lower Courts, by cancelling that portion which allows two years within which the amount decreed is to be satisfied.

Appeal allowed.

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2 A. 651.

[651] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

GANGA PRASAD (*Plaintiff*) *v.* GAJADHAR PRASAD AND OTHERS (*Defendants*).* [29th January, 1880.]

Mesne profits—Procedure on the hearing of appeal—Objection—Act X of 1877 (*Civil Procedure Code*), *ss.* 211, 561.

Where the parties to a suit for certain land and for the payment of mesne profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land, *held* that the most reasonable and fitting mode of assessing such mesne profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant and had not been cultivated by the defendants.

Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower appellate Court. The plaintiff appealed to the High Court from the decree of the lower appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower appellate Court dismissing his appeal. *Held* that such objections could not be entertained.

[Diss., 2 Ind. Cas. 835=12 O.C. 154; D., 8 B. 368 (370).]

THIS was a suit in which the plaintiff claimed the possession of 37 bighas 5 biswas of land and Rs. 883-13-0 the mesne profits of the land for 1283 and 1284 Fasli. The plaintiff claimed under an agreement for the partition of his share and that of the defendants in a certain mahal, under which partition the land in suit had fallen to the share of the plaintiff. The plaintiff estimated [652] the mesne profits for the years 1283 and 1284 Fasli in manner following, that is to say, he stated the produce of the land for each year to be eight maunds per bigha, the total being 298 maunds for each year: he then deducted 37 maunds 5 seers on account of the seed, making the net produce for each year 260 maunds 35 seers: he then valued the produce for each year at Rs. 1-8-0 per maund, which made the value of the produce for each year Rs. 391-2-0; he then added for each year Rs. 93-2-0 as the value of the straw, and then deducted the same sum on account of the expenses of cultivation,

* Second Appeal, No. 1151 of 1878, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 18th June 1878, affirming a decree of Maulvi Muhammad Wajeh-ulla Khan, Subordinate Judge of Mirzapur, dated the 23rd April 1878.

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thus making the total value of the mesne profits for each year, without interest, Rs. 391-2-0. The defendants set up as a defence to the suit, amongst other things, that the land in suit was held by them before the partition as sir-land, and had been so held by them after the partition, and that under the circumstances they were entitled to remain in possession of the land, and the plaintiff could only claim rent from them in respect thereof. The Court of first instance held that under the terms of the agreement for partition any land held as *sir* by the one party was to be surrendered if it fell under the partition to the share of the other party, and gave the plaintiff a decree for the possession of the land claimed. With regard to the mesne profits the Court dismissed the claim observing as follows: "The Court finds that the evidence as to the produce claimed is not satisfactory: the witnesses are not unanimous in their statements, and are not trustworthy, and are also at enmity with the defendants." On appeal by the plaintiff from the decree of the Court of first instance the lower appellate Court observed as follows: "The appellant (plaintiff) claims for profits which he would have made had he not been kept out of the land the subject of suit: the lower Court has found that the evidence as to the produce of the land is not satisfactory, and this Court must agree with the lower Court: appellant has assumed the produce of 37 bighas 5 biswas to be eight maunds per bigha, and the value of the *bhusa* to be Rs. 90, and after deducting one maund per bigha for cost of seed, Rs. 93 for costs of cultivation, claims the balance: this account is most unsatisfactory: the Court cannot accept that wheat and barley only were sown, nor can it accept an account which makes the outturn the same of each field; on an area of 37 bighas the crops sown **[653]** would vary according to the crop and the soil, and the value of the crop according to its amount and kind: the appellant urges that if he is not to obtain a decree for the profits under his estimate he is at all events entitled to the rent recorded against the land: the Court finds that this has been deposited in the Collector's treasury, and remains but to be claimed and taken by appellant: the Court is far from thinking that the rent deposited is a fair equivalent for the use of the land, but it rested with appellant to show what was a fair profit to have been derived from the land, and the Court cannot accept the appellant's account as a fair one, he having failed to show that it is such." The defendants also appealed from the decree of the Court of first instance, the lower appellate Court dismissing their appeal.

The plaintiff appealed to the High Court contending that the lower appellate Court should have determined what was a proper amount to allow as mesne profits, and have given him a decree for that amount. The respondents objected that they had acquired a right of occupancy in the land in suit and could not be dispossessed.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

The Senior Government Pleader (Lala *Juala Prasad*) and Lala *Lalta Prasad*, for the respondents.

The High Court (STUART, C. J., and SPANKIE, J.) remanded the case to the lower appellate Court for the trial of the issue stated in the following

ORDER OF REMAND.

Appellant appears to have claimed a larger share of profits than he was entitled to, or at least to have asked for the same out-turn from each field, which the Judge rightly regards as an unsatisfactory account of the

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profits. The defendants furnished no accounts. Mesne profits (*Explanation*, s. 211 of Act X of 1877) mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom. Applying this rule to the particular circumstances of the case in which both parties are shareholders in estate, and defendants themselves occupied and cultivated the lands in suit, the most reasonable and fitting mode of assessing the amount to which the plaintiff is en-[654]titled would be to ascertain and determine what would be a fair rent for the land, if it had been let to an ordinary tenant and had not been cultivated by the respondents themselves. The rent recorded in the rent-roll is probably that paid by *sir*-lands, and if so the plaintiff seems to be entitled to the rent which the respondents could have obtained from a tenant, if they had not kept the lands in their own hands. We remand the case to the Judge to enable him to ascertain and determine what the rent should be. On receipt of his finding one week might be allowed for objections, and at the end thereof the appeal as regards appellant will be disposed of.

With regard to the objections put in by the respondents, they cannot be admitted. These objections are in fact an appeal from the decree passed against respondents in this case, on the appeal brought by themselves against the original decree of the first Court. Under s. 561 of Act X of 1877 a respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal. But in the case now before us the appellant lost his appeal, and there was no objection which respondents could have taken by way of appeal to this Court against the decree of the lower appellate Court. They might have appealed from the decree on their own separate case of appeal, but in the particular case before us the decree of the lower appellate Court was one dismissing the appeal of the present appellant. We may add that if the objections by way of appeal in their own case could be received, they would fail as they impugn the finding of the Court in that case on a matter of fact, and there are no legal grounds for a second appeal.

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2 A. 654 (F.B.) = 5 Ind. Jur. 264.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

REFERENCE BY BOARD OF REVENUE, N.W.P., UNDER ACT I OF 1879.
[31st January, 1880.]

Stamp—Bond—Agreement—Act I of 1879 *(Stamp Act), ss.* 3, *cl.* (4), 7, *and sch. i, No.* 5 (*c*).

One of the clauses of an instrument by which one party to the instrument bound himself in the event of a breach on his part of any of the conditions of [655] the instrument, to pay the other party thereto a penalty of Rs. 5,000, being regarded as a "bond," within the meaning of Act I of 1879, such instrument if that clause were not so regarded, being an agreement chargeable under that Act with a stamp-duty of eight annas, *held* (STUART, C.J. *dissenting*) that the instrument was chargeable, under s. 7 of that Act, with the stamp-duty leviable on a bond for Rs. 5,000.

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Per STUART, C.J.—That for the purposes of that Act the penal clause in the instrument should not be regarded separately, as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument was only chargeable with a stamp-duty of eight annas.

[**Diss.**, 8 C. 284 (286); **Doubted**, 9 A. 585 (589) (**F.B.**).]

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, as to the amount of stamp-duty chargeable upon an instrument, the terms of which, so far as they are material, were as follows: " Articles of agreement made this———day of———in the year of our Lord one thousand eight hundred and seventy-nine, between the Collector of Allahabad on behalf of Government of the one part, and Nilcomal Mittra and Charu Chandra Mittra, both of Allahabad, carrying on business under the name and firm of Nilcomal Mittra and Son, and so herein-after designated, of the other part. Whereas the aforesaid Nilcomal Mittra and Son hereto of the second part, being desirous of obtaining for themselves the monopoly of the right of manufacture and vend of rum and native or country spirits in and for the city and cantonments of Allahabad, and for the manufacture and sale of country spirits according to the farming system in pargana Chail and the Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all of the Allahabad District, for the period of three years certain, commencing from the first day of October, 1879, have applied to the Collector aforesaid for the same, and whereas the said Collector of Allahabad has been authorised by and with the sanction of the Board of Revenue for the North-Western Provinces to grant the same: It is hereby agreed between the said parties hereto as follows:—

" (i) That in consideration of the payment of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and Rs. 1,200 per annum for license fees on rum, and Rs. 3,000 per annum on account of license fees on native spirits, for the city and cantonments of Allahabad, agreed to be paid by the said Nilcomal Mittra and Son unto the Collector of Allahabad aforesaid in the manner hereinafter specified, the said Nilcomal Mittra and Son shall have the [656] exclusive right of manufacturing rum, *i.e.*, spirits manufactured according to the English method, and shall have the exclusive right of sale of the rum so manufactured by them and of country spirits manufactured by them after the native method in and for the city and cantonments of Allahabad, the abkari jurisdiction of which extends to a radius of four miles round the official cantonment limits. It is also understood that no shops other than those of the said Nilcomal Mittra and Son for sale of country spirits shall exist or be opened, and that no country spirits other than their manufacture shall be permitted to be imported for sale or use within the said area. Also in consideration of Rs. 15,000 agreed to be paid annually in the manner hereinafter specified by the said Nilcoma Mittra and Son to the said Collector of Allahabad on account of the farm of pargana Chail, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said pargana Chail. Also in consideration of Rs. 15,740 agreed to be paid annually in the manner hereinafter to be specified by the said Nilcomal Mittra and Son to the said Collector of Allahabad on account of the farm of the aforesaid Trans-Jumna parganas, the said Nilcomal Mittra and Son shall have the exclusive right of manufacturing and selling country spirits after the farming system in the said Trans-Jumna parganas, *viz.*, Khairagarh, Bara, and Arail, all such farms or monopolies to extend and

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subsist for a period of three years certain, commencing from the first day of October, 1879. (ii) That the said Nilcomal Mittra and Son of the second part shall not open or cause to be opened any shops for the purposes of the above farms other than those now open and existing, without the previous consent of the said Collector of Allahabad of the first part in writing had and obtained. (iii) That as yearly license fees for the sale of rum and country spirits within the abkari limits of the city and cantonments of Allahabad, as above described, the aforesaid Nilcomal Mittra and Son of the second part shall pay or cause to be paid unto the Collector of Allahabad the sum of Rs. 1,200 and Rs. 3,000, respectively, in all Rs. 4,200. (iv) That besides the aforesaid license fees of Rs. 1,200 and Rs. 3,000 the said Nilcomal Mittra and Son shall pay to the Collector of Allahabad aforesaid a still-head duty on all the rum and country spirits issued to them from the distillery at **[657]** Karailabagh at the rate of Rs. 4 per imperial gallon of rum, and Re. 1 per imperial gallon of country spirits. Provided always that for every year during the aforesaid three years no less quantity than 5,000 gallons of rum shall be drawn out by the said Nilcomal Mittra and Son, so as to yield to Government a minimum sum of Rs. 20,000 per annum on account of still-head duty on rum; and it is hereby distinctly understood by and between the parties to these presents that for no cause, such as bad seasons, dearness of material, labour, or provisions, shall the aforesaid Nilcomal Mittra and Son be excused from paying to the said Collector of Allahabad the said minimum sum of Rs. 20,000 per annum as still-head duty on rum. (v) That besides the license fees and still-head duty aforesaid the said Nilcomal Mittra and Son shall pay to the said Collector of Allahabad, during the said period of three years, the sum of Rs. 1,250 for each month, before the 15th day of the month, on account of the farm of Chail, and Rs. 1,311-10-8 for each month, before the 15th day of the month, for the farm of the Trans-Jumna parganas aforesaid, for the exclusive right of manufacture and vend of country spirits after the farming system in the aforesaid parganas Chail, Khairagarh, Bara, and Arail in the district of Allahabad aforesaid. (vi) That in the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000."

The opinion of the Board as regards the stamp-duty chargeable on this instrument was as follows:

"The Board considers that the instrument, although it is in the form of a lease is not a 'lease' as defined in s. 3, cl. (12), of the Stamp Act. It cannot be said to lease immoveable property; nor is it an agricultural lease known as a 'patta,' nor is it a lease of 'tolls.'

"The definition of a 'bond' as given in s. 3, cl. (4) (*a*), of the Stamp Act appears to cover the main provisions of the document. A bond is defined to be 'any instrument whereby a person obliges himself to pay money to another, on condition that the obligation **[658]** shall be void if a specified act is performed, or is not performed, as the case may be.' By the instrument in question the excise contractor binds himself to pay certain sums annually to the Collector of Allahabad on condition that the obligation shall be void if a specified act be not performed, *viz.*, if the Collector do not make over to him the monopoly of the right of vend of spirituous liquors within certain parts of the Allahabad district. The Board, however, are inclined to think that the concluding words of the

definition refer to the obligor of a bond and not to the obligee, and that it is the obligor not the obligee on whom the performance or the non-performance of the 'specified act' is incumbent. If the definition be limited to this construction, it is impossible to class the instrument in question as a 'bond' with reference to its principal provision.

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"There is little doubt, however, that the penal clause in the instrument whereby the contractor binds himself to pay a penalty of Rs. 5,000 on failure to comply with the conditions of the contract is a bond for Rs. 5,000. But the Board believe that such penal clauses have been held to be auxiliary to the main provisions of the contract, and, therefore, do not relate to a 'distinct matter' in the meaning of s. 7 of the Stamp Act. If this view be correct and the instrument be held by the Court to be also a 'bond' in respect to its principal clauses, the duty will be calculated on the amount secured by the latter, and no additional duty will be leviable on account of the subsidiary bond of the penal clause. As the contractor binds himself to pay Rs. 54,940 per annum for three years, the duty will be calculated on a bond for Rs. 1,64,820, and will amount under sch. i, No. 13, of the Act, to Rs. 825.

"If, however, the main clauses of the instrument do not constitute it a 'bond,' it might possibly be held to be a 'conveyance,' as defined by s. 3, cl. (9), being an instrument by which the right of vend is transferred on sale to the excise contractor. Otherwise it must be classed as an 'agreement not otherwise provided for by the Stamp Act' (sch. i, No. 5 (*c*)), and as such is only liable to a duty of eight annas. In this case, however, the duty on the bond in the penal clause would exceed the duty chargeable on the instrument in respect to the principal matter treated of, and under s. 7 the higher duty of the two is leviable."

[659] The Board was not represented.

JUDGMENTS.

The following judgments were delivered by the High Court:

STUART, C. J.—The result of the very anxious consideration I have given to this reference is a conclusion altogether different from that arrived at by my colleagues and by the Board of Revenue. A very careful examination of the Stamp Act I of 1879 has satisfied me that there is nothing in its provisions or its schedules that applies to the penalty of Rs. 5,000 agreed to be paid in the event or events therein expressed, and the legal character of that penalty must be determined solely on legal principle. I agree with the Board that the document is not a lease as defined by the Stamp Act, but a mere agreement or memorandum of an agreement, the proper stamp-duty on which is eight annas, and the several clauses and articles which constitute this agreement constitute the primary obligation undertaken by the parties, the Rs. 5,000 being a mere penalty contingent on the non-performance cannot be anticipated or presumed. On the contrary the presumption, according to all recognised legal principle, is that the contract or agreement will be performed, and that the circumstances under which this penalty may be sought to be enforced will never arise. That I say is the legal presumption applicable to this part of the case, the right to recover the penalty may or may not happen and which we are not to assume will happen. That being so, this penalty of Rs. 5,000 does not come into consideration at present as matter for stamp duty. Should the contingency provided against by this penalty occur, it will then be in the power of the Collector to recover it in a proper suit under an appropriate Court-fee. But at present we have, in my

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opinion, nothing to do with the penalty, what we have to do with is the true character of the instrument with which, in the manner and to the effect I have pointed out, it is incorporated.

A careful examination of the instrument, which I say is an agreement chargeable with a duty of eight annas, ought I think to lead to this conclusion. It recites that Nilcomal Mittra and Son, being desirous of obtaining from the Government the monopoly of the right of manufacture and sale of English and native spirits for [660] the period of three years certain commencing from the 1st day of October, 1879, had applied to the Collector for the privilege, and that the Collector, by and with the sanction of the Board of Revenue, had agreed to grant the monopoly asked for, and in consideration of which monopoly payment shall be made of Rs. 20,000 per annum as still-head duty for 5,000 gallons of rum, and other large payments including payments for license fees are stipulated for; and then comes, as art. 6 of the instrument, the condition respecting the penalty, and which is in these terms:—"In the event of any breach on the part of the said Nilcomal Mittra and Son in the observation or performance of any of the conditions hereof, the aforesaid Nilcomal Mittra and Son hereby bind themselves to pay the said Collector of Allahabad a penalty of Rs. 5,000." There can be no doubt about this penalty, being a *bona fide* condition of the agreement on the contingency which it contemplates happening, but that it was *that* and nothing more is to my mind very evident, for the clauses that follow include this penalty as among the considerations moving the parties.

Both the Board and my colleagues describe the covenant for a penalty of Rs. 5,000 as a "bond" for that amount within the meaning of the term as given in s. 3, cl. (4), of the Stamp Act for 1879. That section provides that "unless there is something repugnant in the subject or context 'Bond' means any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be." But this definition only applies inversely to the case before us in which, besides, there is no condition of nullity or voidance, the penalty being applied, without discrimination or specification, to the entire contract and the whole of its provisions, and which are exclusively of a pecuniary character, and the violation of which could be adequately measured in damages. It is also to be observed that the penalty in an English bond can never be enforced excepting for the purpose of covering interest and costs. In the case of the penalty now under consideration, it was probably intended to be enforced, and is no doubt capable of being enforced, to cover damages as well as interest and costs, but in either case the penalty [661] is not such a unit or entity as that to which a precise stamp duty can *a priori* be applied.

From these considerations it results that the adoption of the penalty as the measure of the stamp-duty on this agreement would involve the injustice of applying it indiscriminately and without regard to the nature and extent of the breach. On this subject I find it laid down in Broom's Commentaries on the Common Law of England (1864), p. 618:—"Where, however, parties agree that a specific sum shall be payable by way of *penalty* for breach of contract, our Courts will apply equitable principles in the assessment of damages, not indeed allowing them to exceed the sum thus stipulated, but requiring evidence to be given for the purpose of fixing their precise amount, and enabling the jury to award it accordingly." And as an illustration of the law so laid down the learned author refers to

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the case of *Kemble* v. *Farren* (1) which appears to be a much stronger case in favour of the principle that I would apply than the present. It was an action of assumpsit for the breach of an engagement by the defendant to perform as an actor at the plaintiff's theatre during several consecutive seasons. "This agreement," continues Mr. Broom, "contained various clauses and stipulations between the parties, *inter alia*, that the defendant should perform, and the plaintiff should pay him so much on every night that the theatre should be open for theatrical performances during the time in question, and that, if either of the parties should neglect or refuse to fulfil the said agreement or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1,000, which sum was declared to be *liquidated and ascertained damages*, and *not a penalty* or in the nature thereof. Notwithstanding, however, this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded *as a penalty merely*, and not as liquidated damages, for they observed that, if an agreement contains clauses, some sounding in uncertain damages and others relating to certain pecuniary payments, as happened in the case *sub judice*, and the action is brought for the breach of a clause of an [662] uncertain nature, *it would be absurd to construe the sum specified in the agreement as liquidated damages: because, if so, a very large sum might become immediately payable in consequence of the non-payment of a very small one*, such case being precisely that in which Courts of Equity have always relieved and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of contract." The fairness of the rule so expounded is obvious, and in the present case would, if applied, prevent the injustice of the full penalty being enforced without reference to the nature and extent of the breach of contract. In the case before us the breaches might involve the violation of the whole contract, in which case the full penalty of Rs. 5,000 would be enforceable. In the present case the penalty is to be paid " in the event of *any* breach on the part of the said Nilcomal Mittra in the observation or performance of any of the conditions hereof." But the actual breach might be something comparatively small, and it would therefore be unjust to exact the whole penalty and not such a portion of it as in such a case might be applied.

But this is a state of things which cannot be anticipated at the commencement of a contract, and can therefore afford no measure for a present calculation of stamp-duty.

For these reasons it appears to me impossible to regard this penalty as a bond within the meaning of that term as defined by the Stamp Act I of 1879, but that it ought to be looked at simply as one of several clauses of the entire agreement, and which, should it ever come to be enforced on the equitable principle I have explained, would involve the levying of a Court-fee according to the amount claimed in a suit to be brought for that purpose.

This is my answer to the reference by the Board of Revenue, and I regret it should be given in disagreement with the opinion of my colleagues.

OLDFIELD, J.—As I understand the terms of this instrument it is an instrument by the first five clauses of which it is agreed [663] between

(1) 6 Bing. 141.

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the parties to it, namely, Nilcomal Mittra and Son on the one side, and the Collector of Allahabad on the other side, that in consideration of Nilcomal Mittra and Son making certain annual payments to the Collector he shall receive from the Collector the exclusive right of manufacture and sale of certain spirits within certain territorial limits for a period of three years, and conditions are specified in respect of shops to be opened for the sale of the spirits and of the instalments by which the payments are to be made: and by the sixth clause Nilcomal Mittra and Son bind themselves in the event of any breach on their part in observation or performance of any part of the conditions of the instrument, to pay to the Collector a penalty of Rs. 5,000: and by the eighth clause the Collector covenants, in consideration of the above conditions being duly observed by Nilcomal Mittra and Son, not to take away or withhold the exclusive license to manufacture or sell spirits for three years, or to do anything whereby the performance of the conditions of the agreement by Nilcomal Mittra and Son shall become practically impossible. No part of this instrument except clause six comes within the meaning of a bond as defined in the Stamp Act. I look on the main clauses as only evidence of a contract between contracting parties in respect of the lease or sale of a right of manufacture and vend of spirits, and so far the instrument is subject to stamp-duty as an agreement under sch. I, No. 5 (*c*). I agree with the Board that the words in the definition of bond in the Act "on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be," refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent. Clause six, however, meets the requirements of the definition of "bond," the obligors therein binding themselves to pay a penalty of Rs. 5,000 on failure by them to comply with the conditions of the contract, and the instrument will be subject to duty accordingly under the provisions of s. 7 of the Act.

PEARSON, J.—I am of the same opinion.

SPANKIE, J.—I also agree.

STRAIGHT, J.—I am of the same opinion.

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2 A. 664 (F.B.).

[664] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Oldfield.

REFERENCE BY BOARD OF REVENUE, N.W.P. UNDER ACT I OF 1879. [19th May, 1880.]

Instrument of partition—Stamp—Act I of 1879 (*Stamp Act*), *ss.* 3, *cl.* (11), 29, *and sch.* I, *No.* 37.

Held that the words "the final order" used in the definition of an "instrument of partition" in Act I of 1879 mean, not the order authorising a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land Also that the stamp-duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that for the purposes of that Act the value of the property is to be computed with reference to its market-value and not with reference to the Court Fees Act, 1870.

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FULL BENCH.

2 A. 664 (F.B.).

THIS was a reference by the Board of Revenue, North-Western Provinces, under s. 46 of Act I of 1879, the nature of which will appear from the opinion of the Board, which was in the following terms :—

"The new Stamp Act requires that partitions effected by the Revenue Courts shall be liable to stamp duty, and cl. (11) of s. 3, defines an 'instrument of partition' as 'the final order for effecting a partition passed by any Revenue Authority.' The question has been raised whether this 'final order' is the order passed by Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land. The Board think that the latter is unquestionably 'the final order' referred to. The import of this order is defined in the 21st rule of the Board's rules for partitions (Circular No. $\frac{8}{11\text{-}34}$, dated the 13th November, 1875, page 63, Part II of Board's Circulars (1).

"The question is also raised as to the extent of the property specified in the instrument of partition. Sch. i, No. 37, directs that the duty on an instrument of partition shall be 'the same duty as a bond for the amount of the value of the property divided as set forth in such instrument.' The instrument of partition sets forth that out of such property previously undivided a certain portion is assigned to *A* the applicant for partition. Is the entire property to be valued for the purpose of the Stamp Act, or merely the portion assigned to the applicant for partition? The Board [665] think that the stamp-duty should be computed on the whole of the undivided property which the parties seek to divide, and which is mentioned for this purpose in the partition instrument.

"There remains the further point as to how the *value* of the property is to be computed, as it has been thought that the method of valuation laid down by cl. v, of s. 7 of the Court Fees Act for the case of land should be followed. The Board consider that the provisions of the Court Fees Act cannot apply to valuations of stamp-duty under the General Stamp Act. The value of property for the purposes of the latter Act is the market-value, *i.e.*, what the property would fetch if sold, and this must be ascertained by the Court issuing the final orders in the partition proceeding."

The Board was not represented.

JUDGMENTS.

The following judgments were delivered by the High Court :

STUART, C. J.—I concur in the view taken by the Board of Revenue on all the questions submitted to us by this reference. I would point out, however, that it is scarcely correct to describe an instrument of partition as "the final order for effecting a partition passed by any Revenue Authority." By s. 3, cl. (11), an instrument of partition is defined to be "any instrument whereby co-owners of any property divide or agree to divide such property severally, and *includes also* a final order for effecting a partition passed by any Revenue Authority." So that there must be in the first place the recorded act of partition or division by the co-owners or their agreement or contract to make it, and the "final order" which follows is simply the *fiat* of the Revenue Authority sanctioning the partition by means of which the partition becomes a completed act, and there can of course be no effectual partition until this is done. And such must also be taken to be the meaning of s. 131 of the Revenue Act XIX of 1873, which

(1) 2 A. 668.

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provides that "every partition shall either be made by the Collector of the District, or, if made by an Assistant Collector, be reported to the Collector of the District for his sanction and confirmation," a provision which, if taken by itself, without reference or relation to any other enactment, would seem to signify that partition of property rested exclu-[666] sively on the independent action of the Collector without any necessary regard to the views or purposes of the co-owners.

As to the question submitted to us in the third paragraph of the Board's letter, I am clear that the Board is right in suggesting that the stamp-duty should be computed on the *whole* of the undivided property which the parties seek to divide, and in my opinion no matter how far or within what limits that division may be carried out. Our attention was directed to s. 29 of the new Stamp Act, which provides that the stamp-duty on an instrument of partition shall be payable "by the parties thereto in proportion to their respective shares in the property comprised therein," and it was argued that the portion of property divided off to the particular co-sharer or co-sharers who apply for partition should only be chargeable with stamp-duty corresponding in value to the particular share or shares partitioned. But this view of s. 29 appears to me to be based upon too narrow a construction of its terms. That section does not say that the stamp-duty shall only be payable on the share or shares partitioned off, but on the contrary declares that the expense of providing the proper stamp shall be borne by the parties thereto in proportion to their respective shares in the property comprised in the instrument of partition. By the expression "the parties thereto" must be understood not merely the party or parties applying for partition, but the whole co-sharers who must necessarily be parties in the partition proceedings and equally bear the proper stamp-duty. For the effect of the partition proceedings is that the property thereby loses its identity as a previously undivided mahal, and there is nothing unreasonable in making any instrument of partition, it matters not how limited the division may be, chargeable with stamp-duty pertaining to the value of the whole.

In further support of this view the stamp-duty chargeable on an instrument of partition as given in No. 37, sch. i of the new Stamp Act was referred to. The duty is there declared to be "the same duty as a bond (No. 13) for the amount of the value of the *property divided* as set forth in such instrument." Here the words "the value of the property divided" must as I have shewn mean [667] the value of the entire property affected by the partition proceedings. And on turning to No. 13 of the same schedule the stamp duty of two annas and upwards according to the value is distinctly set out.

In regard to the last question referred to us, I am clearly of opinion in concurrence with the Board that the value of the property to be computed is the market-value, and that the Court Fees Act has no application to such a question.

PEARSON, J.—The first question proposed for our consideration is whether the order passed by a Revenue Court authorising a partition to proceed, or the order passed after the partition has been made declaring the various allotments of land, is the final order for effecting a partition spoken of in cl. (11), s. 3, Act I of 1879. An order authorising a partition to proceed is in some sense an order for effecting a partition, but the order which declares the various allotments of the land is in my opinion the final order which effects the partition.

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The next question is the extent of the property specified in the instrument of partition. That instrument sets forth that of such and such property previously undivided a certain portion is assigned to *A* the applicant for partition. We are asked whether the entire property is to be valued for the purposes of the Stamp Act or merely the portion assigned to the applicant for partition. In my opinion the entire property has been the subject-matter of partition, and the stamp-duty required by No. 37, sch. i, Act I of 1879, should be calculated upon its value and not merely on the value of the portion assigned to the applicant for partition. The portion assigned to the applicant could only be separated and allotted to him in severalty by a process which dealt with the entire property and separated and allotted the remainder of it to another party. The opinion now expressed appears to be supported by the terms of cl. (*e*), s. 29 of the Act, which provide that the stamp-duty shall be payable in the case of an instrument of partition, not by the applicant for partition, but by the parties thereto,—and the other co-sharers in the entire undivided property must be parties to the partition of it equally with the applicant for partition—in [668] proportion to their respective shares in the property comprised therein, and it cannot be denied that the partition comprises the entire undivided property.

The last question is how the value of the property is to be computed, whether in reference to its actual value in the market, or the rules laid down in the Court-Fees Act for determining the fee payable on plaints and appeals. The Court Fees Act has no relevance to the present matter, and in my opinion the market value to the property, the subject-matter of partition, should furnish the basis for calculating the stamp-duty required by No. 37, sch. i, Act I of 1879.

Thus on the questions referred by the Board of Revenue, I have arrived at the same conclusion as the Board has formed.

SPANKIE, J.—Looking at the first question, the "final order for effecting a partition passed by any Revenue Authority" appears to be that which would be made under s. 131, Act XIX of 1873. I find no place in the Act for the agreement referred to in the 21st paragraph (1) of the Board's Circular. The notification published by the Collector under s. 131 of the Act would probably contain all the particulars referred in the Board's letter.

As to the second question, looking at the definition of "instrument of partition" in cl. (11), s. 3 of Act I of 1879, it would seem that it is "any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also the final order for effecting a partition by any Revenue Authority." By s. 29 of the Act, in the absence of an agreement to the contrary, in the case of an instrument of partition, the expense of providing the proper stamp is to be borne by the parties thereto in proportion to their respective shares in the property comprised therein, or when the partition is made in execution of an order passed by the Revenue Authority in such proportion as such Authority directs. The property comprised in the instrument of partition [669] has to be valued, and the parties thereto contribute towards the expense of the stamp in proportion to their shares in the property. If a stamp of

(1) Rule 21.—"If all agree to the proposals or to such amended proposals as the Collector may think fit to make, their agreement shall be recorded and attested by the Collector. If any objections are raised, the Collector shall hear them and record an order overruling them, or amending the proposals to meet them as he thinks fit."

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one hundred rupees was required, and the property was worth ten thousand rupees, and five share-holders, being co-owners, *provided or agreed* to divide in severalty, the proportionate value of their shares would be two thousand rupees each, and each one would pay the duty on two thousand rupees, unless there was an agreement to the contrary, or where a Revenue Authority had directed otherwise in a partition made under his orders. The last part of cl. (*e*), s. 29 of the Act, gives the revenue officer full authority in the matter and the "final order" is the instrument of partition.

As to the third question the value is doubtless the market value.

OLDFIELD, J.—I agree with the Board of Revenue that the order which declares the various allotments of the land requires the stamp. The stamp should be paid on the value of the whole property which by the instrument of partition the co-owners are dividing or agreeing to divide so far as I understand this is the view taken by the Board.

I also agree with the Board that the stamp should be computed on the market-value of the property.

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2 A. 669=5 Ind. Jur. 268.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

FARZAND ALI (*Defendant*) *v.* YUSUF ALI AND OTHERS (*Plaintiffs*).*
[5th February, 1880.]

Plaint, amendment of—Remand by appellate Court—Act X of 1877, *Civil Procedure Code*, *ss.* 53, 562.

By the amendment of the plaint, a suit for the restoration of a pond, which it was alleged the defendants were wrongfully filling up, to its original condition, was altered into one for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water, by way of easement. *Held* that the alteration in the plaint was a material one.

[670] *Held* also that an appellate Court is not empowered by Act X of 1877 to order or allow a plaint to be amended, or to remand a case under s 562 of that Act, for the purpose of such amendment.

[Diss., 6 M. 239 (244); R., 19 B. 303; A.W.N. (1881), 121; U.B.R. Civil (1897—1901), 231.]

THE facts of this case appear sufficiently for the purposes of this report in the judgment of the High Court.

Pundit *Nand Lal* and Shah *Asad Ali*, for the appellant.

Pundit *Bishambhar Nath*, for the respondents.

JUDGMENT.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—We regret to be obliged to interfere in a case which appears to have been unduly protracted by irregular procedure, but we cannot refuse to admit the validity in the main of the grounds of appeal.

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* First Appeal, No. 125 of 1879, from an order of H. G. Keene, Esq., Judge of Meerut, dated the 7th August, 1879, reversing a decree of Maulvi Azmat Ali Khan, Munsif of Bulandshahr, dated the 5th June, 1879.

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The case after being originally tried by the Munsif appears to have been remanded to him by the Officiating Judge in appeal in contravention of the terms of s. 564, Act X of 1877. The second decision of the Court of first instance was again the subject of an appeal which terminated in a second order of remand in contravention of the section aforesaid. The Munsif's third decision was also appealed; and the Judge in disposing of the third appeal has once more remanded the case for retrial in contravention of the same section, with a direction to cause the plaint to be amended. The present appeal is the seventh stage which the proceedings have reached.

The claim as brought was for the restoration of a pond, which it was alleged that the defendants were wrongfully filling up, to its original condition. By the proposed amendment, if we rightly understand, the claim will be for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water by way of easement. The alteration is certainly a material one.

We observe that s. 53 of Act X of 1877 provides for the amendment of a plaint at or before the hearing of a suit in the Court of first instance at the discretion of that Court, but we do [671] not find any provision in the law empowering an appellate Court to order or allow a plaint to be amended, or to remand a case under s. 562, for the purpose of such amendment. That section contemplates a case in which the decree of the first Court upon a preliminary point has been reversed in appeal. In the present case it does not appear that the decree of the Court of first instance proceeded upon a preliminary point and has in respect thereof been reversed.

We have therefore no alternative but to set aside the lower Court's order of remand and to direct it to dispose of the appeal afresh in reference to the claim as brought. The costs of this appeal will be costs in the cause.

Cause remanded.

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2 A. 671.

CIVIL JURISDICTION.

Before Mr. Justice Spankie and Mr. Justice Straight.

BADR-UN-NISA (*Plaintiff*) *v.* MUHAMMAD JAN AND ANOTHER (*Defendants*).* [27th February, 1880.]

Small Cause Court Suit—Implied contract—Mistake—Damages—Act XI of 1865, *s.* 6—*Act IX of* 1872 (*Contract Act*), s. 72—*Act X of* 1877 (*Civil Procedure Code*), ss. 50, 53—*Plaint, amendment of.*

A suit under s. 72 of the Indian Contract Act to recover from a creditor the amount of an over-payment made to him by mistake is a suit for damages, within the meaning of Act XI of 1865, s. 6, and is accordingly cognizable by a Mufassal Court of Small Causes.

Semble that, where at the first hearing of a suit the plaint is returned for amendment within a fixed time under the provisions of s. 53 of Act X of 1877, and it is amended accordingly, it cannot afterwards be again returned for amendment.

THIS was a reference to the High Court by Mr. G. E. Knox, Judge of the Court of Small Causes at Allahabad.

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The facts out of which the reference arose were as follows: On the 11th September, 1876, Badr-un-nisa, the plaintiff, executed a bond in favour of the defendant Muhammad Jan promising to pay him Rs. 200 with interest at two per cent per mensem within three years. On the 3rd October, 1879, she instituted the present [672] suit in the Court of Small Causes at Allahabad against the defendant Muhammad Jan and the defendant Abdul Ghani, stating in her plaint as follows:—"(i) That she had paid the defendant Muhammad Jan, on the 20th June, 1878, at Allahabad, at his request, Rs. 299 on account of the bond dated the 11th September 1876: (ii) that the sum due on account of the said bond was only Rs. 292-9-0: (iii) that the defendant Muhammad Jan had taken Rs. 6-7-0 more than was due from her: and (iv) that on the 1st April, 1877, she paid to the defendant Abdul Ghani Rs. 9 on account of the said bond as directed by the defendant Muhammad Jan, and for which he did not allow any deduction." She sought in consequence that "(i) Rs. 6-7-0 which the defendant Muhammad Jan had received in excess on the 20th June, 1878, together with interest at two per cent. per mensem from the 21st June, 1878, to the 1st October, 1879, might be awarded to her: (ii) that Rs. 9 paid to the defendant Abdul Ghani at the request of the defendant Muhammad Jan together with Rs. 3-3 0, interest from the first April, 1877, to 1st October, 1879, might be awarded to her: (iii) that Rs. 20-8-0, principal and interest might be awarded in all." The plaint having been returned to her for amendment in respect of the relief sought, the plaintiff amended it by asking that a decree might be passed in her favour for Rs. 15-7-0, principal, and Rs. 5-1-0, interest at twenty-four per cent. per annum, in all Rs. 20-8-0.

The Judge of the Small Cause Court, in referring the case observed as follows:—"She (plaintiff) now sues for the refund of Rs. 15-7-0 excess paid by mistake and Rs. 5 interest upon that excess: and has framed her plaint as a plaint for money due upon a contract: I held that there is no contract whatever in the case, that the relation of the parties (plaintiff and defendant No. 1) is that of one having paid money to the other through mistake. Such a relation subsists, as pointed out by Sir Barnes Peacock in the Full Bench ruling in *Rambux Chittangeo* v. *Modhoosoodun Paul Chowdhry* (1), upon a *quasi* contract; and a *quasi* contract is no contract at all. The Indian Contract Act provides for these cases in s. 70, and by so doing seems to suggest that it recognises to the full the principle that they do not arise from any [673] contract (see the heading of chapter V within which s. 70 falls). I further held that the words which grant jurisdiction to this Court, 'money due on bond or other contract.' cannot be enlarged to include money due on relations resembling those created by contract.

"The pleader for the plaintiff urges on the other hand that the obligation in this case rests upon an implied contract and that the claim is therefore cognizable.

"At the same time he contends that, if overruled in this point, he may be allowed to amend his plaint into one for damages or compensation, in which case, following the ruling of the Hon'ble Court in *Agra Savings Bank* v. *Sri Ram Mitter* (2), his suit would be cognizable by this Court.

"Defendant, however, objects that such amendment would alter the plaint into one of another and inconsistent character, and it seems to me his contention is right.

(1) 7 W.R. 377.

(2) 1 A. 388.

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"In the original plaint he would be suing upon a contract, in the amended plaint upon the breach of a contract. The distinction between a contract and breach of a contract as causes of action seems to me to fall under the words 'another and inconsistent.'

"On this point I am, however, doubtful, and I have therefore determined upon referring both points for decision."

The questions referred by the Judge for the decision of the High Court were as follows: "(1) Are cases falling under s. 70, Act IX of 1872, cognizable by a Court of Small Causes? (ii) Can a plaintiff amend a plaint for money due upon an implied contract into a plaint for damages arising out of breach of an implied contract?"

The parties did not appear.

JUDGMENT.

The judgment of the High Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This is a reference under s. 617 of Act X of 1877 by the Judge of the Small Cause Court, Allahabad, in respect of certain questions of law that have arisen in a case before [674] him, in which one Badr-un-nisa is the plaintiff and Muhammad Jan and Abdul Ghani are the defendants. It appears that the plaintiff was the obligor of a bond for Rs. 200 of which defendant No. 1 was the obligee. On the 1st April 1877, at the request of defendant No. 1, she paid to defendant No. 2 the sum of Rs. 9, on the understanding that it was to be credited to her in the amount due from her on the bond. On the 20th June 1878, the plaintiff, upon his demand, paid to defendant No. 1, Rs. 299 in satisfaction of her debt to him. It now appears that she has paid over and above what was actually due from her, Rs. 15-7-0 and it is this amount she seeks to recover.

The questions properly arising on the Judge's reference appear to be,—(i) Does the plaintiff's claim fall within the terms of s. 72 of the Contract Act? (ii) If it does, can the plaint as filed be altered from its present shape to meet the case, without contravening the directions of the proviso of s. 53, Act X of 1877? (iii) If not, does the plaint upon its face sufficiently disclose what the suit is for, so as to enable the Judge to treat it as one for damages without doing the defendant injustice or taking him by surprise?

It appears to me that the circumstance of the Rs. 9 having been paid to defendant No. 2 in no way affects the nature of the plaintiff's claim. She ought to have been credited in account with that sum by defendant No. 1, but she was not and, consequently, when she satisfied his demand of Rs. 299 on the 20th June 1878, and paid Rs. 15-7-0 too much, her cause of action arose. The suit falls directly within s. 72 of the Contract Act and, the plaintiff having paid this money by mistake and the defendant having refused to repay it when requested to do so, the plaintiff is entitled to recover it from him.

As to the second point, the plaint as originally framed no doubt treated the plaintiff's claim as based upon a *quasi* contract. According to English precedents, suits for the recovery of money paid by mistake are founded upon the fiction of an implied contract and promise to pay. But the provisions of the Contract Act, chap. V, have superseded this fiction of implied contract and promise, and [675] the repayment of money by a person to whom it has been paid by mistake is by s. 72 declared to be a duty on the part of such person, the refusal to perform which, when

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requested, is proper ground of an action for damages. The suit of the plaintiff in the present case therefore is for damages against defendant No. 1 and defendant No. 2 can in no way be a party. The plaint was originally filed on the 3rd October 1879, and was returned for amendment within twenty-four hours on the 19th October. It was amended within the time limited by the Court and re-filed in its present shape.

I have considerable doubt as to whether it is competent now for further amendment of the plaint to be made, if it be necessary. According to the terms of s. 53, Act X of 1877, it was returned for amendment "at the first hearing," and was amended within the "time fixed by the Court." I am disposed to think that it is now too late for any further alterations in its shape to be made, but as the view I entertain upon the third point obviates the necessity for any amendment, it is unnecessary to express any determinate opinion as to this. It appears to me that the plaint in its present shape, although it may be inartistically framed, indicates sufficiently what the suit is for. It shows clearly on its face that a sum of Rs. 15-7-0 is demanded by the plaintiff of the defendant, and, as the application of the Contract Act determines the cause of action and the precise nature of the relief to be asked under a state of facts such as exists in the present case, I think, without infringing the provisions of ss. 50 and 53 of Act X, the Judge may take cognizance of the plaint as one for damages and dispose of the case under s. 6, Act XI of 1865.

As I have already remarked, defendant No. 2 must be struck off, and he will of course be entitled to his costs.

SPANKIE, J.—I concur.

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2 A. 676 (F.B.).

[676] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

MUL CHAND (*Plaintiff*) *v.* SHIB CHARAN LAL AND OTHERS (*Defendants*).* [3rd May, 1880.]

Act VII of 1870 (*Court Fees Act*), *s.* 17—*Act VIII of* 1859 (*Civil Procedure Code*), *s.* 9—*Act X of* 1877 (*Civil Procedure Code*), *ss.* 44, 45—*Multifarious suit*—"*Distinct Subjects*"—*Plaint*—*Memorandum of Appeal.*

Held that the words "distinct subjects" in s. 17 of the Court Fees Act, 1870, mean distinct and separate causes of action. *Chamaili Rani* v. *Ram Dai* (1), observed on.

The plaintiff sued his brothers and a nephew for his share, according to the Hindu Law of inheritance, and under a will, of the moveable and immoveable property of his deceased uncle, by the cancelment of a deed of gift of the immoveable property in favour of the nephew. *Held per* STUART, C.J., and STRAIGHT, J., that, under s. 17 of the Court Fees' Act, 1870, the plaint and memorandum of appeal in the suit were chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in separate suits for the moveable and immoveable property would have been liable under that Act.

Per OLDFIELD, J.—That Court-fees were leviable on the plaint and memorandum of appeal on the total value of the claim, the suit not being one of the nature to which s. 17 of the Court Fees' Act referred.

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* First Appeal, No. 15 of 1879, from a decree of R. F. Saunders, Esq., Judge of Farukhabad, dated the 11th November 1878.

(1) 1 A. 552.

[F., 2 A. 682; 27 A. 186 (189) = A.W.N. (1904) 210; 5 L.B.R. 94; Cons., 16 A. 401 (405 & 406) = A.W.N. (1894) 124; D., 3 A. 131 (133).]

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2 A. 676 (F.B.).

THIS was a reference to the Full Bench arising out of the following circumstances. The plaintiff in this suit sued his six brothers and Shib Charan Lal, the son of one of his brothers, for the possession of his share, under the Hindu Law of inheritance as well as under a will dated the 12th October 1876, of the separate estate of his deceased uncle. The plaint stated that the property described therein formed the separate estate of Salig Ram; that Salig Ram made a will in favour of the defendant Shib Charan Lal on the 29th September 1874, in which he reserved to himself power to revoke the will in case the defendant Shib Charan Lal disobeyed him or misconducted himself; that subsequently the defendant Shib Charan Lal disobeyed the testator and misconducted himself, upon which the testator, having revoked the will of the 29th September 1874, made a will in favour of the plaintiff and his brothers on the [677] 12th October 1876, in respect of his whole estate, in which he did not reserve to himself any power of revocation, and under which the plaintiff and his brothers were holding possession of a portion of the testator's estate without any opposition on the part of the defendant Shib Charan Lal; that on the death of Salig Ram which occurred on the 30th July 1877, the defendant Shib Charan Lal took possession of the greater part of his estate, under cover of a deed of gift alleged to have been executed in his favour by the deceased on the 13th February 1877; that the said deed of gift was invalid by reason that it had been executed by the donor while he was in an unsound state of mind, that it had not operated, and that the donor was precluded by the will dated the 12th October 1876, from alienating his estate; that the cause of action arose on the 30th July 1877, when Salig Ram died and the defendant Shib Charan Lal obtained possession of his estate; that the plaintiff was entitled to a one-seventh share of Salig Ram's estate according to the Hindu Law of inheritance as well as under the will dated the 12th October 1876; that the defendant Shib Charan Lal had no right whatever in the presence of the plaintiff, according to Hindu Law, nor could the deed of gift be considered valid as against the will in the plaintiff's favour; and that the plaintiff's brothers had been made defendants *pro forma* in the suit, as they did not join in it. The plaintiff claimed the following relief: "The plaintiff therefore prays for possession of the disputed property, valued at Rs. 2,698-11-9½, by voidance of the deed of gift set up by the defendant, and for the value of the moveable property in case it cannot be recovered, and mesne profits to the date of receiving possession from the defendant Shib Charan Lal."

The property of which the plaintiff claimed a one-seventh share consisted of (i) land forming estates and definite shares of estates paying annual revenue, settled, but not permanently, to Government; (ii) gardens and indigo factories; (iii) house-property; (iv) decrees and deeds of mortgage; and (v) moveable property. The deed of gift which it was sought to set aside transferred a portion of this land and the whole of the house-property to the defendant Shib Charan Lal, but did not transfer to him the gardens and indigo factories, or decrees and deeds of mortgage, or the [678] moveable property, or any part of such properties. The plaintiff valued a one-seventh share of the land in suit at one-seventh of five times the revenue payable in respect of the land, or Rs. 1,269-11-0. The one-seventh shares of the other properties he valued at their market-values, or at, respectively, Rs. 96-6-10½, Rs. 300-0-0, Rs. 405-6-10½ and Rs. 627-3-1½. He paid in respect of his plaint an *ad valorem* Court-fee of Rs. 160

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computed on the aggregate of these values, *viz.*, Rs. 2,698-11-9½. On appeal to the High Court from the decree of the Court of first instance dismissing his suit, the plaintiff paid a similar Court-fee in respect of his memorandum of appeal. The taxing officer of the High Court reported that the plaint and memorandum of appeal were insufficiently stamped. The report stated as follows:—"The plaintiff claimed to recover possession of certain immoveable properties, valued at Rs. 1,666-1-10½, as also to recover certain documents and other moveable properties valued at Rs. 1,032-9-11 : total claim laid at Rs. 2,698-11-9½. The Court-fee payable on the two distinct subjects embraced in the suit and the appeal would amount to Rs. 190, *i.e.*, Rs. 110 for the claim relating to the immoveable properties, and Rs. 80 for the claim relating to documents and other moveable properties, but the plaintiff-appellant has paid only Rs. 160 in both the Courts. There is then a deficiency of Rs. 30 in each or Rs. 60 in both the Courts."

The Division Bench (STUART, C. J., and STRAIGHT, J.) before which the appeal came referred the matter to the Full Bench.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the appellant.

Mr. *Conlan* and Pandit *Ajudhia Nath*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

STUART, C.J.—This is a reference to the Full Bench of the Court by Straight, J., and myself respecting a deficiency of Court-fees reported to us by the office. The question was raised in a first appeal (No. 15 of 1879) which came before us as a Division Bench, and the report of the office stated that the plaintiff claimed **[679]** to recover possession of certain immoveable properties valued at Rs. 1,666-1-10½, and also to recover certain documents and other moveable properties valued at Rs. 1,032-9-11, the total claim being laid at Rs. 2,698-11-9½. The report suggested that there were here two distinct subjects embraced in the suit, and that the Court-fees in the appeal should be Rs. 190, *i.e.*, Rs. 110 for the claim relating to immoveable property, and Rs. 80 for the claim relating to documents and other moveables. But the plaintiff-appellant had only paid Rs. 160 in the lower Court and this Court, the deficiency being Rs. 30 in each or Rs. 60 in both Courts.

The question thus raised has been before a Full Bench in the case of *Chamaili Rani* v. *Ram Dai* (1), but as the law did not appear to us so distinctly laid down in the opinions of some of the Judges in that case as was desirable, it appeared to us that it would be satisfactory that the question should be reconsidered by the Court, and we therefore referred the matter to the present Full Bench.

On the general question of the construction to be applied to the case, I am not aware that I can express myself more clearly than I did in my judgment in *Chumaili Rani* v. *Ram Dai* (1). I there stated that the meaning of the words 'distinct subjects' in s. 17 of Act VII of 1870 is shown with sufficient clearness in that section itself, when it states that 'the plaint or memorandum of appeal shall be chargeable with the *aggregate amount* of the fees to which *the plaints or memoranda of appeal in suits embracing separately each of such subjects* would be reliable under the Act.' This I think can only mean that the two or more distinct subjects

(1) 1 A. 552.

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are to be so chargeable as being distinct causes of action. The words '*plaints* or memoranda of appeals in *suits*' in the section show this to my mind conclusively, and it is not enough that the distinct subjects should be merely separate and distinct matters embraced in the claim; and I remain entirely of the same opinion. This s. 17 plainly relates to multifarious suits which are allowable by s. 45 of the Code of Procedure, Act X of 1877, a circumstance which appears to me to supply us at once with the principle by means [680] of which we may solve the difficulty, showing that "distinct subjects" must for the purpose of the Court Fees' Act be distinct and separate claims or causes of action in single and separate suits, but which for the purpose of jurisdiction, or the convenience of the procedure, may be united in one suit. And this is shown still more clearly in s. 17 itself, where "distinct subjects" are described as distinct subjects "in *suits* embracing *separately* each of *such* subjects," in other words, as I understand this section, even if we had not the light thrown upon the point by s. 9 of the old and by s. 45 of the new Code of Procedure, distinct and separate causes of action in distinct and separate suits.

In regard to the present case I am of opinion that the report of the office is right. The plaint clearly claims, first, possession of the disputed property by voidance of the deed of gift, and, secondly, to recover certain moveable property or the price or value thereof. These are plainly two distinct subjects of suit or causes of action, and they must be separately considered with reference to the Court-fees to be charged on each. I would, therefore, make an order in conformity with the report of the office.

STRAIGHT, J.—I entirely agree in the views and conclusions of the Chief Justice.

SPANKIE, J.—If there was any vagueness in the opinion expressed by me, when the subject of this reference was last before the Court, I desire to explain my meaning, and I hope more successfully on the present occasion, as follows. It was admitted at the hearing, and indeed, looking at the marginal note to s. 17 of the Court Fees' Act, it could not be denied, that the section refers to multifarious suits. The wording of s. 17 of the Court Fees' Act, "Where a suit embraces two or more distinct subjects," may be read with s. 45, Act X of 1877, which runs as follows—"Subject to the rules contained in s. 44 the plaintiff may unite in the same suit several causes of action, and any plaintiffs having causes of action against the same defendants may unite such causes of action in the same suit." Such a suit would embrace two or more distinct subjects. The second paragraph of this section corresponds with s. 9, Act VIII [681] of 1859, referred to in the second paragraph of s. 17 of the Court Fees' Act. The third paragraph of s. 45 provides that, "When causes of action are united, the jurisdiction of the Court as regards the *suit* shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit." This provision is of course made with a view to determine the jurisdiction of the Court to entertain the suit. But it is noticeable that "causes of action" and "subject-matters" are clearly distinguished in this section. I would, therefore, say regarding the two or more "distinct subjects of a suit," that they are the "subject-matters of a suit" in which several "causes of action" have been united, under the provisions of s. 45 subject to the rules contained in s. 44 of Act X of 1877, and, therefore, in such a suit the plaint or memorandum of appeal is chargeable with the aggregate amount of the fees to which each plaint or memorandum of appeal would be chargeable under the Act. The words, be it observed,

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are "would be liable," not "is liable," under the Act. There must, therefore, be several causes of action, and these several causes of action must be united in the same suit, and the subject-matters, "or two or more distinct subjects," of each cause of action united in the same suit, must be charged, as if each cause had not been so united in the same suit, but had been taken into Court by a separate plaint or memorandum of appeal.

OLDFIELD, J.—The words "multifarious suits" in the margin of s. 17, Court Fees' Act, and the reference in the last part of the section to s. 9, Act VIII of 1859, with which part of s. 45, Act X of 1877, corresponds, sufficiently show, in my opinion, that s. 17, Court Fees' Act, has reference to a suit which embraces two or more distinct subjects under separate causes of action, which might or ought to have been made subject of separate suits, in fact, when the suit is multifarious and the nature of those referred to in s. 9, Act VIII of 1859, and s. 45, Act X of 1877.

In this view, I am of opinion that the Court-fee should be levied in the suit before us, which is not of the nature of those to which s. 17 refers, on the total value of the claim, *i.e.*, Rs. 2,698-11-9½.

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2 A. 682 (F.B.)

[682] FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

CHEDI LAL AND ANOTHER (*Plaintiffs*) *v.* KIRATH CHAND AND OTHERS (*Defendants*).* [2nd February, 1880.]

Act VII of 1870 (*Court Fees' Act*), *s.* 7, *cls. i and ii, s.* 12, *cl. ii, and ss.* 17, 28—*Act X of* 1877 (*Civil Procedure Code*), *ss.* 44, 45—*Multifarious suit*—"*Distinct subjects*"—*Plaint*—*Memorandum of appeal*—*Suit for money*—*Power of the High Court to levy Court-fees on improperly stamped document.*

The plaintiffs sued in virtue of a conditional sale which had been foreclosed for (i) possession of a house, (ii) compensation, in the nature of rent, for its use and occupation from the date of foreclosure to the date of suit, and (iii) like compensation from the latter date to the date on which possession of the house should be delivered to them, the defendants having purchased the house subsequently to the conditional sale but before the same was foreclosed. The plaintiffs stated that their cause of action arose on the date of foreclosure.

Held (SPANKIE, J, *dissenting*) that the suit embraced "distinct subjects" within the meaning of s. 17 of the Court Fees' Act, 1870, and the plaint and memorandum of appeal were chargeable with the aggregate amount of fees to which the plaints or memoranda of appeal in separate suits for the different claims would have been liable.

Held also that, if a document which ought to bear a stamp under the Court Fees' Act has been used in the High Court, and the mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of the Court may, under s. 28 of the Court Fees' Act direct that it should be properly stamped.

Per SPANKIE, J.—That cl. ii, s. 7 of the Court Fees' Act did not apply to the third claim, nor was it one for money within the meaning of cl. i of that section but one for which s. 11 of that Act provided.

Per OLDFIELD, J.—That Court-fees were leviable in respect of the third claim with reference to cl. i, s. 7 and s. 11 of the Court Fees' Act.

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* Second Appeal, No. 150 of 1879, from a decree of C. Daniell, Esq., Judge of Gorakhpur, dated the 22nd November 1878, reversing a decree of Maulvi Ahmadullah, Munsif of Gorakhpur, dated the 13th September 1878.

[Diss., 8 C. 593 (594) (F.B.); F., 22 C.L J. 57; R., 12 A. 129 (153, 162) (F.B.); 29 A. 749 (758) (F.B.)=4 A L.J. 636=A.W.N. (1907) 253; 33 C. 1232 (1235); 5 L.B.R. 94; Cons., 16 A. 402 (407)=A.W.N. (1894) 124; Expl., 15 B. 416 (418).]

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FULL BENCH.

2 A. 682 (F.B.).

THIS was a case which came before the Full Bench under the following circumstances:—The plaintiffs in this suit alleged that the conditional mortgage of a certain house made in their favour in 1872 had been foreclosed on the 19th May 1875, that notwithstanding this the defendants who had purchased the house in 1873 in the execution of a decree for money, had refused to surrender the possession of the house: and they claimed (i) possession of the [683] house, valued at Rs. 275; (ii) Rs. 72 being compensation in the nature of rent for the use and occupation of the house from the 19th May 1875, the date of foreclosure, to the institution of the suit at the rate of two rupees per mensem; and (iii) similar compensation for the "future" from the institution of the suit to the date on which possession of the house should be delivered to them. They stated that their cause of action arose on the 19th May 1875, the date of foreclosure. They paid on their plaint a Court-fee of Rs. 26-4-0. On appeal from the decree of the Court of first instance awarding the plaintiffs possession of the house and "future" compensation, the defendants paid on their memorandum of appeal a Court-fee of Rs. 26. On appeal by the plaintiffs to the High Court from the decree of the lower appellate Court dismissing their suit, the taxing-officer of the High Court reported that deficient Court-fees had been paid both on the plaint and the memorandum of appeal in the lower appellate Court. That officer stated that the proper fee payable on the plaint was Rs. 44-10-0, and on the memorandum of appeal Rs. 39, computed as follows:—

	Rs.	a.	p.
(i) Claim for possession	21	0	0
(ii) Ditto for house-rent	5	10	0
(iii) Future rent at Rs. 2 per mensem under s. 7, cl. ii, Court Fees' Act	18	0	0
Total ...	44	10	0
(i) Claim for possession	21	0	0
(ii) Future rent at Rs. 2 per mensem under s. 7, cl. ii, Court Fees' Act ...	18	0	0
Total ...	39	0	0

In consequence of this report the case came before the Full Bench together with that of *Mul Chand* v. *Shib Charan Lal* (1), with the report of which it should be read.

Pandit *Bishambar Nath*, Munshi *Sukh Ram*, and Maulvi *Mehdi Hasan*, for the appellants.

[684] The Senior Government Pleader (Lala *Juala Prasad*) and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench:—

STUART, C.J.—This case also came before us on the report of the office. It appears that there is no deficiency of Court-fees in this Court,

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but that there is a deficiency to the extent of Rs. 18-6-0 on the part of the plaintiff in the Munsif's Court, and of Rs. 12-12-0 on the part of the defendant in the lower appellate Court.

Pandit Bishamber Nath for the appellants objected that this Court had no jurisdiction at this stage to entertain the question relating to the deficiency of Court-fees reported by the office, but I am clearly of opinion that s. 28 of the Court Fees' Act gives us full power for that purpose.

On the merits of the question respecting the Court-fees to be charged, this case falls within the principle of the decision we have given on the same legal question in First Appeal No. 15 of 1879 (1). According to the principle recognized in that case the report of the office in this case is clearly right, and the additional Court-fees to be paid by both parties is ordered accordingly.

STRAIGHT, J.—I agree in the views and conclusions of the Chief Justice.

SPANKIE, J.—The learned Pandit Bishamber Nath appears to question the power of this Court to decide that a document found in the record of a case sent up in appeal or on reference, as for revision, to this Court should be properly stamped. With reference to fees in other Courts than the High Courts and Presidency Small Cause Courts, the pleader argues that our power of interference is limited by s. 12, cl. ii, of the Court Fees' Act. But I would claim full power for the Court's interference, quite outside chapters II and III of the Act. S. 28 provides that no document which ought to bear a stamp under the Act shall be of any validity, until it has been properly stamped. The section deals with the case in which a document through mistake or inadvertence has been received, filed or used in any Court, without being properly stamped. Such a document may be returned at the outset by the presiding Judge of the [685] Court in which it has been so received or filed or used, or if the document has been received, filed or used in a High Court, any Judge of that Court, may, if he thinks fit, order that such document may be stamped as he may direct. But the section does not say that the High Court Judge can interfere only when this document has actually been filed in his Court. If the document has been used in the High Court, and the original mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may direct that it should be properly stamped, always having regard to the fact that it must be a document chargeable under the Court Fees' Act. This construction appears to be quite reasonable and consistent with the concluding provision of the section, "and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance." In fact, when the insufficiency of the stamp has been detected and when a proper order has been made and carried out, the original mistake or inadvertence and all subsequent consequences of such mistake or inadvertence are cured.

On the other question my opinion in the reference regarding First Appeal No. 15 of 1879, *Mul Chand*, plaintiff (1) would govern this case.

This suit does not appear to be multifarious within the terms of s. 17 of the Court Fees' Act. It is one for immoveable property and a claim for arrears of rent in respect of the property claimed is joined with it under s. 44, *Rule a*, to which s. 45 of the Procedure Code is subject, I

(1) 2 A. 676.

do not think that the plaint would be chargeable as provided by s. 17 of the Court Fees Act. The application of cl. ii, s. 7 of the Court Fees Act seems altogether wrong; the plaintiff asks for house-rent in future, as he would ask for the mesne profits from the date of decree to the date of possession under the decree. It is not a claim for money in the meaning of cl. i; the rate is known, but not the sum that would be actually due when possession was given under the decree. Probably s. 11 of the Court Fees Act provides for this part of the claim.

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[686] OLDFIELD, J.—The suit in my opinion embraces distinct subjects of the nature of those referred to in s. 17, Court Fees Act. Here the claim for possession of the house and the claim for rent, which in this suit is by way of damages, arise out of different causes of action and might have been made subjects of different suits. So much of the claim as refers to future rent should be charged for Court-fees under cl. i, s. 7, leviable under the provisions of s. 11 of the Act. The objection is quite untenable that this Court has no power to interfere to order that the documents shall be properly stamped, as full power to that effect is conferred by s. 28, Court Fees Act.

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2 A. 686=5 Ind. Jur. 323.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

MIANJAN (*Auction-purchaser*) v. MAN SINGH (*Decree-holder*).*
[5th February, 1880.]

Sale in execution—Act X of 1877 *(Civil Procedure Code)*, *ss.* 311, 312—*Review of judgment.*

On the day fixed for the sale of certain immoveable property in the execution of a decree, the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, no application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. *Held* that, the sanction to the sale originally given having been withdrawn, the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding was unlawful and invalid and in reviewing its first order and in setting aside the sale as illegal the Court executing the decree had not acted *ultra vires* and its action was not otherwise illegal (1).

[D., 1 C.W.N. 226 (228); 15 M.L.T. 151=(1914) M.W.N. 46.]

ON the day fixed for the sale of certain immoveable property in the execution of a decree, the judgment-debtor applied to the Subordinate Judge of Aligarh, the Court executing the decree, for the postponement of the sale. This application was granted, the Subordinate Judge making an order for the postponement of the sale. Before this order reached the officer appointed to conduct the sale, [687] the property had been sold. The Subordinate Judge subsequently, no such application to set aside the sale as is mentioned in s. 311 having been made, passed an order confirming the sale. The decree-holder subsequently applied to the Subordinate Judge

* Application No. 43-B of 1879, for revision of an order of W. C. Turner, Esq., Judge of Aligarh, dated the 5th September, 1879, and of an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 28th July, 1879.

(1) See also *Maijha Singh* v. *Jhow Lal*, H.C.R., N.-W.P. 1874, p. 354.

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for a review of this order. The Subordinate Judge granted this application, and on the 28th July, 1879, made an order setting aside the sale on the ground that it was invalid, inasmuch as an order for its postponement had been passed. The purchaser, who had been a party to the proceedings taken in review, appealed to the District Judge against this order. The District Judge held that an appeal would not lie to him from the order. The purchaser thereupon preferred the present application to the High Court in which he prayed for the revision of the orders of the lower Courts, alleging that the first Court had exercised a jurisdiction not vested in it by law, and the second Court had refused to exercise a jurisdiction so vested.

Mir *Akbar Husain*, for the petitioner.

Munshi *Hanuman Prasad*, for the opposite party.

JUDGMENT.

The judgment of the High Court (PEARSON, J. and STRAIGHT, J.) was delivered by

PEARSON, J.—The first plea in appeal is abandoned as untenable. The statement contained in the second ground of appeal is not accurate. What appears from the proceedings is that the 20th September, 1878, had been fixed for the sale of the judgment-debtor's property in execution of decree in pursuance of an order of the Subordinate Judge, who, on that same date, on the judgment-debtor's application, ordered the sale to be postponed. The sanction to the sale originally given being thus withdrawn, it follows that the sale couldnot legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid. It is true that the sale had been effected before the order directing its postponement had reached the officer conducting the sale, but the circumstance, though it exonerates him from blame in the matter, does not make the sale good and valid. It is to be regretted that the Subordinate Judge should have confirmed the sale which he now rightly pronounces to [688] have been wholly illegal. It seems that he thought himself precluded from setting it aside *suo motu*, and no application had been made to him to set it aside. Shortly after he had confirmed the sale an application was made to him by the decree-holder to review his order confirming it, whereupon he set aside the sale as illegal, and so virtually reversed his former order. In reviewing his order and setting aside the sale as illegal, we cannot say that he acted *ultra vires* or that his action was otherwise illegal. This application is therefore disallowed and dismissed with costs.

Application dismissed.

2 A. 688.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

BANNO (*Defendant*) *v.* PIR MUHAMMAD (*Plaintiff*).*
[5th February, 1880.]

Bond—Mortgage—Registration—Act XX of 1866 (*Registration Act*), s. 17.

The immoveable property charged by a bond payable by instalments, dated the 17th December, 1866, was charged for both principal and interest and the first instalment was payable within three years from the date of the bond with the accumulated interest, and the amount then becoming due exceeded Rs. 100. *Held*, in a suit on the bond, that it was an instrument creating an interest in immoveable property of the value of Rs. 100 and upwards and under s. 17 of Act XX of 1866 required registration. *Ragpati Kuar* v. *Ramsukhi Kuar* (1), followed.

THIS was a suit for Rs. 199-13-9, being Rs. 50, the principal amount and Rs. 149-13-9, the interest, due under a bond dated the 17th December, 1866. The plaintiff, to whom this bond had been assigned by the obligee, one Ali Bakhsh, claimed to recover the money in suit by the sale of the immoveable property hypothecated in the bond. Under the terms of the bond the defendant promised to pay the obligee Rs. 50 in manner following, that is to say, "Rs. 20 with interest at two rupees per cent. per mensem within three years, and Rs. 30 with interest at Rs. 3-2-0 per cent. per mensem within four years;" and he hypothecated certain [689] immoveable property as security for the payment of the "entire money secured by this bond, principal and interest." The defendant contended in defence to the suit that by s. 17 of Act XX of 1866 the bond required to be registered, and being unregistered it could not affect the property hypothecated therein. The Court of first instance allowed this contention and dismissed the suit. On appeal by the plaintiff the lower appellate Court held that under s. 17 of Act XX of 1866 registration of the bond was not necessary, and gave the plaintiff a decree for Rs. 191-13-9, directing that this amount should be recovered from the property hypothecated in the bond.

The defendant appealed to the High Court.

Shaikh *Maula Bakhsh* and Shah *Asad Ali*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

JUDGMENT.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—It seems to us that this appeal should prevail. By the bond of 17th December, 1866, the property was charged for both principal and interest. The first instalment was payable in three years from the date of the bond with the accumulated interest, and the amount then becoming due would exceed Rs. 100. It was therefore an instrument creating an interest in immoveable property of the value of Rs. 100 and upwards, and under s. 17 of Act XX of 1866 required registration. The

* Second Appeal, No. 964 of 1879, from a decree of Maulvi Sami-ul-lah Khan, Subordinate Judge of Moradabad, dated the 7th May, 1879, modifying a decree of Maulvi Ain-ud-din, City Munsif, dated the 6th February, 1879.

(1) 2 A. 40.

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present case is analogous to one decided by Pearson, J. and Oldfield, J., in *Rajpati Singh* v. *Ramsukhi Kuar* (1), and the view we now hold is in accordance with the current of decisions in this Court (2), to which our attention was called in the course of the hearing. The appeal is decreed with costs, the judgment of the lower appellate Court reversed and the decree of the Munsif restored.

Appeal allowed.

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2 A. 690.

[690] APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Pearson.

GIRDHARI DAS (*Defendant*) *v.* POWLETT, POLITICAL AGENT AND SUPERINTENDENT OF THE KOTA RAJ ON THE PART OF THE GOVERNMENT OF INDIA (*Plaintiff*).* [9th February, 1880.]

Parties to a Suit—Political Agent—Superintendent of Raj.

A suit for property belonging to the Rajah of Kota was brought in the name of the "Political Agent and Superintendent of the Kota State, on the part of the Government of India." *Held* that, if the Rajah was the proprietor of the property, he should have been the plaintiff, or, if his right and interest therein had passed to Government, the Government should have been the plaintiff, but the Political Agent and Superintendent of the Kota State was not entitled to sue for the property.

THIS suit was instituted in the Court of the Subordinate Judge of Agra in the name of "Major P.W. Powlett, Political Agent and Superintendent of the Kota State, on the part of the Government of India," the plaintiff claiming certain moveable and immoveable property belonging to the Kota State. The defendant set up as a defence to the suit, amongst other things that it had been instituted in the name of the wrong person, stating in his written statement, dated the 24th November, 1877, as follows :—" Since the plaintiff admits that the property belongs to the State, he is not competent to file the suit in his own name as Political Agent and Superintendent on the part of the Government of India: neither the Government itself nor the plaintiff as its representative is competent to file this suit." In his written statement, dated the 19th December, 1877, the plaintiff stated as follows :—" The Kota State was placed under the management of the Government of India on the application of the Rajah himself, and it is entirely managed by the Government, and Major Powlett has been appointed Political Agent and Superintendent of the State, on the part of Government; he alone and no other person therefore is competent to institute this suit, and in fact this suit is instituted by the plaintiff for the benefit of the State of Kota, as representative of the Chief and not in any other capacity." It appeared from the evidence adduced by the plaintiff that in or about 1873 the Maharao of Kota had invited the British Government to provide for the due administration of the Kota State promising to abide by whatever

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* First Appeal, No. 163 of 1878, from a decree of Maulvi Maksud Ali Khan, Subordinate Judge of Agra, dated the 22nd August, 1878.

(1) 2 A. 40.

(2) See *Ahmad Bakhsh* v. *Gobindi*, 2 A. 216; *Karan Singh* v. *Ram Lal*, 2 A. 96; and *Darshan Singh* v. *Hanwanta*, 1 A. 274.

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[691] arrangements might be made for that purpose. Accordingly the Governor-General in Council appointed one Nawab Sir Faiz Ali Khan, K.C.S.I., minister for the Kota State, whose powers were thus defined in the letter appointing him, addressed to him by the Agent of the Governor-General in Council in Rajputana, dated the 5th February, 1874: "You are invested with full powers of administration, subject only to the general advice and control of the Political Agent, Harauti, and myself: you will refer to us in any matters of difficulty and importance: His Excellency the Viceroy and Governor-General further deems it indispensable that His Highness the Maharao of Kota should be absolutely prohibited from interfering with or thwarting your proceedings: that His Highness should receive a suitable allowance for his support: that all debts in future contracted by His Highness should be treated as unauthorised and irrecoverable: that His Highness should have no power whatever to tamper with the revenues of the state: that your proceedings as minister, when concurred in by the political Agent and myself, shall, if necessary, be enforced by the British Government: that the appointment of subordinate officials shall be left to my discretion, and that any member who may be associated with you in the administration of the Kota State shall be in subordination to you and bound to execute your requirements." In December, 1876, the Governor-General in Council appointed Major P. W. Powlett to the charge of the Kota State in the room of Nawab Sir Faiz Ali Khan, K.C.S.I.

The first issue for trial framed by the Subordinate Judge was, "regard being had to the administration of the Kota State, is the suit brought by the Political Agent and Superintendent entertainable or not"? The Subordinate Judge held on this issue that the suit so brought was entertainable. His reasons for so holding appear from the following extract from his judgment:—

"The papers relating to the appointment of the said officer show that the arrangement regarding the management of the Kota State was made in a special manner with the sanction of His Excellency the Viceroy and Governor-General of India in Council; that a sum of money has been fixed for the personal expenses of the Rajah; and that he has nothing to do with the administration of [692] the State, which is in every respect governed by the Agent and Superintendent, subject to the supervision of the Government of India. There is no law or ruling which would lead me to hold the suit to have been illegally brought in the name of the Agent and Superintendent, nor is there any ground for making such a presumption, inasmuch as it would be clearly improper to judge of the Rajah, who is an intelligent person and attained the age of majority, according to those ordinary persons to whom the law is applicable. Even in the cases of the minor chiefs whose states are managed by Agents under the supervision of the Government of India, suits are not prohibited to be brought in the names of those Agents; moreover, the powers vested in the present Agent of Kota, who in addition to the usual title of Agent bears the special title of Superintendent, and in the letter of his appointment absolute powers are granted to him, must be considered to be far superior to those vested in the other Agents. Consequently, as he can discharge all the important and intricate business of the State under the powers vested in him, and is in every respect responsible for it, there is no reason why he should not institute this suit, which is brought only for the benefit of the State, in his own name. Now, as far as I can see, I think the suit is properly brought in the name and designation used in the plaint, and considering all the

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procedure of the Civil Courts, there appears to be no harm at present or in future in passing a decree in that name." The Subordinate Judge eventually gave the plaintiff a decree for the immoveable property claimed.

The defendant appealed from this decree to the High Court, contending that the suit had been instituted in the name of the wrong person and was consequently not maintainable.

Mr. *Howard*, Mr. *Chatterji*, and Munshi *Sukh Ram*, for the appellant.

Mr. *Colvin*, the Junior Government Pleader (Babu *Dwarka Nath Banarji*), and Pandit *Nand Lal*, for respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

Stuart, C. J.—This appeal must be allowed. Indeed, no serious attempt was made as the hearing before us by the counsel [693] for the respondent to support the judgment, and I must express my surprise and disappointment, that so experienced an officer as the then Subordinate Judge of Agra should have been content to have given such reasons as he assigns in his judgment for holding that the suit in this instance had been properly laid. It is not pretended that the Rajah is a disqualified proprietor under the Court of Wards, or that he has been in any respect divested of his rights of property over his estate; and as for the suggestion that the position assumed by the Government of India and its Political Agent in this suit could be justified as an act of State, such a contention cannot for one moment be admitted. The claim for interference on the part of the Government of India, whether in its own name or in that of its Political Agent, is one based entirely on a correspondence showing the necessity of the management and administration of the estate being for a time taken out of the hands of the Rajah, and he himself no doubt acted wisely in applying to the Government for assistance in his troubles. But it is a very different thing to say that such management and administration gave the Government, not only the power to administer the estate for the benefit of the Rajah, but to deprive him of his right and title in it and his dominion over it, to such effect that the Government could by itself, or by any of its officers, deal with it and with parties indebted to it as if it was the Government's own independent property. For, however large the power of the Government might be in the way of administration and management, the right to the estate itself and every part of it, the title to the estate and all that constitutes a *jus in re* in regard to it, remained in and was inherent in the Rajah himself, and such a suit as the present could only be brought in his own name, by which means, and by which means alone, could his consent as the true plaintiff be made to appear on the face of the record. In such a case the Government of India neither have themselves, nor can they delegate to others, any larger powers than those that could be given to any other administrator or manager; and the principle on which this view of the case rests is that no man who is *sui juris* can be deprived of his property, for a single moment, or for any purpose whatever, excepting by his own deliberate consent and act, such an act on his part as would in law have the effect of at once divesting himself of, [694] and investing his transferee with, his estate. No doubt the services agreed to be given to the Rajah on his own application were most important and likely to be very beneficial to himself and his property, but the estate has still remained his, and is his, and his alone, and his name alone can be used in all judicial proceedings

connected with its administration. As for Major Powlett, he, as Political Agent and Superintendent of the estate under the orders of the Government of India, has simply no *locus standi* whatever, nor could he be allowed to represent the Government of India, in such a suit, even if that Government had itself a better title than it has. 1880 FEB. 9. —— APPELLATE CIVIL. —— 2 A. 690.

The appeal is allowed and the suit is dismissed with costs in both Courts.

PEARSON, J.—The property in suit is claimed as belonging to the Kota estate, and the claim is based on the proprietary right of the Rajah of Kota. If he be the proprietor of the property the subject of the claim, he should have been the plaintiff in the suit; on the other hand, if his right and interest therein has passed to the Government of India, the Government of India should be the plaintiff. The Political Agent and Superintendent of the Kota Raj does not profess to have any such proprietary right and interest in the property as to entitle him to sue as plaintiff for its recovery. The suit, as brought, must be dismissed, and the appeal decreed with costs.

Appeal allowed.

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2 A. 694 (F B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

EMPRESS OF INDIA *v.* SRI LAL AND OTHERS. [9th February, 1880.]

Act XLV of 1860 (*Penal Code*), ss. 372, 373—*Buying or selling minor for the purpose of prostitution, &c,*

Certain persons, falsely representing that a minor girl of a low caste was a member of a higher caste, induced a member of such higher caste to take her in marriage and to pay money for her in the full belief that such representation was true. *Held, per* STUART, C J., that such persons could not be convicted, on these facts, of offences under ss. 372 and 373 of the [695] Indian Penal Code. *Per* OLDFIELD, J. and STRAIGHT, J., that, if such girl was disposed of for the purpose of marriage, it could not be said, because the marriage might be invalid under Hindu law, that such persons acted with the intention that she should be employed or used for the purposes of prostitution or for any unlawful and immoral purpose, or that they knew it to be likely that she would be employed or used for such purpose, and consequently they could not be convicted of an offence under those sections. *Per* PEARSON, J., and SPANKIE, J., that, such girl having been disposed of for the purpose of marriage, although the marriage might be objectionable under Hindu law, it did not appear that it was wholly invalid, and therefore such intent or knowledge could not certainly be presumed, and such persons could not be convicted of offences under those sections.

[D., A.W.N., (1902), 133.]

THIS was a reference to the Full Bench by Straight, J. The facts out of which the reference arose and the point of law referred are stated in the order of reference.

STRAIGHT, J.—These are appeals against a series of convictions by the Officiating Sessions Judge of Gorakhpur. The appellants were charged under ss. 372 and 373 of the Penal Code. The evidence establishes that they, by falsely representing certain girls of the Baniah, Dome and other castes to be members of Kayasth, Rajput, and Ahir families induced a number of Kayasths, Rajputs, and one Ahir to take these girls to wife and

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to pay money for them to the appellants in full belief that the representation was true. The question I have to refer for the decision of the Full Bench is whether under such circumstances the convictions on ss. 372, 373, Penal Code, can properly stand.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

The accused persons were not represented.

JUDGMENTS.

STUART, C. J.—On the facts as stated to us in this reference and as, explained at the hearing, it is quite clear that the convictions under ss. 372 and 373 cannot stand. The offence apparently committed by the accused was cheating. There can be no doubt of the immorality of the purpose and motive on the part of the accused, but I hesitate to say that their conduct was unlawful in any absolute sense. On discovery the girls, who by fraud had succeeded in becoming wives, and who had in the meantime communicated loathsome disease to the unfortunate men who had married them, **[696]** were turned out of their so-called husbands' houses, and it would appear from what was stated at the hearing that their course of life thereafter was that of prostitution, so that what began in fraud to the husbands has ended in the permanent degradation of the wives themselves. Again, the girls appear to have been parties to the fraud committed on their husbands, having been duly instructed beforehand by the accused as to the part they were to play and the deceit they were to practice on the unhappy men, and they acted the part so well that the ceremony of marriage was gone through without any suspicion being entertained that any thing was wrong. That this state of things could not be reached by any law, civil or criminal, I hesitate to affirm. The appellants in the present case might have been tried for cheating under s. 415 of the Penal Code, and I am inclined to think that a very strong argument might be maintained in support of the opinion that these girls, wives though they be, were guilty of abetment and conspiracy, within the scope and meaning of s. 107. The convictions, however, under ss. 372 and 373 were altogether mistaken, and should be set aside.

PEARSON, J.—If, as I understand the referring order to mean, the evidence establishes no more than this, that the appellants, "by falsely representing certain girls of the Baniah, Dome and other low castes to be members of Kayasth, Rajput, and Ahir families, induced a number of Kayasths, Rajputs, and one Ahir to take these girls to wife and to pay money for them to the appellants in full belief that the representation was true," then I am clearly of opinion that they cannot be convicted of the offence defined in s. 372, Indian Penal Code. For conviction of that offence it must be proved that the accused intended that the minor should be employed or used for the purpose of prostitution or for some unlawful and immoral purpose, and knew it to be likely that the minor would be so employed or used. Not only are we given to understand that evidence of such intent or knowledge is wanting; but it would seem that under the circumstances such intent or knowledge cannot certainly be presumed. The girls were disposed of for the purpose of being married, and, although the marriages might have been objectionable under Hindu law on the ground **[697]** of the inequality in respect of social status of the respective parties to them, it does not appear that they would have been wholly invalid. The offence of which the appellants were apparently guilty was cheating as defined in s. 415, Indian Penal Code.

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SPANKIE, J.—I concur in the opinion of Mr. Justice Pearson.

OLDFIELD, J.—If the accused intended *bona fide* that the girls should be taken in marriage, although, by reason of difference of caste, no legal marriage might take place under Hindu law (and on this point it is unnecessary to give an opinion), yet the accused will not be guilty of an offence under ss. 372 and 373, Indian Penal Code, for it cannot be said that they acted with intent that the girls should be employed or used for purpose of prostitution or for any unlawful and immoral purpose, or that they knew it to be likely that they would be employed or used for such purpose. The reference does not require us to go further in our reply or to say what offence under the Penal Code the accused may have committed.

STRAIGHT, J.—Upon the question I have submitted to the Full Bench in this reference, I am of opinion, that the convictions under ss. 372 and 373 cannot be sustained. The main object and real intent of the accused was to get money and the representations made were merely the means to that end. I do not think it can be said, that the prohibited act was done with the intent, that the minor should be used for an "unlawful and immoral purpose." All the false statements were directed to convincing the proposed purchasers of the girls of their caste qualifications for *marriage*, and the Sessions Judge specifically found that the buyers were deceived. This is clear from the fact, that in each case the ceremony of marriage was gone through with all the accustomed formalities attending such proceedings, and it is equally plain, that the accused, never contemplating that discovery of their frauds would take place, intended, that the girls should live as the wives of their purchasers. It was contended by the Junior Government Pleader, that, as in point of fact no proper or recognizable marriage could take place between persons of these different castes, the accused must be assumed to have intended the [698] natural consequences of their acts, namely, that the ultimate position of the girls would be that of mere mistresses. Even if this be so, which I very much doubt, it cannot be said, that that is an "unlawful and immoral purpose." It may be immoral, but it is impossible to say it is unlawful. The mischief aimed at by these sections was traffic in female minors for purposes of "prostitution" that is, in its perfectly well-understood sense, "or for any unlawful and immoral purpose" of a like description. But here a form of marriage, no matter what its precise character was, was gone through, and though the men who took part in it have been punished by being put out of caste for disregarding the rules and regulations of their community, it does not appear to me, that the girls should, for the purposes of the law, be regarded as any the less the wives of those excommunicated persons.

Entertaining the views I do, I am of opinion that the convictions under ss. 372 and 373, Penal Code, must be set aside.

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APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

JANKI DAS (*Defendant*) *v.* BADRI NATH (*Plaintiff*).*
[11th February, 1880.]

Suit for money charged on immoveable property—Jurisdiction—Mortgage—First and second mortgages—Sales in execution of decrees enforcing mortgages—Auction-purchasers.

Held that a suit for money charged on immoveable property in which the money did not exceed Rs. 1,000, although the value of the immoveable property did exceed that sum, was cognizable by a Munsif, such property being situate within the local limits of his jurisdiction.

Certain immoveable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864 and the other a charge created in 1867. *Held* that the purchaser of such property at the sale in the execution of the decree, which enforced the earlier charge, was entitled to the possession of such property in preference to the purchaser of it at the sale in the execution of the decree which enforced the later charger, notwithstanding the latter had obtained possession of the property in virtue of his purchase. *Ajoodhya Pershad* v. *Moracha Kooer* (1), distinguished.

[F., 15 C. 104 (106); 8 Ind. Cas. 973=5 L.B.R. 208 ; R., 13 C.L.J. 505=10 Ind. Cas. 990.]

[699] ON the 14th November, 1864, one Chotay Lal executed a bond in favour of Munni Bibi in which he promised to pay her Rs. 500 with interest at two per cent. per mensem within two years, and in which he hypothecated his proprietary interests in a certain house, situate at Allahabad, as collateral security for such payment. On the 24th June, 1867, Chotay Lal executed a bond in favour of Janki Das, the defendant in this suit, in which he promised to pay him Rs. 1,800 with interest at one per cent. per mensem within seven years, and in which he hypothecated a moiety of the same house as collateral security for such payment. Munni Bibi sued Chotay Lal on her bond, in the Court of the Munsif of Allahabad, for Rs. 720, and obtained a decree on the 9th March, 1872, giving her a lien on the hypothecated property for that amount. Janki Das subsequently sued Chotay Lal on his bond in the Court of the Subordinate Judge of Allahabad, and obtained a decree on the 1st August, 1874, giving him a lien on the hypothecated property for the amount of the decree. On the 10th December, 1877, a moiety of the house, being the interest of Chotay Lal therein, was put up for sale in the execution of Munni Bibi's decree under the order of the Munsif, and was purchased by the plaintiff in this suit, Badri Nath. On the same day the same property was put up for sale in the execution of Janki Das' decree under the order of the Subordinate Judge and was purchased by Janki Das, who obtained possession of the property in virtue of his purchase. Badri Nath, on endeavouring to obtain possession of the property in virtue of his purchase, was resisted by Janki Das. On his complaint the Munsif inquired into the matter of the resistance and made an order against him. He accordingly brought the present suit against Janki Das to establish

* Second Appeal, No. 785 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 6th May, 1879, reversing a decree of G. E. Knox, Esq., Subordinate Judge, dated the 24th December, 1878.

(1) 25 W.R. 254.

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his right to the possession of a moiety of the house. The defendant stated in his defence to the suit as follows:—"Chotay Lal, the judgment-debtor and original owner of the house in dispute, was indebted to several creditors: to defraud those creditors of their just dues and to secure his house from attachment, he executed, without consideration or any money paid, under false language and with dishonest intent, a bond in favour of Munni Bibi, his sister; this bond after execution and registration he kept in his own possession; as [700] soon as the creditors came down upon him he borrowed from Ram Prasad, brother of the defendant, Rs. 1,000 through Munni Bibi, and executed a bond for the same; this bond bears date 24th June, 1867; a short time before the date for paying this bond fell due, he got Munni Bibi to bring a case against him founded upon the bond in her favour and caused a decree to be passed against him on the 9th March, 1872; Munni Bibi, her mother, and the judgment-debtor himself have told many persons that the bond in favour of Munni Bibi was written only to keep the property from attachment, and that no consideration ever passed for the same: as the bond upon which the decree was passed under which plaintiff eventually became a purchaser was one without consideration and collusive, it follows that rights resting upon the auction under such circumstances can bear no comparison with defendant's claim, which is a just one and free from all taint of collusion: further the plaintiff by another act of collusion caused the house to fetch at auction a much lower sum than it was really worth."

The issues fixed by the Subordinate Judge were (i) which of the two decrees confers a prior right upon the purchaser, and (ii) was the decree passed by the Munsif of Allahabad on the 9th March, 1872, one within the jurisdiction of that Court. The Subordinate Judge dismissed the plaintiff's claim for the reasons stated in the following extract from his judgment:—"In this case the rival applicants for possession of the same half of a house situate in the city of Allahabad are Badri Nath and Janki Das. They both base their claims upon a purchase at open auction held by two different Civil Courts on one and the same day. There is no evidence tendered to show whether there was any priority of time in the sale. It is, however, undisputed that Janki Das was the first to obtain possession and that he has been in possession ever since. Being a possessor with a title it is incumbent upon the plaintiff to show that he has a better title under which to demand the re-conveyance of the property from defendant to himself. The position in which defendant stands is briefly this. There has been a public avowal of a sale between the Civil Court as agent for the judgment-debtor and the defendant as vendee. The transfer was at once [701] complete. It was perfected by possession, and the defendant can now only be compelled to re-convey to a prior vendee. If the plaintiff could show such priority he ought to have done so. Instead of this he has confined himself to showing that the decree under which he purchased proceeds from a bond of an earlier date than the bond which led to the execution and sale under which defendant purchased. There might have been some object in this had he been striving to establish a charge upon the property in dispute. The bond was not in his favour, but in favour of Munni Bibi, and even to her it gave only a lien upon the house hypothecated therein. The document, which stands upon the file as exhibit A, shows that the mortgage in favour of the lady was a simple mortgage in which the borrower bound himself personally for the repayment of the loan with interest, and pledged his land as a collateral security for such repayment. Under such a mortgage, as

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Mr. Macpherson (1) shows, the mortgagee, having obtained a decree, proceeds in execution to sell the land and out of the proceeds of the sale to satisfy his claim.

"Munni Bibi's right was nothing more than a right to certain money with interest. She never had possession of the land, nor could she ever obtain possession unless she proceeded at the sale to become the vendee. Nor was her position altered by the decree which was correctly given in the first instance against the person of the mortgagor. We come lastly to the sale, and here for the first time we have a starting of possession in favour of plaintiff against the vendor. It has, however, been already shown that, for all that has ever been shown to the Court, the plaintiff's and defendant's starting point were one and the same; anyhow, the defendant being in possession, plaintiff must show his priority. The burden being upon him and not having been discharged, the Court finds the first issue against him.

"As regards the second issue, it is unnecessary here to enter into the grounds upon which the Court holds it has cognizance. The plaintiff maintains the Court has cognizance and the Court [702] agrees with him on the point. Having, however, found against him on the first issue there is no need to pursue this issue further."

On appeal by the plaintiff the lower appellate Court held that he was entitled to the possession of the property in suit, having purchased it at a sale effected to discharge a lien created prior to the lien in discharge of which the sale at which the defendant had purchased was effected.

The defendant appealed to the High Court.

Mr. *Colvin*, for the appellant.

Babus *Oprokash Chandar Mukarji* and *Ram Das Chakarbati*, and Munshi *Ram Prasad*, for the respondent.

JUDGMENT.

The judgment of the High Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

SPANKIE, J.—In dealing with the pleas in appeal it is necessary to see what was the defence set up. It was briefly as follows; that Chotay Lal the judgment-debtor and original owner of the house in dispute was indebted to several creditors, and, to defraud them and secure his house from attachment, he dishonestly executed a bond hypothecating the house to Munni Bibi, his sister, without any consideration, the transaction being altogether fraudulent. He retained possession of the bond, but, when pressed by his creditors, he borrowed from Ram Prasad, the brother of defendant, Rs. 1,000, through Munni Bibi, and executed a bond for that sum. The bond is dated 24th June, 1867. Before the bond fell due the judgment-debtor caused Munni Bibi to bring a suit against him founded upon the bond which he had given her and on the 9th March, 1872, a decree was given against him.

Now the plaintiff's case is that the bond under which the decree was executed and sale in his favour was had is dated 14th November, 1864. Both plaintiff and defendant are auction-purchasers upon the same day in execution of decrees. The decrees are of two different Courts. The plaintiff purchased in execution of the decree of the Munsif upon the bond, dated 14th November, 1864, and the defendant purchased in execution of the decree of the Subordinate Judge upon the bond executed on the 24th

(1) Macpherson on Mortgages, 2d Ed., p. 13.

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June, [703] 1867. In both bonds there was an hypothecation of the house as security for the payment of the debt.

The Subordinate Judge on the 28th November, 1878, laid down the following issue: "Which of the two decrees confers a prior right upon the purchaser." On the 18th December he added this issue, "Was the decree passed by the Munsif of Allahabad on the 9th March, 1872, one within the jurisdiction of that Court." The second issue was added because in the first instance the property was valued at Rs. 1,200 by the Munsif, and the plaint was returned by him on the ground that the claim was beyond his jurisdiction. The Subordinate Judge found that there was no evidence to show that there was any priority in the time in favour of one auction-purchaser over the other. But Janki Das, defendant, obtained possession first, under his sale, and, therefore, as Janki Das was a purchaser with title, the plaintiff was bound to show a better title, if he desired to secure the property for himself. In coming to a conclusion upon this point the Subordinate Judge appears to have made a mistake in assuming that in the decree of the 9th March, 1872, there had been no decree against the property hypothecated as security in the bond dated the 14th November, 1864. He seems to hold that the plaintiff failed to prove any priority of lien, and, as defendant had obtained possession in execution as auction-purchaser, his possession could not be disturbed. The Subordinate Judge did not think it necessary to express his reason for holding that the Munsif of Allahabad had jurisdiction in the suit in which he made the decree of the 9th March, 1872, at the same time he held that there had been jurisdiction. The first Court then dismissed the suit on the ground that plaintiff had established no title as against defendant. In appeal the Judge reversed the decision of the Subordinate Judge, and decreed the claim in favour of plaintiff. The lower appellate Court held that the decrees were not money decrees, but both had been made in suits to recover money by enforcing the security hypothecated in the bonds upon which the claims were based, and that priority would be found according to the dates of the respective bonds. The plaintiff as auction-purchaser in execution of a decree against person and property hypothe-[704]cated in a bond dated 14th November, 1864, would thus have a prior title as against an auction-purchaser in execution similarly situated in execution of a decree under a bond dated 14th June, 1867, the sale to satisfy a prior incumbrance being preferred to that satisfying a subsequent incumbrance.

The first plea for determination is the fifth in the memorandum of appeal, that of jurisdiction. There can be no doubt (assuming that we could go behind the decree of the 9th March, 1872) that the Munsif had jurisdiction. The claim was for money and to enforce the security, the property hypothecated being within the jurisdiction of the Court. The cases cited by defendant appellant's counsel do not apply. The Calcutta Court (*Petition of S. J. Leslie* (1) has ruled that a suit brought upon a mortgage praying for a decree for the amount due under it, and also that in default of payment the land might be sold, was a suit for land within the meaning of s. 15, Act VIII of 1859, and was rightly brought in the Court of the district within which the land is situate. The question there was one of territorial jurisdiction; no such difficulty arises in this case. So again the Full Bench decision of the Presidency Court in *Surwar Husain Khan* v. *Shahzada Gholam Mahomed* (2) does not affect this case,

(1) 9 B.L.R. 171. (2) B. L. R. F. B. R. 879.

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for in that suit the question was one of limitation which does not arise here. Admitting that the suit is one to enforce a charge upon immoveable property, and is therefore one for the recovery of an interest in immoveable property, still the claim is to enforce that charge only to the extent of the debt due, and no further. The property could have been preserved from attachment and sale by payment of the debt due, which with interest was within the pecuniary jurisdiction of the Munsif's Court. The plea, therefore, that the suit upon which the decree on the bond dated 14th November, 1864, was given, and in execution of which the plaintiff became the auction-purchaser, is barred, because the value of the property exceeded Rs. 1,000, fails.

As to the other pleas, the judgment of the lower appellate Court decreeing the claim in favour of plaintiff respondent appears to be sound, and in accordance with the practice of the Courts. [705] The precedents cited by the appellant, *Dayal Jairaj* v. *Jivraj Ratansi* (1), do not seem to apply. There is no question here of notice or no notice of a prior incumbrance. The circumstances of this case, such as they are, must be looked at. Here there was in execution a sale of the same property twice over under two different decrees of two different Courts, and the question is whether the auction-purchaser, who has brought the property sold in execution of a decree charging it for the satisfaction of the debt due under a bond of much earlier date, is not to be preferred to the auction-purchaser in execution of a decree to satisfy a more recently executed bond, and on this point there was really no defence. It has already been noticed at the commencement of this judgment what was the defence to the suit. It was contended that the bond on which plaintiff relied was executed fraudulently, and that the bond upon which defendant relies was free from all taint of fraud and therefore was to be preferred to that of plaintiff. It did not appear to be denied that, if the plaintiff could show a better title, he was entitled to a decree. The first Court under a misapprehension as to the nature of the decree holds that the plaintiff had not established a better title than defendant had, and therefore the Subordinate Judge dismissed the claim. The Judge, correcting the error of the Subordinate Judge as to the nature of the decree, finds that the lien in the plaintiff's case was of a date prior to that of the lien in the defendant's case, and, as there appears to be nothing contrary to law in this finding our interference is not required.

The purchaser at an auction-sale in execution of a decree against a judgment-debtor is bound to satisfy all charges on the estate purchased by him which existed at the time of the mortgage, to satisfy which the property was sold. I have not found any cases exactly analogous to the present which is somewhat peculiar, the sales being simultaneous, under different decrees, and in two different Courts. But the principle above noticed may be applied to the case, and as both parties purchased the property at auction in execution of decrees charging it, the plaintiff's title appears to be superior to that of [706] the defendant, inasmuch as he purchased in execution of a decree upon a bond of prior date to that which was the foundation of the claim that led to a decree in execution of which defendant purchased. The earlier possession of defendant under the auction-sale was simply an accident arising out of the simultaneous sales in two different Courts. I notice a case in the Presidency Court, *Ajoodhya Pershad* v. *Moracha Kooer* (2), where the claims of both the

(1) 1 B. 237. (2) 25 W.R. 254.

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parties were on bonds specially registered under ss. 52, 53, Act XX of 1866, so that neither decree could have legally imposed any lien on the property. The estate was sold by auction on two occasions in satisfaction of two distinct bonds, and the person who had proceeded on the later-dated of the two bonds, but who represented the earlier auction-purchaser, had actually taken possession of the estate. It was held that, though in a properly brought suit between the parties to declare the property liable for the amount of the first mortgage, the party in possession would have to pay to secure his possession, yet he could not be ousted by the opposite party. This case differs from the present one in so much that the decrees in the precedent cited must be regarded as money-decrees, whereas in the present case both decrees charged the property. Moreover in that case the sales were not simultaneous, but one occurred on 25th January, 1869, and the other on the 9th March, 1869. Here it appears to me that I ought to consider what would have been the effect, if by accident or otherwise there had been two simultaneous sales in execution of two decrees charging property by order of the same Court. In such a case effect would doubtless have been given to the auction-purchase under the decree upon the older lien, and, under the circumstances of the case, it appears to me that the plaintiff is entitled to claim possession of the property, and that the sale in favour of defendant should be considered of no effect as against that in favour of plaintiff, and his possession should be regarded as not having been acquired under any good title. Here again I should say once more that the claim was not resisted by the defendant on the ground of his title being superior to that of the plaintiff under the sale, but mainly, if not altogether, on the **[707]** ground that the decree under which the plaintiff purchased was a decree obtained in a fraudulent transaction and therefore should have no force. On this point, if it be allowed that we could go behind a decree which has not been set aside, it is sufficient to say that the Judge has found that the defendant declined to give any evidence in support of the plea of fraud. As he asserted the fraud he was bound to prove it; as he did not even attempt to do so, there is an end of the plea. I would dismiss the appeal and affirm the judgment with costs.

Appeal dismissed.

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2 A. 707.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

SAWAI RAM (*Plaintiff*) *v.* GIR PRASAD SINGH (*Defendant*).*
[11th February, 1880.]

Wrongful dispossession of land—Compensation for wrongful dispossession—Jurisdiction—Act XVIII of 1873 (*N.W.P. Rent Act*), s. 95, *cls.* (*m*) *and* (*n*).

In an estate held by S as a sub-proprietor he held certain land with a right of occupancy. *G*, the zamindar, obtained a decree against *S* in a Civil Court for the possession of the estate, in execution of which he ousted *S* from the estate including the land held by him with a right of occupancy. This decree having

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* Second Appeal, No. 991 of 1879, from a decree of C.W. Moore, Esq., Judge of Aligarh, dated the 28th July 1879, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 29th March, 1879.

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been set aside, *S* recovered the possession of the estate including such land, and sued *G* in the Civil Court for the value of the crops standing on such land at the time he was ousted from it by *G*, and for the rents of a portion of such land which *G* had let to tenants while in possession of it. *Held* that the suit was cognizable by the Civil Court (1) and that *G* was liable for such rents.

[R., 19 A. 456 (457) = A.W.N. (1897) 101.]

IN the year 1874 the plaintiff in this suit was in the possession of a certain estate paying revenue to Government, situate in the Aligarh district, of which the defendant was the proprietor. At the settlement of this estate in that year a dispute arose between the plaintiff and the defendant as to the nature of the former's possession. On the 21st December, 1874, the Settlement Officer made an order which declared that, the plaintiff was the lessee of the estate for an indefinite term, and that he was also an occupancy-tenant of fifty-one bighas, ten biswas, of land comprised in the estate. The defendant subsequently instituted a suit against the plaintiff in the Court of the Subordinate Judge of Aligarh, for his ejectment [708] from the estate and for the cancelment of the Settlement Officer's order, alleging that the lease under which the plaintiff held the estate had expired. He obtained a decree in this suit on the 29th July, 1876. On the 31st August, 1876, in the execution of this decree, the plaintiff was ejected from the entire estate including the fifty-one bighas, ten biswas of land. On the 7th December, 1877, this decree was set aside and the defendant's suit dismissed by the District Court, on appeal by the plaintiff, which decided that the plaintiff held the estate, not as a lessee, but as a sub-proprietor under a permanent tenure. The District Court's decree was affirmed by the High Court on the 16th May, 1878. After the passing of the High Court's decree the plaintiff, on the 4th July, 1878, recovered the possession of the entire estate. He subsequently, in November, 1878, instituted the present suit against the defendant in the Court of the Subordinate Judge of Aligarh, in which he claimed, *inter alia*, (i) the value of the crops standing on the fifty-one bighas, ten biswas, of land at the time the defendant obtained possession of such land in the execution of the decree dated the 29th July, 1876, alleging that the defendant had appropriated such crops; and (ii) the rents of forty-eight bighas of land, being a part of the fifty-one bighas, ten biswas, before mentioned, which the plaintiff alleged had been let by the defendant to tenants. The Subordinate Judge gave the plaintiff a decree in respect of these claims. On appeal by the defendant the District Judge dismissed the suit in respect of these claims for the reasons which appear in the following extract from his decision :—

"It is to be observed that the plaintiff in this suit has always had two different rights in this village; first, his rights as lessee of the zemindars; secondly, his rights as an occupancy-tenant of fifty-one bighas, ten biswas of land. With these latter rights the Civil Court has no concern, nor has any order been passed by, or any claim been made in, any Civil Court throughout these proceedings which could affect the plaintiff's possession as an occupancy-tenant of the fifty-one bighas, ten biswas, of land. The Civil Court's orders have always had reference to the zemindari rights held by the lessee. It follows, then, that any interference with the plaintiff's rights as an occupancy-tenant, of which the defendant may have [709] been guilty, was made by the defendant as zemindar in possession and had no warrant of the Civil Court to support them. It is clear also

(1) See also *Kalian Das* v. *Tika Ram*, 2 A. 137.

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that the defendant was in possession as zamindar from August, 1876. It appears to me that, when in August, 1876, the defendant turned the plaintiff out of his occupancy-tenancy and seized the standing crops on the lands comprised therein, the plaintiff might and should have made applications under s. 95, cls. (*m*) and (*n*) of Act XVIII of 1873. Those applications should have been made within six months of the cause of action (s. 96, *e.*), and as those applications 'might have been made,' no other Court (s. 95) can take cognizance of the matter to which they would have referred. It is nothing to the purpose to say that the plaintiff was awaiting the end of the litigation in the Civil Courts, The action of the defendant in seizing the crops and turning plaintiff out of his cultivation was always wrongful. It has not become so only under the Civil Court's final decree, though that decree may throw a stronger light on the wrong. I have, therefore, no hesitation in deciding that the claim on account of the standing crops is not cognizable here, and would be, in my opinion, barred by limitation, even if the Court had jurisdiction, as this seizure of the standing crops was never ordered by the Court and was outside the litigation between the parties.

"Turning now to the claim of the plaintiff to the rent of the '*khud-kasht*' land, no doubt the defendant had the right to collect the rents of that land from the plaintiff (if the defendant had not ousted plaintiff), as long as he (defendant) was in possession as zamindar, and now that defendant's possession as zamindar has been restored as lessee, the plaintiff is entitled to receive from defendant what defendant was entitled to collect and could accordingly have collected. The lower Court has found as a fact that the land in question was let by the defendant in 1285 Fasli for Rs. 175, and from this fact has deduced that the rent for the rabi of 1284 Fasli should have been Rs. 72-14-0. These, however, are rents which the defendant collected from tenants-at-will, with whom, so far as the Civil Court is concerned, he had no right to deal in connection with plaintiff's "*khud-kasht*" land. These sums in fact represent the damage resulting to plaintiff, not only from his ejectment from his [710] lease, but also from his "*khud-kast*" lands. As already remarked by this Court, the Court below has no concern with the latter ejectment and resulting damage.

"The question is how much the defendant received from the land (*khud-kasht*) as zamindar and by virtue of the rights held to be his by the Civil Court.

"There is no evidence to show. In fact, as regards 1284 Fasli, if the plaintiff is to be believed, defendant received nothing but the crops standing on the land, a matter I have already disposed of."

The plaintiff appealed to the High Court.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

Pandit *Bishambhar Nath* and Munshi *Kashi Prasad*, for the respondent.

JUDGMENT.

The judgment of the High Court (SPANKIE, J., and STRAIGHT, J.), so far as it is material for the purposes of this report, was as follows:—

SPANKIE, J.—The facts of the case are very clearly set forth by the first Court in the elaborate judgment in favour of the plaintiff. In appeal the Judge modified the first Court's judgment, finding that, when plaintiff has been dispossessed from the lands comprising his occupancy-right as tenant, he should have made an application under cls. (*m*) and (*n*),

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s. 95, Act XVIII of 1873, and, as this application might have been made, the Civil Court had no jurisdiction to hear this part of the claim, which, indeed, if the Civil Court could have entertained it, was barred by limitation.

It is contended by the plaintiff that the Civil Court had full jurisdiction: the plaintiff in bringing this suit had adopted the only course open to him, his ejectment having been carried out in execution of a decree of Court, and this decree having been subsequently set aside: the Judge too had erred in holding that the claim was barred by limitation, and in dismissing the claim on account of the "*khud-kasht*" lands.

We are of opinion that the applications referred to in letters (*m*) and (*n*), for compensation for wrongful dispossession, or for **[711]** recovery of possession of land of which a tenant has been wrongfully dispossessed, do not apply to the present case, in which there was no wrongful dispossession within the meaning of the Rent Act, and that the claim of the plaintiff was not one for which a remedy was available under s. 95 of that Act, and, therefore, the Civil Court had jurisdiction. Holding this view, it follows that the limitation of s. 96 of the Rent Act does not apply. So, we think that the Judge was wrong in dismissing the claim for the rent of the "*khud-kasht*" land which defendant let to tenants. The effect of the decree against the present plaintiff, when executed, put him out of possession of the entire estate which he held as lessee, and defendant took possession of all the lands. Therefore plaintiff is clearly entitled to a refund of all rents to which the lessee alone had a claim, if he had chosen, as defendant did, to let a portion of his sir.

Appeal allowed.

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2 A. 711=5 Ind. Jur. 324.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

RAM LAKHAN RAI (*Plaintiff*) *v.* BANDAN RAI AND OTHERS (*Defendants*).* [16th February, 1880.]

Vendor and Purchaser—First and Second Purchasers.

The proprietor of certain immoveable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it, but had been ousted by the second purchaser. *Held* that the first sale was not void by reason of the non-payment of the purchase-money, and that, the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money.

[Rel., 7 Ind. Cas. 541 (543)=6 N.L.R. 98 (101); R., 19 C.L.J. 146=17 C.W.N. 1161, 6 N.L.R. 98; D, 18 M. 61 (63).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

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* Second Appeal, No. 725 of 1879, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 27th March, 1879, modifying a decree of Maulvi Mir Badshah, Munsif of Saidpur, dated the 1st December, 1878.

Munshi *Hanuman Prasad* and *Sukh Ram*, for the appellant.
Lala *Lalta Prasad* and Babu *Lal Chand*, for the respondents.

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APPELLATE CIVIL.

2 A. 711 = 5 Ind. Jur. 324.

JUDGMENT.

[712] The judgment of the High Court (PEARSON, J. and STRAIGHT, J.) was delivered by

PEARSON, J.—The plaintiff sued to recover possession of an eight gandas share in mauza Chandipur under a sale-deed executed in his favour by Ram Bakhsh, defendant, on the 7th August, 1874, on the averment that after his purchase he had been put in possession of the property, but had been ousted from it by the other defendants, to whom Ram Bakhsh had ostensibly conveyed the same property by a sale-deed dated 11th December, 1877. The defendant, Ram Bakhsh, admitted the receipt of the sale-consideration, Rs. 600, from the plaintiff, and the truth and justice of his claim. The other defendants contended that the sale-deed of the 7th August, 1874, had been invalidated by the non-payment of the sale-consideration therein mentioned, and that consequently Ram Bak sh was competent to sell the property, the subject thereof, to them, and that they were lawfully in possession of it under the sale-deed executed in their favour. The Court of first instance allowing these contentions dismissed the suit with costs. The lower appellate Court concurred with the Munsif in finding that the plaintiff had neither paid the sale-price, nor been put in possession of the property, nor been ejected from it by the second vendees, but nevertheless held that the vendor was not free or competent to avoid the first sale. The Subordinate Judge was of opinion that Ram Bakhsh had only a right to sue for the sale-consideration, or to refuse possession of the property to the plaintiff until receipt of that consideration. The Subordinate Judge further ruled that the plaintiff was not entitled to obtain possession of the property without payment of Rs. 600, the sale-consideration, which was payable to the defendants, the second vendees, as representatives of the vendor, whatever rights and interests he had in the disputed property against the plaintiff having passed to them, and that they were accordingly entitled to receive the sale-consideration, or until its receipt to retain possession of the property in question.

The respondents have not taken any objections to the lower appellate Court's decision, and we are bound therefore to accept the ruling that the first sale is not void by reason of the non-payment of the sale-consideration, and that the second sale is invalid as [713] having been made by a person who had no rights and interests remaining in the property. This being so, we cannot assent to the view that the second vendees are representatives of the vendor and entitled to receive the sale-consideration, found to be still owing to him, and retain possession of the property in suit until the receipt of that consideration. What he sold to them was not the right to receive that consideration, but the property in suit. They were doubtless at liberty to resist the plaintiff's claim on the ground that the sale made to him had been invalidated by his failure to pay the sale-price; but they have not challenged the ruling that it was not so invalidated, and they must submit to the conclusion that the sale made to themselves is invalid, and that they are not entitled to retain possession of the property thereunder.

If then they are not entitled to retain possession of the property until receipt of Rs. 600 from the plaintiff, the question remains whether that sum should be paid to the vendor. To him, if it be due at all, it is due from the plaintiff, but he admitted its receipt in the Court of first instance,

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and has not claimed it here. From him and not from the plaintiff the second vendees are entitled to recover the price which they paid to him for the property, which the lower appellate Court has ruled that he was not free and competent to sell to them.

For the above reasons we must decree the appeal with costs, and modify the lower appellate Court's decree by reversing that portion of it which directs the plaintiff to pay Rs. 600 and to bear his own costs. Those costs must be paid by the defendants, second vendees.

Appeal allowed.

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2 A. 713 = 5 Ind. Jur. 325.

APPELLATE CRIMINAL.

Before Mr. Justice Pearson.

EMPRESS OF INDIA *v.* KISHNA AND ANOTHER. [18th February, 1880.]

Act XLV of 1860 (*Penal Code*), *s.* 201.

K and *B*, having caused the death of *J* in a field belonging to *B*, removed *J's* dead body from that field to his own field with the intention of screening themselves from punishment. *K* was convicted on these facts of an offence [714] under s. 201 of the Penal Code. *Held*, that that section referred to persons other than the actual offenders, and *K* could not therefore properly be punished under that section for what he had done to screen himself from punishment. Also that, as a matter of fact, he did not by removing *J's* corpse from one field to another cause any evidence of *J's* murder which that corpse afforded to disappear, and his act, although his object may have been to divert suspicion from himself and *B*, did not constitute the offence defined in that section.

[F., 8 A. 252 = A.W.N. (1886) 716; 22 C 638 (641); R., 1 L.B R. 366; 1 P.R. 1904, Cr. = 30 P.L.R. 1904; 1 S.L.R. 73 (81), Cr.]

THE facts of this case, so far as they are material for the purposes of this report, were as follows:—Kishna and Fauja were charged before Mr. H. M. Chase, Sessions Judge of Saharanpur, with the murder of one Jiwan; also with the culpable homicide not amounting to murder of Jiwan; and also of causing evidence of the commission of those offences to disappear with intent to screen the offenders—an offence punishable under s. 201 of the Indian Penal Code. With regard to the last charge, it appeared from the evidence at the trial that the two accused persons, together with one Bhikan, having caused the death of Jiwan in a field belonging to Bhikan, had carried his body out of that field and thrown it into his own field. The Sessions Judge convicted Kishna of the culpable homicide not amounting to murder of Jiwan, and also, under s. 201 of the Penal Code, of having, by removing Jiwan's body, caused evidence of the commission of the culpable homicide to disappear, with the intention of screening himself from punishment.

Kishna appealed to the High Court.

JUDGMENT.

The Court's judgment, so far as it is material to the purposes of this report, was as follows:—

PEARSON, J.—No one is present on behalf of the appellant to support the appeal. The grounds on which the findings of the Sessions Judge are appealed against are not apparent from the petition of appeal. Those findings, however, appear to me to be obnoxious to grave objections.

The appellant has been found guilty of causing the disappearance of evidence of an offence committed with the intention of screening himself and other offenders from legal punishment. Now s. 201, Indian Penal Code, has been held to refer to persons other than the actual offenders; and therefore the appellant in this case could not properly be punished for what he [715] may have done to screen himself from punishment. But, as a matter of fact, he did not, by removing the corpse of Jiwan from one field to another, cause any evidence of Jiwan's murder which that corpse afforded to disappear. His object may have been to divert suspicion from himself or from Bhikan; but his act does not constitute the offence defined in s. 201, Indian Penal Code. The conviction and sentence under that section are therefore annulled.

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2 A. 715.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

CHUHAR MAL (*Plaintiff*) v. MIR AND OTHERS (*Defendants*).*
[24th February, 1880.]

Bond—Interest—Penalty.

The obligors of a bond agreed to pay the principal amount by instalments without interest, and in case of default to pay interest at the rate of Rs. 3-2-0 per cent. per mensem, and hypothecated immoveable property as security for the payment of the bond-debt, sufficient for the discharge of the debt, and furnished a surety. *Held* by STUART, C.J., in a suit on the bond, that the principal amount being payable, in the first instance, without interest, the stipulation to pay interest at the rate of Rs. 3-2-0 per cent. per mensen, in case of default, was a penal one, and reasonable interest should only be allowed. *Held* by SPANKIE J., that, looking at all the circumstances of the case, the very high rate of interest imposed in case of default should be regarded as penal, and should be reduced.

The Court under the circumstances allowed interest at the rate of one rupee per cent. per mensem.

[N.F., 15 A. 232 (255) (F.B.); R., 14 Ind. Cas. 511=22 M.L.J. 354]

ON the 14th August, 1868, the defendant Mir and one Sumair, as principals, and one Narpat, as surety, executed a bond in favour of the plaintiff, in which the defendant Mir and Sumair promised to pay the plaintiff Rs. 400 by three instalments, "and in case of default with future interest at Rs. 3-2-0 per cent, per mensem." As collateral security for the payment of the "aforesaid amount" they hypothecated certain immoveable property "in lieu of the amount of the bond." Narpat, as surety, agreed to pay the amount of this bond in case the principals failed to pay the "aforesaid amount." In July, 1878, the plaintiff instituted [716] the present suit against the defendant Mir and the persons representing Sumair and Narpat, who had meanwhile died, claiming to recover on the bond Rs. 1,477, principal and interest, by the sale of the property hypothecated in the bond, and from the estate of Narpat. The plaintiff claimed interest from the dates the three instalments became due and were not paid at the rate stipulated in the bond, *viz.*, Rs. 3-2-0 per cent. per mensem.

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* Second Appeal, No. 43 of 1879, from a decree of H. M. Chase, Esq., Judge of Saharanpur, dated the 26th November 1878, affirming a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 25th July 1878.

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Both the lower Courts held that this rate was penal and should not therefore be allowed, and awarded interest at the rate only of one rupee per cent. per mensem.

On appeal by the plaintiff to the High Court it was contended on his behalf that the stipulated rate of interest was not penal, and the property hypothecated in the bond being expressly made liable for the payment of principal and interest, interest at the stipulated rate should have been awarded; and that, as the instalments were payable without interest, the rate of interest claimed could not be considered unfair and excessive.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

Shah *Asad Ali*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

STUART, C. J.—It is clear that the defendants, who are the debtors under the hypothecation-bond, have been taken advantage of by their greedy and unscrupulous lender. But, if there were nothing else in the case than the mere stipulation for a high rate of interest, it might be difficult to hold that the plaintiff was not entitled to recover on that footing, the usury laws having been repealed, and parties generally in such transactions being left to their contracts. But here there appears to be a peculiarity which takes his case out of the general category to which I have referred. As I understand, the money was lent in the first instance without interest, and, that being so, the subsequent stipulation for Rs. 3-2-0 per cent. per mensem, to be enforced on the defendant's default in paying the instalments, appears to me to be not only penal, but really in the nature of a fraud on the main contract, and interest should be reduced to what is reasonable under all the circumstances. [717] I agree with the lower Courts in thinking that one per cent. per mensem would be sufficient, and to this rate my colleague Mr. Justice Spankie is willing to reduce the interest. After date of decree of the first Court six per cent. per annum to be allowed. The judgments of the lower Courts will therefore stand and the present appeal is dismissed with costs.

SPANKIE, J.—Plaintiff-appellant sued defendants-respondents on a bond executed by Mir and Sumair on the 14th August, 1868, for Rs. 400 payable by instalments without interest, and stipulating, in case of default, that the obligors would pay interest at Rs. 3-2-0 per cent. per mensem. The obligors hypothecated twenty-nine bighas of land in mauza Mirzapur, as security for the payment of the debt. One Narpat was also surety. Sumair and Narpat are both dead, leaving Khushal and others, defendants, their sons, in possession of their property.

Mir admitted the bond and also that he was in possession of the estate of Sumair, deceased. He contended, however, that he had only received Rs. 250, out of the Rs. 400 borrowed, as Narpat, the surety, had to take Rs. 150; and he further urged that the provision in the bond for such extortionate interest was penal. Khushal, as heir of Narpat, admitted the bond, but pleaded that the debt should be recovered from the debtors, and, if that could not be done, he was liable for the balance.

The only question now before us in second appeal relates to the interest. The first Court held the condition in the bond to be a penal provision and would not allow it. In appeal the Judge affirmed the decree of the first Court, holding that the rate of interest amounted to a penalty and was excessive.

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2 A. 715.

It is contended by the plaintiff that the ruling of the Courts below as to the interest is erroneous. The property hypothecated in the bond was expressly made liable for the payment of principal and interest, and therefore the plaintiff is at liberty to recover the rate stipulated therein.

Looking at all the circumstances of the case, and the terms of the contract, which are much in favour of the obligee, as the pro- [718]perty of the obligors, sufficient for the discharge of the debt, is hypothecated to him in the deed, and besides this another person became surety, I am disposed to regard the very high rate of interest imposed in case of default as being of a penal character. At the same time the money was lent in the first instance without interest, and the deed hypothecates the property both for the payment of the debt and interest; the appellant therefore may have some ground for contending that the interest named in the bond is the consideration agreed to be paid by the borrower to the lender for the use of the money. Still the rate of interest imposed by the terms of the bond is so excessively high, and specially so when the security appears to be good and the risk therefore less, that it seems impossible not to regard the clause respecting interest as a penal one, in case of default, and as there was default, I would give the plaintiff-appellant reasonable compensation, and this I think would be half the rate imposed by the bond to the date of the decree of the Court of first instance, and after that I would allow interest at six per cent. per mensem. But if the learned Chief Justice considers that a less rate should be allowed, I am willing to reduce it to twelve per cent.

Appeal dismissed.

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2 A. 718.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

SHEO PRASAD AND ANOTHER (*Plaintiffs*) v. UDAI SINGH (*Defendant*).*
[25th February, 1880.]

Vendor and purchaser—Transfer of immoveable property—Specific performance of contract—Act XV of 1877 (*Limitation Act*), *sch. ii, arts.* 113, 136, 144.

On the 27th October, 1865, the vendor of certain immoveable property executed a conveyance of such property to the purchasers. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express promise or undertaking on the vendor's part to put the purchasers into possession. On the 24th February, 1870, the vendor obtained possession of the larger portion of the property and on the 23rd August, 1872, of the remainder. On the 5th October, 1877, the purchasers sued the vendor for the possession of the property, stating that "possession was agreed to be delivered on the receipt of possession by the vendor," and that the cause of action was that the vendor had not put them into possession. *Held* that the suit was not one for [719] the specific performance of a contract to deliver possession to which art. 113 of sch. ii of Act XV of 1877 was applicable, but one to obtain possession in virtue of the right and title conveyed to the purchasers to which either arts. 136 or 144 of sch. ii of that Act was applicable, and that, whichever of them was applicable, the suit was within time.

[Rel. on, 33 A. 224=7 A.L.J. 1184=8 Ind. Cas. 1095; R., 13 B. 424 (428); 15 B. 261 (264); 10 C. 218 (224); 9 Ind. Cas. 238=18 P.R. 1911=92 P.L.R. 1911=45 P.W.R. 1911; 5 Ind. Cas. 273 (275).]

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* First Appeal, No. 55 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 17th February, 1879.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs appealed from the decree of the Court of first instance dismissing their suit.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), Pandit *Ajudhia Nath*, and Babu *Oprokash Chundar Mukarji*, for the appellants.

The Senior Government Pleader (Lala *Juala Prasad*), for the respondent.

JUDGMENT.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.— This purports to be a suit to obtain possession of landed property sold by the defendant to the plaintiffs on the 27th October, 1865. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree of the late Sudder Dewany Adawlat, North-Western Provinces, dated 9th August, 1864, against which an appeal was pending before the Privy Council. But he obtained possession of the larger portion of the property on the 24th February, 1870, and of the remainder on the 23rd August, 1872, and the cause of action in this suit is that he has not put the plaintiffs in possession of it.

The lower Court has held the suit to be one for the specific performance of a contract to which art. 113, sch. ii, Act XV of 1877, is applicable, and has dismissed the suit as barred by efflux of time, it having been instituted on the 5th October, 1877, or more than three years after the dates above mentioned.

On examining the deed of sale, we find that it does not contain any express promise or undertaking on the vendor's part to put the vendees in possession. It recites that he has sold to them and received the sale-consideration, and goes on to declare that they, [720] regarding themselves as the absolute proprietors thereof, shall remain in possession of it from the date on which he may obtain possession of it in execution of the decree aforesaid.

Such being the terms of the deed, the plaintiffs are not in a position to sue that the defendant may be compelled to put them in possession in fulfilment of a specific engagement to do so, nor is such the prayer of their plaint. As we have already observed, they sue to obtain possession in virtue of the right and title conveyed to them by the sale-deed.

In the 3rd paragraph of the plaint they say that the possession was agreed to be delivered "on the receipt of possession by the vendor," but, inasmuch as there was not really any such express agreement, we must understand what they say to mean no more than that he was bound by an implied agreement to put them in possession.

Taking this view of the nature of the suit, we are unable to concur in the ruling that art. 113, sch. ii, Act XV of 1877 is applicable to it, and we rule that either art. 136 or art. 144 is applicable, and that, whichever of them be applicable, the suit is within time. (The judgment then proceeded to determine the appeal on its merits).

2 A. 720 (F.B.).

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FULL BENCH.

2 A. 720
(F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

RAM PRASAD (*Defendant*) *v.* SUKH DAI (*Plaintiff*).*
[28th February, 1880.]

Declaratory decree—Consequential relief—Act VII of 1870 (*Court Fees Act*) *s.* 7, *cl. iv* (*c*) *and sch.* (*ii*), *art.* 17 (*iii*)—*Suit to establish right to attached property—Act X of* 1877 (*Civil Procedure Code*), s. 283.

In a suit, under s. 283 of Act X of 1877, for a declaration of her proprietary right to certain immoveable property attached in the execution of a decree, the plaintiff asked that the property might be "protected from sale." *Held* that consequential relief was claimed in the suit and court-fees were therefore leviable under s. 7, cl. iv (c), and not under sch. ii, art. 17 (iii) of Act VII of 1870.

[Overr., 16 A. 308 (312) (F.B.); F., 12 A. 129 (163) (F.B.); R., 16 B. 608 (616, 617); 31 B. 73 (77)=8 Bom.L.R. 885; 31 C. 511 (515); D., 20 B. 736 (741).]

[721] THIS was a reference to the Full Bench arising out of the following facts: A certain dwelling-house having been attached in the execution of a decree as the property of one Ram Dial, the plaintiff claimed to be the owner of the house under a gift. The Court executing the decree disallowed this claim. Thereupon the plaintiff instituted the present suit against the defendant, the decreeholder, in which she claimed that her proprietary right under the gift might be declared, and the house be "protected from sale." She paid in respect of her plaint the *ad valorem* fee computed on the market-value of the house leviable under the Court Fees' Act. The Court of first instance gave the plaintiff a decree as claimed. On appeal by the defendant the lower appellate Court affirmed this decree. On appeal to the High Court from the decree of the lower appellate Court the defendant only paid on his memorandum of appeal the fixed fee leviable in a suit to obtain a declaratory decree, where no consequential relief is prayed. The taxing-officer of the High Court reported that the proper fee leviable on the memorandum of appeal had not been paid, inasmuch as consequential relief was prayed. The Division Bench (STUART, C. J. and SPANKIE, J.) before which the appeal came referred the case to the Full Bench, the order of reference being as follows:—"Finding that the rulings of this Court—S. A. No. 168 of 1879, decided the 13th May, 1880 (1): S. A. No. 296 of 1879, decided the 29th July, 1879 (1): S. A. 334 of 1879, decided the 22nd August, 1879 (1): S. A. No. 384 of 1879, decided the 1st August, 1879 (1)—are contradictory as regards the principle on which court-fees are payable in suits under s. 283 of the Code of Civil Procedure, and that some of them are opposed to rulings of other High Courts—*Jai Narayan Giri* v. *Grish Chandur Myti* (2); *Thakur Din Tiwary* v. *Nawab Syed Ali Hussain* (3); *Bahur-un-nissa Bibi* v. *Karim-un-nissa Khatun* (4); *Bank of Hindustan* v. *Premchand Raichand* (5)—we refer for the consideration of a Full Bench the question

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* Second Appeal, No. 499 of 1879, from a decree of J.H. Prinsep, Esq., Judge of Cawnpore, dated the 24th February 1879, affirming a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 3rd May 1878.

(1) Unreported. (2) 22 W.R. 438. (3) 21 W.R. 340.
(4) 19 W.R. 18. (5) 5 B.H.C.R. O.C.J. 83.

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whether court-fees are payable in such suits under cl. iv (*c*), s. 7, or under cl. iii, art. 17, sch. ii, Act VII of 1870."

The following judgments were delivered by the Full Bench:

JUDGMENTS.

[722] STUART, C. J.—Since this case was before Spankie, J., and myself I have had an opportunity of perusing the plaint, and it cannot be doubted that by it, not only a declaration of right, but that consequential relief is also prayed for. And I may observe that in my opinion the plaintiff was quite entitled to frame her suit in this form and was in no way bound to await the eventualities of a mere declaration of right; and she appears to me to have wisely considered that her object would be most effectually attained by a plaint in the form which she adopted. The plaint shows how Sukh Dai the plaintiff acquired the house, which is the subject of the suit, and that her claim as owner had been interfered with by the action of the purchaser of a decree against the house, or rather one-third of it, and that she had applied to have the sale postponed, but that the Munsif had rejected her application. The plaintiff therefore prays for the following relief:—"That her right be established in respect of the said house, or one-third of the said house, valuing Rs. 1,333-5-4, by virtue of the deed of gift dated the 26th March 1873, and for her possession and enjoyment thereof being protected from sale be established." There cannot be a doubt that consequential and substantial relief is here asked for, and that the Court-fee payable is that provided by cl. iv (*c*), s. 7 of the Court Fees' Act, and that cl. iii, art. 17, sch. ii of the same Act has no application.

This is my clear opinion irrespective of any rulings on the subject by this or by any other of the High Courts. But I have looked into all those printed for us in this case, and they all appear to me to have been correctly decided and to be in strict consistence with the opinion I have formed and stated in the present case, not even excepting the ruling by Pearson, J., and Turner, J., in *Chunia* v. *Ram Dial*(1), for in that case all that was prayed for was a mere declaration of right. The decision of the Privy Council of the 6th March 1874, *Thakur Din Tiwary* v. *Nawab Syed Ali Husain* (2), as also the rulings by the Calcutta and Bombay High Courts are as satisfactory as they are to my mind conclusive.

PEARSON, J.—In the suit out of which this appeal has arisen it would seem that the plaint asked, not only for a declaration of [723] the plaintiff's right to the property in question, but also for its protection or exemption from sale in execution of the defendant's decree. The latter prayer was, in my opinion, superfluous; for, if the plaintiff succeeded in obtaining a decree declaratory of his right, he could on the strength thereof apply to the Court executing the decree to release the property from attachment and to refuse to proceed to the sale thereof. As, however, he was so ill-advised in framing his suit as to pray for consequential relief which he did not need to obtain by means of the decree passed in the suit, it is impossible to hold that his suit is not one of the nature described under letter *c*, cl. iv, s. 7 of the Court Fees Act. I confine my remarks to the particular case under reference, and refrain from noticing or commenting on the decisions to which our attention has been drawn. The distinction between suits under letter *c*, cl. iv, s. 7, and suits under cl. iii, art. 17, sch. ii of the Act is plain; the former are

(1) 1 A. 360. (2) 21 W R. 340.

suits for a declaratory decree where consequential relief is prayed; the latter are suits of the like kind where no consequential relief is prayed. There is no scope for argument in the matter.

SPANKIE, J.—I concur.

OLDFIELD, J.—I am of opinion that in this case, looking to the relief sought, there is a claim for consequential relief, and the court-fees should be levied under letter *c*, cl. iv, s. 7 of the Court Fees Act.

STRAIGHT, J.—Plaintiff rightly estimated the nature of the relief she was seeking in her suit, by paying a court-fee of Rs. 60-12-0 in the first Court. It was not a mere declaration of her right at which she aimed, but she sought consequential relief as well. The defendant-appellant has therefore inadequately stamped his petition of appeal and he will have to make up the deficiency.

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2 A. 723 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

EMPRESS OF INDIA v. RAM KUAR. [8th March, 1880.]

Buying or disposing of a person as a slave—Act XLV of 1860 (*Penal Code*), s. 370.

R, having obtained possession of *D*, a girl about eleven years of age, disposed of her to a third person, for value, with intent that such person [724] should marry her, and such person received her with that intent. *Held* that *R* could not be convicted of disposing of *D* as a slave under s. 370 of the Indian Penal Code. *Queen* v. *Mirza Sikundur Bukhut* (1) remarked upon.

[R., 7 M. 277 (279) = 1 Weir 356.]

THIS was a case called for by Spankie, J., under s. 294 of Act X of 1872 and subsequently referred by him to the Full Bench. The accused Ram Kuar had been convicted by Mr. W. C. Turner, Sessions Judge of Agra, of disposing of one Deoki as a slave, an offence punishable under s. 370 of the Indian Penal Code. The main facts upon which this conviction was based were as follows:—The accused, on a certain day, in the town of Agra, met Deoki, who was a married girl, aged about eleven years, and living with her uncle, and telling her that she would provide well for her, took her, against her will, to the house of one Udai Ram a *Jat* by caste. There the accused, alleging that Deoki was a *Jat* whereas she was in fact a *Gararia*, disposed of her to Udai Ram's brother, with a view to marriage, for Rs. 4 and a buffalo. The following extract from the Sessions Judge's judgment contains the grounds upon which he convicted the accused under s. 370 of the Indian Penal Code:—"Apparently by this section the traffic in all human beings is prohibited, and when the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of as a slave within the meaning of this section, whatever force the parties to the transaction may attempt to give it. In the present case, it is clear that Ram Kuar took this young girl, who was at the time without protection, and, for a consideration, disposed of her to a *Jat*, knowing at the time that

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(1) H.C.R.N.W.P. 1871, p. 146.

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the girl was not by caste a *Jat* but a *Gararia*. Her conduct brings her within the meaning of this section."

ORDER OF REFERENCE.

The order referring the case to the Full Bench was as follows :—

SPANKIE, J.—Upon the facts found in this case I have come to the conclusion, as at present advised, that the conviction under s. 370 of the Penal Code ought not to be maintained. It cannot, I think, be said that there was in the transaction any buying or disposing of the girl as a slave. The section was not, in my opinion, intended to apply to such a case as the one before me. But I have [725] found a decision of a Bench of this Court, which, there can be no doubt, supports the view taken by the Sessions Judge in this case. The decision to which I refer will be found in the volume of this Court's Reports for 1871, and at p. 146,—*Queen* v. *Sikundur Bukut*.

The learned Judges in that decision remarked that it was "urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour, and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or a jailor. It appears to us that the appellant asserted a right to restrain the liberty of Musammat Paigya, and to dispose of her labour, and that she was detained in his house as a slave." In the present case the Sessions Judge seems to have had this judgment before him, and as it was the decision of a Divisional Bench (although at present I cannot agree that s. 370 meets either that or the case now before me), I am unwilling to dispose of the latter, without asking for the opinion of a Full Bench of the Court on the subject. I reserve for the present any expression of my reasons for thinking that s. 370 does not apply to the ordinary circumstances of kidnapping and disposing of young females to persons, either to be their wives or the wives of members of their families, or as mistresses, as the case may be. It is desirable that the case should be placed before the Court with as little delay as possible, as two cases in Criminal Revision are pending, which would be disposed of on my receiving the Full Court's judgment on the point submitted.

JUDGMENTS.

The following judgments were delivered by the Full Bench :

STUART, C. J.—The conviction in this case under s. 370, Indian Penal Code, cannot for a moment stand. The offence, if any, appears to have been one of kidnapping or abduction, but there is not a single element of the legal conception of slavery to be found under the facts. The Judge, in coming to his utterly mistaken conclusion [726] that Deoki had been treated as a slave within the legal meaning of that status, was probably influenced by what I must call the extraordinary ruling by a Bench of this Court in the case of *Queen* v. *Mirza Sikundur Bukhut* (1). That was, indeed, really a much stronger case than the present, and yet it, too, was obviously a case not of slavery but of kidnapping or abduction. It is exceedingly difficult to understand what is meant by s. 370, Indian

(1) H.C.R., N.W.P., 1871, p. 146.

Penal Code. That section provides that "whoever imports, exports, removes, buys, sells, or disposes of, any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." This appears to assume the condition of slavery as a possible fact within the cognizance of the law, but such a condition is as much ignored by the law of this country as it is by the law of England. A slave is a creature without any rights or any status whatsoever, who is or may become the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even of life or death, over the slave, without being responsible to any legal authority. Such is the determinate and fixed condition of the slave, and it is not, as ruled in the above case, a condition capable of degrees.

But such a position for any human being under the Government of India was utterly repudiated by an Act passed in 1843, Act V of 1843, entitled, "An Act for declaring and amending the law regarding the condition of slavery within the territories of the East India Company." And the Act, which is a short one, containing only four brief sections, provides as follows:—1. "No public Officer shall, in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, sell or cause to be sold, any person, or the right to the compulsory labour of services of any person, on the ground that such person is in a state of slavery." 2. "No rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company." 3. "No person who may have acquired property [727] by his own industry or by the exercise of any art, calling or profession, or by inheritance, assignment, gift or bequest, shall be dispossessed of such property or prevented from taking possession thereof on the ground that such person or that the person from whom the property may have been derived was a slave." 4. "Any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery." There is by this Act a thorough repudiation by the law of India not only of the condition of slavery as a possible state of things, but of any rights or interests or estate which could be asserted in respect of it, and therefore, as I have said, it is exceedingly difficult to understand what is meant to be intended by s. 370, Indian Penal Code. The actual accomplishment of placing a human being in the condition of a slave could not have been contemplated, inasmuch as the possibility of accomplishing anything unknown to the law cannot be supposed to have been meant or intended; s. 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way that is inconsistent with the idea of the person so treated being free as to his property, services, or conduct, in any respect.

Here the girl Deoki appears simply to have been enticed away by the accused Ram Kuar for the purpose of a marriage, which owing to an objection on the score of caste did not take place, and she was sent back to Ram Kuar. Whether in any case the marriage could have been carried out must be more than doubtful, as she herself states she had previously been married to Nangha, a fact which in all probability was not known at the time to Ram Kuar. But, whether that be so or not, it is perfectly

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clear that on the facts there is not the slightest pretence for holding that any offence whatever under s. 370 was committed.

PEARSON, J.—It is apparent upon the surface of the case that Deoki was sold to Udai Ram's brother and purchased by him not as a slave but for the purpose of becoming his wife. I therefore concur with the learned Judge who made the reference to the Full Bench in the opinion that the conviction of Ram Kuar under [728] s. 370, Indian Penal Code, cannot be maintained. But I do not think that the decision of this Court in *Queen* v. *Mirza Sikundur Bukhut* (1) affords any support to the view taken by the Sessions Judge in this case.

SPANKIE, J.—I am still of the same opinion as I was when I referred the case, that s. 370 of the Penal Code does not meet it.

The Sessions Judge makes the following observations in his judgment:—"Apparently by this s. (370) the traffic in all human beings is prohibited, and when the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of as a slave within the meaning of this section, whatever force the parties to the transaction may attempt to give it."

The precedent of this Court (1), to which I refer in submitting the case to the Full Bench, appears to me to support this view. The learned Judges say that a person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or jailor. This doubtless is so. But the Judges go further and say: "The offeuce of which the appellant has been convicted is we are informed one of which instances are not uncommon in this country. Children are purchased from their parents or strangers, and are brought up as domestic servants, having little or no personal liberty conceded to them. These children are practically slaves and it cannot be too widely known that their condition is such as will not be tolerated by English law, and that persons who detain them in their houses are liable to punishment under the Penal Code."

I have examined the records of Government with a view to ascertain the circumstances under which the section was framed.

In the draft Penal Code published by command in 1837, in the chapter on kidnapping, except in cl. 357, now represented by s. 367, there is no reference to slavery. The report, however, of the [729] Commissioners recognizes slavery as existing. They say that they had collected information on the subject from every part of India, and that the documents collected have satisfied them that there is at present no law whatever defining the extent of the power of a master over his slaves, that every thing depends on the disposition of the particular functionary who happens to be in charge of a district, and that functionaries who are in charge of contiguous districts, or who have at different times been in charge of the same district, hold diametrically opposite opinions as to what their official duty requires. The result was that the Law Commissioners recommended to the Governor-General in Council that no act falling under the definition of an offence should be exempted from punishment because it was committed by a master against a slave.

It may be thought, they say, that by framing the law in this manner they do in fact virtually abolish slavery in British India. But their object was to deprive slavery of those evils which are its essence, and to

(1) H. C. R. N. W. P. 1871, p. 146.

do so would ensure the speedy and natural extinction of the whole system. "The essence of slavery," they observe, "the circumstance which makes slavery the worst of all social evils, is not in our opinion this, that the master has a legal right to certain services from the slave, but this, that the master has a legal right to enforce the performance of those services without having recourse to the tribunals."

The Hon'ble Court of Directors in 1838 directed that the Government of India should lose no time in passing an enactment to the effect of the recommendation just referred to. The majority of the Commissioners framed a draft Act, but Mr. Cameron differed from them, and afterwards the Commissioners again differed amongst themselves in submitting another report on the subject in 1841. At last in 1843 Act V of that year was passed which carried out the original recommendation of the Law Commissioners. The first section forbade the public sale by any public officer in execution of any decree or order of Court, or for the enforcement of any demand of rent or revenue, of any person, or of the right to the compulsory labour or services of any person on the ground that such person is in a state of slavery. S. 2 [730] declared that no rights arising out of an alleged property in the person and services of another as a slave shall be enforced by any Civil or Criminal Court or Magistrate within the territories of the East India Company. S. 3 provides that no person shall be deprived of any property whatsoever, however obtained, on the ground that such person or that the person from whom the property may have been derived was a slave. S. 4 enacted that any act which would be a penal offence if done to a free man shall be equally an offence if done to any person on the pretext of his being in a condition of slavery.

After this in 1846 the Indian Law Commissioners again submitted a report on the Penal Code. In cls. 426 to 438 of their report, the Commissioners refer to kidnapping and sale of children. In cl. 435 they refer to Act V of 1843, and observe that the private sale of a free person for the purpose of being dealt with as a slave is not prohibited by this law. But as, under s. 4 of it, no person so sold could be dealt with as a slave against his will, it amounts to a virtual prohibition which may be effectual as regards adults who can avail themselves of the law, without any further provision. But with respect to children, it should be made penal to sell or purchase a child under any circumstances. I can obtain no clue to what happened after this report. This recommendation in the report of 1846 appears to have borne fruit, for ss. 370 and 371 were prepared.

Looking at the former law, V of 1843, and specially at s. 4, I conclude that, so far as we are concerned in the case referred to, it would be necessary for the prosecution to show that the prisoner Ram Kuar asserted a right to dispose of the girl's liberty, and under pretext of her being a slave sold her as such and to continue such. The case before us does not present any such features. The section, therefore, does not apply.

The observation of the learned Judges in the latter part of the judgment in *Queen* v. *Mirza Sikundur Bukhut* (1) appear to me to go beyond the section. Ss. 365, 366, 367, 368, 372 and 373 seem to provide for the cases of kidnapping children whilst s. [731] 374 declares that any one who unlawfully compels any person to labour against his will shall be punished with imprisonment of either description for a term

(1) H.C.R. N.W.P. 1871, p. 146.

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which may extend to one year or with fine or with both. But s. 370 must be read as providing for the specific offence which it includes, *i. e.*, (i) the importation and exportation of a person as a slave; (ii) the disposal of a person as a slave (and here the presumption is that the act is against the will of the person); (iii) the acceptation, reception or detention of any person against his will as a slave, that is, it must be shown that the act done was done against the will of the person, who cannot be accepted, received or detained as a slave. When these conditions are not seen in any case, s. 370 does not appear to me to apply.

OLDFIELD, J.—I apprehend that the sections of the Penal Code with which this reference deals were enacted for the suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another.

Slavery had the sanction of the Muhammadan and Hindu laws, and a form of slavery was prevalent in this country at the commencement of our rule, and Mr. Justice Spankie, whose written opinion on this reference I have had the advantage of reading, has abundantly shown that the law we are dealing with was enacted to suppress that practice.

To bring the act of the accused in the case before us within the meaning of s. 370, there must be a selling or disposal of the girl as a slave, that is, a selling or disposal whereby one who claims to have a property in the person as a slave transfers that property to another.

But the facts in this case do not show anything of the kind; no such right of property in the girl appears to have been set up by the accused. The girl appears to have come under the protection of accused when in a state of destitution, and she was given [732] over to Udai Ram in order that she might become his brother's wife, the accused receiving a gratification for her trouble. The facts do not, therefore, appear to me to constitute an offence under s. 370.

STRAIGHT, J.—Upon the facts as disclosed in the judgment of the Sessions Judge, I am of opinion that the conviction of Ram Kuar under s. 370 of the Penal Code cannot be sustained. There is no sufficient evidence that the girl Deoki was "sold or disposed of" to the brother of Udai Ram for the purpose of her being dealt with as a slave, or, in other words, that a right of property in and over her should be asserted by her purchaser in employing her in menial and enforced services against her will and by restraining her liberty. On the contrary, the proof appears to be, that the Rs. 4 and the buffalo were given by Udai Ram's brother under the belief that Deoki was a *Jat*, and his admitted object and intention in reference to her was marriage. Moreover, the moment it was discovered she was a *Gararia*, Udai Ram started to take her back to Ram Kuar and was only prevented from doing so by his arrest. Under all the circumstances, I think that the decision of the Sessions Judge should be set aside.

2 A. 732.

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2 A. 732.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

PURAN MAL AND OTHERS (*Plaintiffs*) v. PADMA (*Defendant*).*
[11th March, 1880.]

Rent-free grant—Jurisdiction—Act XVIII of 1879 (*N.W.P. Rent Act*), ss. 30, 95 (c)—*Act XIX of* 1873 (*N.W.P. Land Revenue Act*), ss. 79, 241 (*h*).

The plaintiffs in this suit, zemindars of a certain village, sued for the possession of certain land in such village, alleging that it had been assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of village-watchman, and the defendant had ceased to perform those duties, and was holding as a trespasser. The defendant set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, and that he held it as a proprietor. *Held* that such assignment was not a grant within the meaning [733] of Regulation XIX of 1793 and the plaintiffs' claim was not one to resume such a grant or to assess rent on the land, for which a Revenue Court could take cognizance under ss. 30 and 95 (c) of Act XVIII of 1873 or ss. 79 and 241 (*h*) of Act XIX of 1873, but one which was cognizable by the Civil Courts.

[Appr., 8 A. 552 (557) = A.W.N. (1886), 221.]

THIS was a suit for the possession of five bighas, nine biswas of land situate in Thoke Sundar Lal, mauza Chedermi, pargana Firozabad, Agra district. The plaintiffs, who were zemindars of the village, claimed such land on the ground that it had been granted to a predecessor of the defendant in consideration of his services as "*balahar*" or village-watchman, and the defendant had ceased to perform those services. The defendant set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, that he held the land as a proprietor, and that the suit was not cognizable by the Civil Courts. The Munsif and the Subordinate Judge concurred in holding that the suit was not cognizable by the Civil Courts, the matter in dispute being in their opinion the resumption of a rent-free grant of land, and one therefore on which an application might have been made to a Revenue Court, under s. 30 of Act XVIII of 1873, or s. 79 of Act XIX of 1873.

On appeal by the plaintiff to the High Court it was contended that the claim was not one for the resumption of a rent-free grant of land, within the meaning of those sections, but one for the possession of land which had been given to the defendant for the performance of services which he had ceased to perform, and the suit was consequently cognizable by the Civil Courts.

Munshi *Hanuman Prasad*, for the appellants.

Maulvi *Obeidul Rahman*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

SPANKIE, J.—I have considered the appellants' plea and have come to the conclusion that the finding of the Courts below, that the suit is not cognizable in the Civil Courts, is incorrect. The grants referred to in s. 30, Act XVIII of 1873, and in s. 79, Act XIX of 1873, are those set forth

* Second Appeal, No. 1029 of 1879, from a decree of Maulvi Maqsud Ali Khan, Subordinate Judge of Agra, dated the 6th June, 1879, affirming a decree of Maulvi Munir-ud-din, Munsif of Jalesar, dated the 26th March 1879.

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in the preamble of Regulation XIX of 1793, and in the first section thereof. That section recites [734] that, by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, while he continues to discharge the latter. As a necessary consequence of this law, if a zemindar made a grant of any part of his lands to be held exempt from payment of revenue, it was considered void, from being an alienation of the dues of Government without its sanction. There the grants referred to are those made by the zemindar. *Badshahi* or royal grants are excepted in the preamble. The grant referred to is a permanent alienation of revenue, or, as Acts XVIII and XIX, in ss. 30 and 79, respectively, term it, rent. The first section of Regulation XIX of 1793 further indicates the nature of the grants as having been made under the pretext that the produce of the lands was to be applied to religious or charitable purposes. Of these grants some were applied to the purposes for which they were professed to have been made, but, in general, they were given for the personal advantage of the grantee, or with a view to the clandestine appropriation of the produce to the use of the grantor, or sold to supply his private exigencies. All such grants since the 1st December, 1790, and in future, were declared null and void by s. 10 of the Regulation.

What the plaintiff desires in this case is full possession of a plot of land which he says has hitherto been held without payment of rent by defendant, the village "*balahar*" or watchman. He was allowed to occupy the land for his support, and in point of fact whatever he derived from the land constituted his wages. But there was no permanent grant of the land to him or his predecessors. He would continue to occupy it as long as he continued to give his services as watchman. Obviously such an assignment is not a grant within the meaning of Regulation XIX of 1793, and the present claim is not one to resume such a grant or to assess the rent on the land. The settlement officer therefore very properly refused to entertain the claim. Nor could an application to dispossess the [735] defendant be made to the Collector under letter (*c*), s. 95, and s. 30, Act XVIII of 1873, for the same reason. It is not a claim to recover a rent-free grant as being one of those declared by the Regulation to be null and void, nor is it a claim to assess the rent on the land.

The plaintiff wishes the defendant to give up the land or pay rent. The defendant repudiates the plaintiff's superior title, and claims that he has acquired a proprietary right in the plot which has been in the possession of himself and his family for two hundred years. Clearly there is a dispute between the parties which it is the special duty of the Civil Courts to determine. The plaintiff now regards the defendant, who is no longer watchman, as a trespasser; the latter asserts his full proprietary right in the plot. The Courts below are bound to determine the party to whom the right belongs and to decide the case on all its merits.

I would therefore decree the appeal, reverse the decision of the lower appellate Court, and remand the case for trial on the merits by that Court, should it find materials on the record to enable it to do so; but if it should appear that the first Court has excluded evidence of fact essential to the

determination of the rights of the parties, the lower appellate Court is at liberty to reverse the decree of the first Court. Costs to abide the result of a new trial.

STRAIGHT, J.—I concur fully in the above judgment of my honorable colleague.

Cause remanded.

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2 A. 735.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

MARKUNDI DIAL (*Plaintiff*) v. RAMBARAN RAI AND ANOTHER (*Defendants*).* [15th March, 1880.]

Sale of proprietary rights in a Mahal—Right of occupancy—Ex-proprietary tenant—Act XVIII of 1873 (*N. W. P. Rent Act*), *ss.* 7, 9.

The right of occupancy which a person losing or parting with his proprietary rights in a mahal acquires, under s. 7 of Act XVIII of 1873, in the land held by him as sir in such mahal at the date of such loss or parting, is a saleable interest.

[736] *Held*, where such a right was sold by private sale, that it was transferable, s. 9 of Act XVIII of 1873 notwithstanding. *Umrao Begam* v. *The Land Mortgage Bank of India* (1) followed.

A deed executed by a village proprietor purporting to transfer his share in the village including his sir-land and ex-proprietary right divests such proprietor of the ex-proprietary right conferred by s. 7 of Act XVIII of 1873.

[R., 7 A. 553 (559) (F.B.).]

THE plaintiff claimed nineteen bighas, two biswas of land, under a deed of sale dated the 9th April, 1878. At the time of the sale this land was held by the defendants as sir-land. The deed of sale purported to transfer the share of the defendants in a certain mahal including their "sir-land" and their "ex-proprietary rights." The plaintiff alleged that the defendants were holding the land as trespassers. The defendants set up as a defence to the suit that they held the land under a right of occupancy in virtue of the provisions of Act XVIII of 1873; that they did not acquire such right until after the date of the sale to the plaintiff, and therefore such right did not pass under that sale; that, under s. 9 of Act XVIII of 1873, such right was not transferable; and that the suit was not cognizable by the Civil Courts. The Court of first instance allowed their contention, and, holding that the suit was not cognizable by the Civil Courts, returned the plaint to the plaintiff to be presented in a Court of Revenue. On appeal by the plaintiff the lower appellate Court held that the suit was cognizable by the Civil Courts, but dismissed it on the ground that the defendants held the land as occupancy-tenants and not as trespassers, and could not be dispossessed, holding that, inasmuch as the defendants only acquired the right of occupancy under s. 7 of Act XVIII of 1873 after the date of the sale of their share, that right did not pass under that sale to the plaintiff, and further that that right, under s. 9 of that Act, was not transferable.

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* Second Appeal, No. 997 of 1879, from a decree of Maulvi Muhammad Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 22nd May, 1879, modifying a decree of Maulvi Mir Badshah, Munsif of Saidpur, dated the 17th February, 1879.

(1) 2 A. 451.

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The plaintiff appealed to the High Court, contending that the defendants were competent to transfer their occupancy-rights as ex-proprietary tenants, and having transferred such rights to her she was entitled to the possession of the land in suit.

Munshi *Hanuman Prasad*, for the appellant.

[737] The Senior Government Pleader (Lala *Juala Prasad*), for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court:

SPANKIE, J.—The defendant, as lambardar, sold his share including the "sir" and "ex-proprietary rights" to the plaintiff. The lower appellate Court holds that he could not dispose of the ex-proprietary right, as it had not accrued until the defendant had transferred his share in the estate to the plaintiff.

The wording of s. 7, Act XVIII of 1873, is to the following effect, "that every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants at will for land of similar advantages." The second paragraph goes on to say that "persons having such rights of occupancy shall be called ex-proprietary tenants and shall have all the rights of occupancy-tenants."

It is true that the general rule is that the subject of sale must belong to the vendor and that he can sell no more than the interest which he legally possesses. But it appears to me that s. 7 of the Act recognizes from the date of its passing that a proprietor has a right of occupancy in land held by him as "sir," and reserves it to him, if he pleases, upon the terms provided by the section. The vendor was at liberty to sell his sir-land, and I do not think that s. 7 debars him from selling the interest reserved to him by the Act, namely, the right to occupy the land at a favourable rate of rent. This seems to me to be an interest created from the date of the passing of Act XVIII of 1873, and an expectancy which he might dispose of along with the sir and his proprietary share. It also seems to me that it is erroneous to refer to the right as that of an "ex-proprietary tenant." Persons who have such rights of occupancy as those described in s. 7 *shall be*, the Act says, *called* ex-proprietary tenants and shall have all the rights of occupancy tenants. They are so called to distinguish them from the occupancy-tenants described in s. 8. What s. 7 recognizes is a right [738] of occupancy that has always perhaps been inherent in the proprietor of a share, a right to occupy a portion of the lands as his sir, either for his own cultivation, or to sublet them to others. Whether this be so or not, that he has a recognized interest in the right to occupy the land held by him as sir, in the event of his losing or parting with his proprietary rights in the mahal, would appear to be quite clear. How far the second paragraph of s. 9 of the Rent Act would invalidate such a sale of the occupancy-right, as being contrary to law and policy, is another matter, which might have required fuller consideration. But I feel myself bound by the ruling of the Full Bench in *Umrao Begam* v. *The Land Mortgage Bank of India* (1), from which, however, I dissented. I am of opinion that the appeal should be decreed and that the case should go back to the lower appellate Court to be tried on the merits.

(1) 2 A. 451.

STRAIGHT, J.—I have had some doubt as to the proper construction to be put upon s .7 of the Rent Act, but after very careful consideration, I agree with the view of Mr. Justice Spankie as stated in his judgment. I may add, that like him I feel bound by the decision of the Full Bench (1) referred to, though were the matter still an open one, I should hold the prohibition of s. 9 of the Rent Act to apply strictly.

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2 A. 735.

Cause remanded.

2 A. 738.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

NARAINI KUAR (*Defendant*) v. DURJAN KUAR AND OTHERS (*Plaintiffs*).*
NARAINI KUAR (*Defendant*) v. PIAREY LAL AND OTHERS (*Plaintiffs*).*
[2nd February, 1880.]

Addition of parties—Act X of 1877 (*Civil Procedure Code*), *s.* 32.

Held, reading ss. 28, 29 and 32 of Act X of 1877 together, that, where an application is made under s. 32 for the addition of a person whether as plaintiff or defendant, such person should, as a general rule, be added, only where there are questions directly arising out of and incidental to the original cause of action, in which such person has an identity or community of interest with the original plaintiff or defendant.

[739] Two suits against *K* for possession of the property of *B*, deceased, were instituted in the Court of a Subordinate Judge by parties claiming adversely to one another as heirs to *B*. The Subordinate Judge, on the applications of the plaintiffs in these suits, under s. 32 of Act X of 1877, added the plaintiffs in the first suit as defendants in the second, and the plaintiffs in the second suit as defendants in the first. *Held*, on appeal by the defendant *K* from the orders of the Subordinate Judge, applying the rules stated above that such additions of parties, not being necessary to enable the Subordinate Judge "effectually and completely to adjudicate upon and settle all the questions involved in the suits," were not proper.

The principles on which s. 73 of Act VIII of 1859 should be interpreted enunciated by Sir Barnes Peacock in *Joy Gobind Doss* v. *Gouree Prashad Shaha* (2); *Raja Ram Tewary* v. *Luckman Pershad* (3), and *Ahmad Hosain* v. *Khodeja* (4), and the remarks of Pontifex, J. in *Mahomed Badsha* v. *Nicol* (5), followed and applied.

[R., 8 A. 91 (94); 10 A. 223 (237) (F.B.); 2 L.B.R. 246 (250); 5 O.C. 94 (95); 118 P.R. 1890; D., 4 Ind. Cas. 488.]

WHILE two suits against one Naraini Kuar numbered respectively 63 and 76 were pending in the Court of the Subordinate Judge of Bareilly, the plaintiffs in suit No. 63 applied, under s. 32 of Act X of 1877, to be made defendants in suit No. 76, and the plaintiffs in suit No. 76 applied, under the same section, to be made defendants in suit No. 63. On the 4th July, 1879, the Subordinate Judge passed orders granting these applications. In each case the application was granted on the ground that a suit by the applicants in the other case against Naraini Kuar relating to the same property was pending. Naraini Kuar appealed against these orders to the High Court.

* First Appeals, Nos. 101 and 102 of 1879, from orders of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 4th July, 1879.

(1) 2 A. 451. (2) 7 W.R. 202, (3) 8 W.R. 15.
(4) 10 W.R. 369=3 B.L.R. A.C. 28. (5) 4 C. 355.

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Mr. *Hill*, for the appellant.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for the respondents in No. 101.

Mr. *Colvin*, and Pandit *Bishambhar Nath*, for the respondents in No. 102.

JUDGMENT.

The judgment of the Court (PEARSON, J., concurring) was delivered by

STRAIGHT, J.—These are first appeals from two orders, passed by the Subordinate Judge of Bareilly, on the 4th of July, 1879.

[740] In order to make the question of law raised on behalf of the appellant intelligible it is necessary to recapitulate the following facts.

It appears that two suits are pending in the Court of the Subordinate Judge against one Naraini Kuar. In the first of these the plaintiffs are Rani Durjan Kuar, Chandi Din, and Mashuk Mahal Sahiba Begam, and in the second Piarey Lal, Bhairon Prasad, Shib Lal, and Narbada Prasad. The litigation relates to the ancestral property of Chaudhri Basant Ram, deceased. The three plaintiffs in case No. 1 sue for possession of the property by right of inheritance,—Rani Durjan Kuar as widow of Basant Ram and stepmother of Chaudhri Naubat Ram, his son, also deceased; Chandi Din as grandson of Basant Ram and sister's son of Naubat Ram; and Mashuk Mahal Sahiba Begam as vendee of a portion of the property in suit from the other two plaintiffs, under a sale deed of the 17th of February, 1879. In case No. 2 the four plaintiffs, alleging themselves to be the nearest heirs of the deceased Naubat Ram, sue for proprietary possession, by cancelment of an order of the 15th August, 1879, declaring Naraini Kuar to be the owner of the property in suit and directing the entry of her name, in that character, in the *khewat*. To both suits the defendant replies, that she is entitled to the property by virtue of the adoption of her deceased husband, Raghunandan Prasad, by Naubat Ram. It is admitted that she is in possession, and that her name is entered in the revenue records. The two plaints were filed, respectively, in the first case, on the 17th April, and, in the second, on the 12th May, 1879. The pleas of the defendant were put in on the 4th of July. Upon that day application was made, under s. 32 of Act X of 1877, by both sets of plaintiffs, praying that they might be added as defendants in that suit in which they were not plaintiffs, and thereupon the orders now appealed were passed.

It is objected before us on behalf of the original defendant, Naraini Kuar, that these orders are irregular and illegal; that the Subordinate Judge has misinterpreted the provisions of s. 32 of Act X; that he has improperly exercised the discretion vested in him under that section; and that it is inequitable that the defendant should be hampered and embarrassed in the conduct of her case, by being placed between a cross-fire of adverse claims, **[741]** those of the plaintiffs on the one hand and of the defendants on the other.

The question thus raised is one of much importance, as to the procedure and practice contemplated by s. 32. The substantial point for determination appears to be, has the Subordinate Judge, having regard to the permissive character of s. 32, properly, that is, within the terms of the section, exercised his discretion in passing the two orders appealed.

No doubt it is most desirable, when litigation has been instituted in respect of a particular subject-matter or specific contract, that the Court

having cognizance of it should see that all questions directly springing out of it should be raised and dealt with once and for all, and that all persons naturally concerned in and likely to be legally affected by the determination of those questions should be joined as parties. The practice of the English Equity Court has always been to recognise this principle in its widest aspect, and the Orders under Rule XVI of the Judicature Act afford abundant facilities for the joinder of parties. It is noticeable that their language, with slight exception, is repeated word for word in the earlier sections of the 3rd chapter of the Civil Procedure Code, though it is worthy of observation that the provisions of Orders 17 and 19, as to adding person from whom a defendant claims contribution or indemnity, or others whom the Court or Judge thinks should be joined for the purpose of a question being determined, not only as between the plaintiff and defendant, but between them and such other person, have not been incorporated. While the propriety of preventing unnecessary and expensive repetition of litigation and multiplication of suits cannot be questioned, neither as a principle of justice to litigants nor as a convenient rule of practice can an indiscriminate joinder either of causes or action or of parties be tolerated.

It becomes necessary to closelv examine not only the terms of s. 32, but also the kindred provisions in the earlier part of chapter III, which now replace the legislation formerly contained in s. 73 of Act VIII of 1859. First as to s. 32 the Court may at any time, either upon or without application, "order that any plaintiff be made a defendant or that any defendant be made [742] a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suits, be added." But it seems to me that, in exercising the very wide discretion given by these later words, regard should be had to the terms of ss. 28 and 29 and the test as to the joinder of defendants should be whether the relief sought is "in respect of the same matter," or the liability alleged to exist relates to "any one contract."

Now let us see how the language of these sections is applicable to the cases under consideration. So far as the two sets of plaintiffs are concerned, it is obvious that their claims are altogether adverse, and that, as between them, there is a question of priority of heirship to be decided, in which Naraini Kuar, the original defendant, has no actual interest. It is true that the property to which they both assert a title is one and the same, but I do not think that this circumstance justified the orders of the Subordinate Judge. Apart from all questions of inconvenience or embarrassment to the principal defendant in the conduct of her defence, should she fail to establish the adoption on which the whole fabric of her case rests, I do not see how, as between the plaintiffs and the joined defendants, no matter in which case, any decision that can be passed will estop either of them from subsequent assertion of their rights against one another in a separate suit. It does not appear to me that the plaintiffs in either case could have joined the other plaintiffs in their original plaint as defendants, for they sought not relief against them, and the relief they did seek against Naraini Kuar was not in the sense of s. 28 in respect of "the same matter." The joinder of the two sets of plaintiffs, as defendants, in accordance with the order of the Subordinate Judge, can only be reasonable, if they are to be equally bound by the decree in one suit, not only as to the principal defendant, but as between themselves; and it is only in this sense that "their presence before the Court is necessary in

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order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." But the question involved in each suit is not what are the rights of the two [743] sets of plaintiffs *inter se*; the issue to be decided between the defendant Naraini Kuar and each set of plaintiffs is perfectly plain and intelligible, and, as she is in possession, the burden of proof will be on those who assail her title. Necessarily all the plaintiffs are interested in the determination of the "adoption," set up by the principal defendant, but, as I have already remarked, I do not see how a finding upon this point in either suit can bind the joined defendants to the plaintiffs or the plaintiffs to the joined defendants, in respect of their mutual claims between one another to the property, or in the event of the principal defendant establishing the adoption in one case can obviate a second trial. No plea of *res judicata* could be sustained. Upon the argument before us Mr. Hill for the appellant called our attention to three lengthy judgments of Sir Barnes Peacock—*Joy Gobind Doss* v. *Gouree Prashad Shaha* (1); *Raja Ram Tewary* v. *Luchmun Pershad* (2); *Ahmed Hosain* v. *Khodeja* (3)—which are valuable and instructive. For though these were given upon cases arising under s. 73 of Act VIII of 1859, the reasoning and principles of interpretation enunciated may appropriately be followed in construing s. 32, Act X of 1877. Under s. 73, Act VIII of 1859, the Court had power to join "all parties who may be likely to be affected by the result," an expression that might be taken to mean a great deal more than was ever intended by the legislative authorities, and which Sir Barnes Peacock in the judgments already adverted to was careful to qualify and reduce within intelligible limits. But now reading, as I think one should, ss. 28, 29 and 32 of Act X together, the terms "questions involved in the suit" must be taken to mean questions directly arising out of and incident to the original cause of action, in which, either in character of plaintiff or defendant, the person to be joined has an identity or community of interest with that party in the litigation on whose side he is to be ranged. I do not lay this down as an irrefragable rule by which applications under s. 32 of Act X should be determined; for cases may arise similar to *Saroda Pershad Mitter* v. *Kylash Chunder Banerjee* (4) and *Kali Prasad Singh* v. *Jainarayan Roy* (5); but in the multi-[744]tude of instances it will be a useful test to apply in deciding whether the presence of parties is necessary to enable the Court "effectually and completely to adjudicate and settle the questions involved in the suit." I entirely agree with the remarks of Pontifex, J., in *Mahomed Badsha* v. *Nicol* (6) and applying them in the present cases, it appears to me that the joinder of the two sets of plaintiffs as defendants was not necessary to enable the Court effectually and completely to settle the question arising between the plaintiffs and Naraini Kuar in the respective suits. I, therefore, think that the Subordinate Judge improperly passed the two orders of the 4th of July and that these appeals must be allowed with costs. The defendants who have been added to the record will be struck off, their statements of defence returned to them, and the plaints restored to their original shape.

Appeals allowed.

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(1) 7 W.R. 202. (2) 8 W.R. 15. (3) 10 W.R. 368=3 B.L.R. A.C. 28.
(4) 7 W. R. 315. (5) 3 B.L.R. A.C. 23. (6) 4 C. 355.

2 A. 744.

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APPELLATE CIVIL.

2 A. 744.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

PARSHADI LAL (*Defendant*) v. RAM DIAL (*Plaintiff*).*
[13th February, 1880.]

Suit for Pre-emption—Deposit of purchase-money—Appellate Court, powers of—Ac X of 1877 (Civil Procedure Code), s. 214.

The decree of the Court of first instance in a suit to enforce a right of pre-emption directed that the sum which that Court had ascertained to be the purchase-money should be deposited within one month from the date of the decree. The plaintiff appealed, contending that such sum was not the purchase-money. While the appeal was pending the time fixed by the decree of the Court of first instance expired without any deposit having been made. The appellate Court dismissed the appeal, fixing by its decree, of its own motion, a further time for the deposit. *Held*, following *Sheo Prasad Lal* v. *Thakur Rai* (1), that the appellate Court was competent to extend the time for making the deposit, and its action and order did not contravene the provisions of s. 214 of Act X of 1877.

[**Appr.**, 13 A. 376 (379) (**F.B.**); **R.**, 13 **A.** 189 (190) (**F.B.**); 11 O.C. 144; **D.**, 137 P.R. 1894.]

THIS was a suit to enforce a right of pre-emption in which the plaintiff alleged that the purchase-money was Rs. 600, and not Rs. 800 as entered in the deed of sale. The Munsif determined **[745]** that the plaintiff was entitled to pre-emption, but found that the purchase-money was Rs. 800, and gave the plaintiff a decree dated the 14th December, 1878, which directed him to deposit the purchase-money, Rs. 800, within one month from the date of the decree, and that in default the decree should be considered null and void. The plaintiff appealed from this decree, and the Subordinate Judge on the 29th May, 1879, finding that the purchase-money was Rs. 800, made a decree dismissing the appeal, and directing the plaintiff to deposit the purchase-money within one month from the date the decree became final.

The defendant appealed to the High Court, contending that the Subordinate Judge "was not competent, in the absence of any objection in appeal, to modify the decree of the Court of first instance as regards the time within which the plaintiff had been directed to pay the purchase-money;" and "that, as the plaintiff failed to conform to the decree of the Court of first instance as regards the deposit of the purchase-money and took no exception in his appeal as regards the time fixed by that decree for the deposit, his suit should be held liable to dismissal as prescribed by s. 214 of Act X of 1877."

Pandit *Bishambhar Nath* and Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J., and SPANKIE, J.) was delivered by

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* Second Appeal, No. 943 of 1879, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 29th May, 1879, affirming a decree of Babu Sanwal Singh, Munsif of Etawah, dated the 14th December, 1878.

(1) H.C.R. N.W.P. (1868) 254.

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PEARSON, J.—The grounds of appeal are overruled by the Full Bench decision in *Sheo Prasad Lal* v. *Thakur Rai* (1), and it does not appear to us that the appellate Court's action and order contravened the provisions of s. 214, Act X of 1877. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 746.

[746] APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

DEVA SINGH (*Plaintiff*) v. RAM MANOHAR AND ANOTHER (*Defendants*).* [19th February, 1880.]

Hindu Law—Mitakshara—Mortgage by father of joint ancestral property—Sale of joint ancestral property in the execution of a decree against father—Liability of Son's share.

The undivided estate of a joint Hindu family consisting of a father and his sons, while in the possession and management of the father, was mortgaged by him, with the knowledge of the sons, as security for the re-payment of moneys borrowed and lent for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale, and sought to bring the family estate to sale in the execution of this decree. *Held*, in a suit by one of the sons to protect his share in such estate from sale in the execution of such decree, that such decree could not be regarded as against the father only, and his share in such property was not alone saleable in execution of it, but such suit and decree must be regarded as against the father as representing the joint family, and the whole of the family estate was saleable in the execution of such decree. *Bissessur Lall Sahoo* v. *Luchmessur Singh* (2) followed. *Deendyal Lall* v. *Jugdeep Narain Singh* (3) distinguished.

[R., 1 O.C. 1 (8).]

THIS was a suit, instituted in the Court of the Munsif of Ballia, zila Ghazipur, to establish the plaintiff's proprietary right to a one-seventh share of certain zemindari shares of four villages called severally Koel, Narainpur, Lakhmi Pah, Kharauli and Mahatpal, situated in that zila. These shares had been attached in execution of a decree against the plaintiff's father, the defendant Sheo Narain Singh, dated the 6th July, 1877, held by the defendant Ram Manohar. The plaintiff objected to this attachment, claiming that a one-seventh share of the property was his and should be excluded from attachment and sale, but his objection was disallowed, and he accordingly brought the present suit to establish his claim. The plaintiff stated in his plaint that those zemindari shares were joint ancestral property in which his share according to Hindu law was one-seventh; the share of the remaining four sons of the defendant Sheo Narain Singh four-sevenths, the share of the wife of that defendant one-seventh, and the share of that defendant himself one-seventh; that each member of the family [747] as a member of a joint and undivided Hindu family was in the possession and enjoyment of the property in suit; and hat the defendant Ram Manohar had, in execution of his decree of the

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* Second Appeal, No. 793 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 22nd March, 1879, affirming a decree of Maulvi Kamar-ud-din, Munsif of Ballia, dated the 13th December, 1878.

(1) H.C.R. N.W.P. (1868), 254. (2) 6 I.A. 233=5 C.L.R. 477.
(3) 3 C. 198.

6th July, 1877, which was against the defendant Sheo Narain Singh only the other members of the family not being parties to it, caused to be attached and notified for sale the whole of the family property as the property of the defendant Sheo Narain Singh. 1880 FEB. 19.

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The decree of the 6th July, 1877, had been obtained under these circumstances: On the 17th June, 1874, the defendant Sheo Narain Singh executed in favour of the defendant Ram Manohar an instrument called a "*zar-i-peshgi*" lease, by which he transferred to him the zemindari shares before-mentioned, in consideration of an old loan of Rs. 49-15-0 and a fresh loan of Rs. 50. This instrument recited that the executant was "in possession of the shares and by payment of Government revenue enjoying the income and profits thereof," and that the further advance to him of Rs. 50 was made "to meet his wants." It further recited that the executant had put the "lessee" into possession of the shares, and then proceeded as follows:—" I declare that the said lessee shall, until the payment of the principal mortgage-money, without being offered resistance by any person, remain in possession of the property leased, and plough, settle, collect, and cultivate the same, and enjoy the income of the shares in lieu of his *zar-i-peshgi*, and pay Rs. 4 to me the executant on account of the Government revenue every year. I the executant have no claim to the mesne profits nor has the mortgagee to the interest: that whenever at the close of the month of Jaith in any year, I the executant or my heirs pay the principal mortgage-money, Rs. 99-15-0, mentioned in the deed to the banker, then by taking back the instrument I shall enter upon possession of the property leased." The instrument concluded by stating that if the "mortgagee" was ejected "in any way without the payment of the mortgage-money, he should be at liberty to recover the mortgage-money, with interest at four rupees per cent. per mensem, from the zemindari shares in suit." On the 26th May, 1877, the defendant Ram Manohar instituted a suit against the defendant Sheo Narain Singh, in the Court of the Munsif of Ballia, on this instrument, claiming to recover Rs. 239-9-0, prin-[748]cipal and interest, by the sale of the zemindari shares, on the ground that on the 7th January, 1875, the defendant Sheo Narain Singh had resisted his making collections, and had made collections himself, hereby he, Ram Manohar, had been dispossessed. The Munsif gave Ram Manohar, a decree for the amount claimed against Sheo Narain Singh "and the hypothecated property."

The defendant Ram Manohar set up the following defence to the present suit:—" That the plaintiff, notwithstanding his knowledge of the transaction, had kept quiet and admitted it; under these circumstances his claim is improper: that the justice of the defendant's claim is not denied and its nature is not open to any objection, therefore under Hindu law and precedents the defendant's debt is chargeable on the property advertized for sale as well as against the plaintiff and other sharers, and the property cannot be exempted: that the defendant Sheo Narain Singh, having borrowed the money secured by the bond for the maintenance and the benefit of the plaintiff and all other members of the family, had executed the document in question: that the defendant Sheo Narain Singh and all other members of the family benefited by the loan: that the defendant Sheo Narain Singh, having failed to fulfil the promise, the defendant obtained a decree; and that the defendant Sheo Narain Singh, has caused his son to bring this suit, with a view to delay the recovery of the money due to this defendant."

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The suit was not defended by the defendant Sheo Narain Singh. On the date fixed for the settlement of issue (11th December, 1878) the plaintiff's vakil stated to the Munsif that he did not require to examine any witnesses. The defendant's vakil also stated on the same occasion that, if the plaintiff admitted that he had been living with his father, the defendant also did not require to examine any witnesses. The plaintiff's vakil then admitted "that the plaintiff lived as a member of a joint family in commensality, and that he derived benefit from the property in suit as one of the joint family." The second issue fixed by the Munsif was: "Whether the property in suit is actually owned and possessed by plaintiff or Sheo Narain Singh, defendant, and whether it is liable to be sold in satisfaction of the decree?"

[749] The Munsif decided this issue against the plaintiff and dismissed the suit for the reasons which will appear from the following extract from his judgment:—"The Court has deliberately taken into consideration the precedents cited by the parties. The Privy Council ruling relied on and quoted by the plaintiff's pleader, *Deendyal Lall* v. *Jugdeep Narain Singh* (1), is inapplicable to the present suit for the following reasons:—(i) In that case the debt had been contracted by the father for his own personal use, and not to meet any legal necessity, such as maintenance of his family. Now the plaintiff in this case has not only failed to prove that the defendant No. 2 had borrowed the money for his personal use, and that he spent it for his own purposes (his wife and his sons, the plaintiff and others, not participating in the benefit), but it also appears, on the contrary, from the statement of his pleader recorded in the proceeding dated the 11th December, 1878, that the money secured by the bond was enjoyed by the plaintiff, his mother, and brothers, when they admittedly lived and messed together. Under these circumstances all the property pledged in the bond is liable for the debt and the plaintiff's share cannot be exempted. (ii) The precedent applies to the case of a transfer made by the ancestor of an ancestral joint property without the consent of his co-sharers who did not benefit by the transaction. In this case the defendant No. 2 borrowed money of a banker while living and messing jointly, and spent it for the benefit of his wife and sons, and when the banker demanded the money he caused this suit to be brought under colour of the Hindu law. It is impossible that the son should remain ignorant of the act of his father with whom he lived. The plaintiff ought to have brought a suit when the defendant No. 2 had acted beyond his power in borrowing the money for his own use on the security of the ancestral property. But at that time the plaintiff, his brothers, and the wife of the defendant No. 2 jointly appropriated the money quietly. A decree was eventually passed for that money and the property having been advertised for sale the present suit has been instituted. There can be no doubt that the suit has been brought in collusion with the defendant No. 2 for a dishonest purpose."

[750] On appeal by the plaintiff the Subordinate Judge affirmed the Munsif's decision and dismissed the appeal. The material portion of the Subordinate Judge's judgment was as follows:—"It appears from the proceeding dated the 11th December, 1878, referred to by the Munsif, that the plaintiff has admitted the fact of his living with his father. It is clear that the plaintiff and his father live together, and it is also clear that the plaintiff has been living in commensality with his father, who is

(1) 3 C. 198.

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the judgment-debtor, and that the debt was for the plaintiff's support and benefit. It is also clear that the property continued all along in possession of the plaintiff's father, the judgment-debtor, who hypothecated all that was in his possession. Under these circumstances no part of the property can be, in consideration of the plaintiff's right of inheritance, exempted from liability for the money lent for the use of the joint family by the defendant-respondent. As the judgment-debtor was in possession of the property which he had hypothecated in the bond, it was not necessary to implead the plaintiff. As the plaintiff was aware of the defendant-respondent's just demand, and of the decree, and the suit, and as he took no measures at that time for his protection from the demand which has not been paid off as yet, the claim of the plaintiff does not deserve any consideration. The precedents cited by the plaintiff cannot be applicable to a case in which a debt is contracted for the support and benefit of the children, and in which the father has possession of the whole property which he has pledged. The fact of the whole property being liable for the debt is apparent from the plaint, in which the plaintiff himself says that all the property has been hypothecated. In short, with reference to the facts of the case, the Munsif's decision deserves to be upheld. According to law, a son who wants the property of his father is bound to pay his father's debt. The debt was contracted for the support of the children including the plaintiff and it is a just debt. The debt being incurred in good faith for the support of the joint family, the liquidation thereof is incumbent on all persons. No plea against the validity of the debt is worthy of consideration. It being necessary for a son to pay his father's debt, and he having failed to do so, the property is in consequence advertised for sale by auction; the plaintiff's claim must be considered improper."

[751] The plaintiff appealed to the High Court, contending that his right, title, and interest in the family property could not be sold in the execution of a decree against his father, to which he was not a party; and that the only question to be determined was whether the decree as made could be executed against him, and it was not proper to go behind the decree and inquire into the nature of the debt.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

The judgment of the High Court (SPANKIE, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—It appears that the defendant Ram Manohar obtained a decree against the defendant Sheo Narain Singh, the father of plaintiff, upon a bond executed by him, and sought to execute the decree against certain joint family property pledged in the bond, and the plaintiff has brought this suit to exempt his share in the joint family property from sale on the ground that the defendant Ram Manohar only obtained a decree against his father, and it is only his father's rights that can be taken in execution under such a decree. The decree was passed against the property pledged in the bond, and the finding of the lower appellate Court on the facts is that father and son lived together as members of an undivided Hindu family, the property being in the father's possession and management, and that the debt was incurred for the plaintiff's support and benefit, and the money was lent for the use of the joint family by the defendant Ram Manohar, and the plaintiff was aware of the transaction.

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It is undoubted that the whole ancestral property is liable for a debt contracted by a father under such circumstances, and there is no weight to be attached in the present case to the contention that, the decree being against the father only, it is only his interest that can be sold, for we cannot but hold that the suit and decree in this case must be regarded as against the father as representing the joint family.

In a recent case before the Judicial Committee of the Privy Council, *Bissessur Lall Sahoo* v. *Luchmessur Singh* (1), decided [752] 15th July, 1879, where the question was whether certain family property could be held liable under decrees obtained against members of the joint family, their Lordships appear to consider that, where the family is joint, there may be a presumption that the party sued is sued as a representative of the family, and they held that, when the decrees are substantially decrees in respect of a joint family and against the representatives of the family, they may be properly executed against the joint family property. Such appears to be the case in the suit in which this appeal has been made. Much stress has been laid by the plaintiff-appellant's counsel on the case of *Deendyal Lall* v. *Jugdeep Narain Singh* (2). In that case it was held that the auction-purchaser, who was also the decree-holder, "could not acquire more than the right, title, and interest of the judgment-debtor; and if he had sought to go further, and to enforce his debt against the whole property, and the co-sharers who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it; by the proceedings which he took he could not get more than that was seized and sold in execution, *viz.*, the right, title and interest of the father."

But our view of the case before us, which proceeds on the representative character of the judgment-debtor as representing the family, cannot be said to be in conflict with the principle laid down in the above case.

We affirm the decree of the lower appellate Court and dismiss this appeal with costs.

Appeal dismissed.

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2 A. 752.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

SHANKAR DIAL (*Decree-holder*) *v.* AMIR HAIDAR AND OTHERS (*Judgment-debtors*).* [24th February, 1880.]

Objection to attachment of attached property by judgment-debtor—Order against decree-holder—Decree-holder's remedy—Appeal—Suit to establish right—Act X of 1877 *(Civil Procedure Code)*, ss. 278, 279, 280, 281, 282, 283.

An objection was made to the attachment of certain property in the execution of a decree, by the judgment-debtor, on the ground that such [753] property was in his possession, not as his own property, but on account of an endowment. This objection was one of the nature to be dealt with under s. 278 and following sections of Act X of 1877. The Court executing the decree made an order against the decree-holder releasing the property from attachment. *Held* that such order was not appealable, the fact that the objection was made by the

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* First Appeal, No. 145 of 1879, from an order of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 18th July, 1879.

(1) 6 I. A. 233=5 C.L.R. 477. (2) 3 C. 198.

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judgment-debtor notwithstanding, and the decree-holder's proper remedy was to institute a suit, under the provisions of s. 283 of Act X of 1877.

[F., 7 A. 36 (37); 15 C. 437 (445); 6 C.W.N. 63 (65); R., 8 A. 626 (634)=A.W.N. (1886), 228; 23 B. 237 (252); 16 C. 1 (7); 10 M. 117 (119); 1 O.C. Sup. 11 (12); D., 7 A. 547 (549)=A.W.N. (1885) 132; 9 A. 605 (607); 16 C. 603 (607).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

The Senior Government Pleader (Lala *Juala Prasad*) and Shah *Asad Ali*, for the respondents.

JUDGMENT.

The judgment of the High Court (PEARSON, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The decree-holder, appellant before us, sought to attach certain property in execution of his decree, and the judgment debtors objected that they held the property, not as their own property, but as superintendents of an endowment to which the property belonged, and they objected to the attachment. The Court of first instance released the property from attachment on the objections taken. The decree-holder appealed to the Judge, who dismissed the appeal on the ground that, with reference to the value of the subject-matter, it lay to the High Court. The decree-holder has now appealed to this Court. A preliminary objection appears to us to be valid, to the effect that there is no appeal, and that the decree-holder's proper remedy is by regular suit.

The objections taken to the attachment were of the nature of those to be dealt with under s. 278 and following sections, Civil Procedure Code, and the remedy for the party dissatisfied is under s. 283 by regular suit. The case is not altered by the circumstance that the objectors were the judgment-debtors. It has been held frequently that the provisions of s. 278 and following sections apply equally to the objections by parties to the suit as by strangers, when their objections are of the nature of those with which those sections deal.—*Haris Chandra Gupto* v *Srimati Shasi Mala* [754] *Gupti* (1); *In the matter of the petition of J. B. Rainey* (2); *Chunder Kant Surmah* v. *Bangshee Deh Surmah* (3). We dismiss the appeal with costs.

Appeal dismissed.

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2 A. 754.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

BALDEO PRASAD AND ANOTHER (*Plaintiffs*) *v.* GRIS CHANDAR BOSE (*Defendant*).* [24th February, 1880.]

Suit on lost Cheque – Parties to Suit – Act X of 1877 (*Civil Procedure Code*), *s.* 61.

The indorsees of a cheque sued the indorser stating in their plaint that the cheque had not been lost and that the defendant refused to give them a duplicate

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* First Appeal, No. 130 of 1879, from a decree of H.D. Willock, Esq., Judge of Azamgarh, dated the 4th April, 1879.

(1) 6 B.L.R. 721. (2) 6 B.L.R. 725. (3) 6 W.R. 61.

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of it and claiming a duplicate of it or the refund of the money they had paid the defendant on the cheque.

Held that the plaint disclosed a cause of action against the defendant. *Held* also that the plaint should be amended by joining the drawer of the cheque as a defendant in the suit.

[R., 25 Ind. Cas. 881 (882).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the appellants.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Babus *Oprokas Chandar Mukarji* and *Baroda Prasad Ghose*, for the respondent.

JUDGMENT.

The judgment of the High Court (PEARSON, J. and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The case of the plaintiffs is that a cheque No. 3821 of the 18th October, 1877, drawn by Captain C. Ellis, Emigration Agent, on the Bank of Bengal, for Rs. 300, was endorsed over to their agent, Parsotam Das, by the defendant, for valuable consideration. Parsotam Das sent the cheque to the plaintiff's firm at [755] Ghazipur, and they forwarded it by post to their firm at Arrah, but it was lost in transit. The defendant refused to give a duplicate of the cheque; and the plaintiffs now sue to compel him to give a duplicate or to refund the money, and to pay damages, Rs. 48, equivalent to interest on the amount of the bill lost by plaintiffs owing to defendant's refusal, and future interest from date of institution of the suit. The defendant replies that he did not indorse the cheque over to plaintiffs; that it was drawn payable to Babu Hari Mohan Banarji, who indorsed it. The Judge has rejected the plaint on the ground that it does not disclose a cause of action. This is, however, erroneous.

Under s. 61, Code of Civil Procedure, a suit may be maintained on a lost negotiable instrument, and, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff to the satisfaction of the Court against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint; and in Byles on Bills of Exchange, 11th ed., chapter XXVIII, p. 378, we find that the relief administered by Courts of equity will be afforded, "not only on bills, but on notes; not only against the drawer, but against the indorser, or the acceptor; not only may a new bill be required, but payment; but the Court will not call on a party to renew or pay a lost bill without providing him with a satisfactory indemnity."

The defendant Babu Grish Chandar Bhose, assuming him to be the indorser of the cheque, cannot give the new cheque asked for without the co-operation of the alleged drawer, Captain Ellis; and the plaintiff should amend his plaint by joining Captain Ellis as a defendant in the suit, and praying that the relief sought may be given against both defendants.

The Judge will return the plaint to the plaintiff to be amended accordingly, and his order rejecting it is set aside, and the costs of this appeal will be costs in the cause.

Order accordingly.

2 A. 756.

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2 A. 756.

[756] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) *v.* SHEO SINGH RAI AND ANOTHER (*Plaintiffs*).* [1st March, 1880.]

Contract—Bailment—Government Promissory Note—Contributory negligence—Master and servant.

The agent of the plaintiff delivered to the Treasury officer at Meerut nine Government Promissory notes, aggregating Rs. 48,000 in value, in order that such notes, might be transmitted to the Public Debt Office at Calcutta for cancellation and consolidation into a single note for Rs. 48,000, having previously indorsed the plaintiff's name on such notes at the request of a subordinate of the Treasury officer, and received a receipt for such notes under the hand of the Treasury officer. Owing partly to such indorsements and partly to the negligence of the Treasury officer such subordinate was enabled to misappropriate and negotiate two of such notes, aggregating Rs. 12,000 in value. The remaining seven of such notes were despatched to Calcutta, and a consolidated note for Rs. 31,200 was returned and delivered to the plaintiff, when the misappropriation of the two notes was discovered. The plaintiff sued Government claiming "that it might be directed to make restitution of the two notes or to deliver two other notes of equal value or their value in cash" with interest. On behalf of Government it was contended that it was not liable to the plaintiff's claim inasmuch as the plaintiff, by his agent, had contributed to the loss of the two notes, and a master was not liable in damages for loss or injury sustained through the fraud or dishonesty of his servant without the scope of his employment. *Held* that, the two notes not having been delivered to the Treasury officer as a bailee but having been surrendered, the receipt given by that officer must be regarded as an undertaking on the part of Government to deliver a consolidated note for Rs. 48,000 in due course, and the plaintiff's suit was in reality one for damages on account of the refusal of Government to discharge its obligation, the measure of those damages being the amount by which the note for Rs. 31,200 fell short of Rs. 48,000 with interest, and such being the suit, the contention of Government was not any answer to it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Mr. *Conlan*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court:

STRAIGHT, J.—The plaintiffs in this suit claim from the Collector of Meerut, as representing the Secretary of State for India, restitution [757] of two Government Promissory notes of the loan of 1854-55, made over to the Meerut Treasury on their behalf by their duly authorised agent on the 12th August, 1872. They further ask alternatively for other notes of equal value or for the equivalent cash with interest at four per cent. from date of last payment. The lower Court decreed the claim and the defendant now appeals.

The facts of the case, which are not disputed, appear to be as follows:—The plaintiffs are Commissariat agents carrying on business in the city of Delhi, under the style or firm of Sheo Singh Rai, Nihal Singh. On the 12th August, 1872, they sent by the hand of their gomashta,

* First Appeal, No. 26 of 1879, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 27th November, 1878.

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Sumair Chand, nine Government Promissory notes of the value in all of Rs. 48,000 to the Meerut Treasury office, in order that they should be forwarded thence to Calcutta for cancellation and consolidation into one note. At that time the regular Treasury Officer, Mr. Billings, was absent on leave, and one Babu Kali Charan, Deputy Collector, was holding charge in his stead. Employed in the office in the capacity of chief clerk was a certain Muhammad Husain, and it was his special duty, when securities were left there for transmission to Calcutta, to see that they were carefully packed and despatched, as speedily as possible, and to prepare the necessary forwarding letter that had to accompany them. Mohammad Husain had been for many years in the Government service, and the most perfect confidence was reposed in him by his superior officers, and those who were acquainted with him or had to come in contact with him in business matters had entire faith in his integrity and honesty. It was to this man that Sumair Chand delivered the nine Promissory notes on the 12th August, 1872. The following is his account of what then occurred: "Muhammad Husain then made a mark on the notes and then I signed for Nihal Singh: Muhammad Husain himself wrote something, or he caused some other person to write something, on the notes, and then he had the interest paid to me: on the same day he again asked me to sign the notes at another place, which he said was required to get the notes consolidated: these too I signed for Nihal Singh: then he asked me to remain outside and that he would do all that was required: after some time I was called in and Muhammad Husain gave me a receipt in [758] English." The receipt here referred to was for the nine Promissory notes, and bears the signature of "Kali Charan, Treasury Officer." In ordinary course it should take from ten to fifteen days to transmit the notes to the Public Debt Office at Calcutta for cancellation and to get back the consolidated note. Subsequent to the 12th August, 1872, Sumair Chand called on two or three occasions at the Meerut Treasury to know whether his note had arrived, but on each occasion his inquiries were answered by Muhammad Husain to the effect that it had not been received from Calcutta. Somewhere about the beginning of March, 1873, Muhammad Husain absconded, and on the 31st of that month a consolidated note which has been received from Calcutta, for Rs. 31,200, was handed to the plaintiffs, but as it should have been Rs. 48,000 as shown by the receipt of the 12th August, 1872, suspicion was necessarily at once awakened and inquiry was instituted, with the following result. Two of the nine notes made over by Sumair Chand to Muhammad Husain, numbered 017849 for Rs. 12,000, and 020102 for Rs. 5,000, had never been forwarded to Calcutta at all, but had been misappropriated by him, he taking advantage of the blank indorsement of the name of Nihal Singh by Sumair Chand to make the latter one payable to himself, by writing above that signature the words "Sold to Muhammad Husain;" while, on the other, under a pretended authority from Nihal Singh, he put "Pay to the Agra Bank or order." On the note for Rs. 12,000 the Bank made Muhammad Husain an advance in August 1872, of Rs 8,000, and on that of Rs. 5,000 in December of Rs. 2,300, retaining them as security. With regard to the remaining seven Promissory notes, they remained in the Treasury at Meerut until the 19th February, 1873, upon which day they were sent to Calcutta for cancelment and consolidation, accompanied by a forwarding letter signed by Mr. Billings, who had returned from leave and resumed charge. At that time Muhammad Husain had made the necessary formal indorsement on these seven notes, above the name of

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Nihal Singh, which amounted to an acknowledgment on the part of that person, that he had "received a new note in exchange." When the misappropriation of these two notes was discovered, they were, as has already been stated, in the hands of the Agra Bank, and this fact coming to the [759] knowledge of Mr. Billings, he in his capacity of a Magistrate of the first class, issued a most illegal and improper search-warrant, upon the strength of which the Bank premises were entered, and the two notes were carried away by force to the Treasury for restoration to the plaintiffs. The natural consequence of this most unwarrantable proceeding was, that the authorities of the Bank instituted a suit against Mr. Billings for restitution of the two notes and damages for their illegal seizure, and in the course of the litigation, the Secretary of State for India, and the present plaintiffs, were brought upon the record as defendants. Ultimately this Court, upon appeal by the Bank, on the 29th May, 1876, reversed the decision of the Subordinate Judge dismissing the claim of the Bank, and passed a decree in its favour, the result of which was that the two notes were restored. These two notes are the subject of the present suit, and it may be remarked that, since their return to the Bank, they have been negotiated away, and are now in the hands of third parties, whose names do not appear.

The plaintiffs came into Court with their present claim on the 17th August, 1878, and the relief asked in the plaint is that "the Government may be directed to make restitution of the two notes, or to deliver other notes of equal value or their value in cash, amounting to Rs. 17,000, with interest at four per cent. from date of last payment, *viz.*, the 1st July, 1872, to date of suit, amounting in all to Rs. 21,165." This the Subordinate Judge has decreed, and the defendant now appeals against that decision on two grounds, (i) That the plaintiffs, in the person of their agent, were guilty of contributory negligence, (ii) That a master is not liable in damages for loss or injury sustained through the fraudulent or dishonest act of his servant without the scope of his employment

Both these points were urged at great length on the hearing of this appeal by the Senior Government Pleader, and many English and American authorities were cited, under both heads of argument. But upon a close and careful consideration of all the facts in the case, it appears to me that the contention for the appellant proceeded on a complete misconception of the real nature of the suit, for which I may add the Subordinate Judge is primarily responsible. In my judgment he was in error in dealing with the [760] question between the parties as governed by the law relating to bailments. The nine Promissory notes were not made over to the Meerut Treasury for any temporary purpose, upon the accomplishment of which they were to be returned or otherwise disposed of according to the directions of the bailor. On the contrary, they were unconditionally surrendered, when they were handed over by Sumair Chand for cancelment, and the effect of their delivery to the Treasury at Meerut is the same as if they had been taken by the plaintiffs to the Public Debt Office at Calcutta and handed over there. In those individual notes, as individual notes, they retained no interest. Properly, the plaintiffs might for their own protection have refused to give them up except upon receipt of the consolidated note, and I think they would have been justified in doing so; but the Government has, for its own convenience and security, established a rule that persons wishing to have old securities cancelled and consolidated are required, not only to deliver up their old securities, but to give a receipt in advance for the new one, their only document of title being

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the written acknowledgment of the Treasury Officer, that their securities have been received. As a matter of fact they have no option, and in order to obtain what they want, they must perforce conform to the requisitions. In my opinion the receipt given in the present case by Babu Kali Charan, the acting Treasury Officer, must be regarded as an undertaking on the part of the authorities to deliver one consolidated note for Rs. 48,000 in due course. Consequently, I do not think that there was any bailment of the two notes in the defendant for the plaintiffs, but that there was a contract entered into, the effect of which was that the plaintiffs were entitled to demand, and the defendant was bound to give, a consolidated note of the value of Rs. 48,000. The present suit is, therefore, in reality one for damages on account of the defendant's refusal to discharge his obligation, and the measure of those damages must be the amount by which the note for Rs. 31,200 falls short of Rs. 48,000 with interest. Regarding the case in this light, it is difficult to see in what way the two pleas in appeal are in any way an answer to the plaintiffs' claim. The authority of Babu Kali Charan to bind the Government is unquestioned, and if he chose to contract [761] it into a responsibility without proper care and caution, that is a matter which in no way affects the position of the plaintiffs. It is perfectly obvious, that Kali Charan was guilty of the greatest negligence in not verifying the nine notes, and seeing they were properly indorsed before he gave his receipt. Moreover, he was grossly careless, both in failing to lock them up in the safe, of which he had the key, and in forgetting their receipt, and in not requiring Muhammad Husain to prepare the forwarding letter for his signature, and to pack them for transmission thither. The evidence of Mr. Billings seems to me to establish the negligence of the Treasury in the most conclusive way, and had a bailment been established, or were this rightly an action of tort for the loss of the two notes, I think an overwhelming case would have been made out against the defendant. I am well aware that heads of departments and officers in a superior position in the public service are, from pressure of business, necessarily compelled to rely largely on the good faith and honesty of their subordinates, and I should never be disposed to draw the line too tightly in forming an opinion as to what, under this or that state of circumstances, they ought or ought not to have done. But reasonable and intelligent confidence is one thing, blind and careless trust is another; and while the one may fairly be accepted in explanation or excuse, the other should never be allowed in extenuation or relief from responsibility. The clerk in a bank handles unlimited sovereigns and bank notes during the hours of business, but no employer exercising the most ordinary precaution or prudence would fail to have his cash and securities locked up at the close of each day and so kept until banking hours recommenced. To do otherwise would afford unreasonable temptations, of which were the clerk to take advantage, the employer should not have the benefit to escape from the liability to third parties for any loss or damage they might thereby sustain.

In the present case the Government had the misfortune to be badly served. It had, as its representative in authority, a person who was negligent and slipshod in the discharge of his duties of control and supervision over a subordinate, who took advantage of these deficiencies to perpetrate a series of misappropriations and forgeries. Upon all the facts the inference is irresistible, that, but [762] for this laxity of administration in the Meerut Treasury on the part of Babu Kali Charan, the two

notes could never have been stolen, nor the forgeries committed in respect of them, and such being the case it is impossible to avoid remarking, that it is matter for regret the plaintiffs' claim should ever have been contested, much less that a countercharge of contributory negligence should have been made against them. Were it necessary to dispose of this allegation, I should have unhesitatingly come to the conclusion, that no sufficient case to establish it had been made out. A person like Sumair Chand going into a Government office can hardly be expected to anticipate that he will be made the victim of fraud and misrepresentation by the officials employed there. On many previous occasions Sumair Chand had drawn interest on Promissory Notes for his masters at the Meerut Treasury through Muhammad Husain, and had also made over notes to him for consolidation and always without misadventure. It is not by what we know, now, but from the state of things that existed at the time of the delivery of the notes, that the conduct of Sumair Chand must be judged, and looking at it from this point of view, I do not find any such evidence of co-operative negligence as would disentitle the plaintiffs, either as bailors or parties damnified, from recovering damages.

But, as I have in an earlier part of this judgment pointed out, this suit is properly one for breach of contract, by reason of the failure of the defendant to discharge his obligation to give a consolidation note to the extent of Rs. 48,000, and, in my judgment, the pleas in appeal to this Court, and in answer to the plaintiffs' claim in the Court below, are irrelevant and afford no answer to the case set up. The property of the plaintiffs in the nine notes was determined, when they were handed over and the receipt was given, and thereupon an implied undertaking on the part of the defendant to deliver an equivalent security after the lapse of a reasonable interval of time was to be assumed. It is clear that, to all intents and purposes, the notes had been reduced into the possession of Government, and that all right to or control over them had been parted, with by the plaintiffs. Whether they were properly taken care of or not was indifferent to them, for, at any time on the presentation [763] of their official receipt, they were entitled to demand a consolidation note for Rs. 48,000. Such being the view I entertain of the case, I am of opinion that this appeal should be dismissed with costs. But the decree must be amended from the shape in which the relief has been given by the lower Court, so as to declare the plaintiffs entitled to damages, such damages to be the amount of the two promissory notes for Rs. 12,000 and Rs. 5,000, with interest from 1st July, 1872, to date of payment.

PEARSON, J.—I concur generally and substantially in the view taken of the case by my honorable and learned colleague, and in dismissing the appeal with costs, and in amending the decree of the lower Court in the manner proposed by him.

Appeal dismissed.

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APPELLATE CIVIL.

2 A. 763= 5 Ind. Jur. 269.

2 A. 763=5 Ind. Jur. 269.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

NARSINGH DAS (*Decree-holder*) *v.* NARAIN DAS (*Judgment-debtor*).*
[5th March, 1880.]

Execution of decree—Limitation—Act XV of 1877 (*Limitation Act*), *sch. ii*, *arts.* 177, 179 (2), 180.

Held, that the words "appeal" and "appellate Court" in art. 179 (2), sch. ii, of Act XV of 1877, include an appeal to Her Majesty in Council.

Held, therefore, where an appeal had been preferred to Her Majesty in Council from a decree of the High Court dated the 18th August, 1871, and the High Court's decree was affirmed by an order of Her Majesty in Council dated the 12th August, 1876, and an application for execution of the High Court's decree was made on the 15th July, 1879, that, under art. 179 (2), sch. ii, of Act XV of 1877, the limitation of such application must be computed from the date of the order of Her Majesty in Council.

[R., 7 C. 620 (624).]

THE decree of which execution was sought in this case was one made by the High Court on the 18th August, 1871, on appeal from a decree of the District Judge of Benares. On the 28th January, 1874, the decree-holder applied for the execution of the High Court's decree. On the 12th August, 1876, an appeal having been preferred from the decree to Her Majesty in Council, the High Court's decree was affirmed. On the 15th July, 1879, the decree-holder made the present application for execution of the High Court's decree. The District Judge of Benares held that [764] this application was barred by limitation, inasmuch as between the 28th January, 1874, and the 15th July, 1879, the decree-holder had taken no action in the matter of the execution of the decree. In so holding the Judge disallowed the decree-holder's contention that the period of limitation should be computed from the date of the order of Her Majesty in Council, such order being the order of an "appellate Court" within the meaning of No. 179, proviso 2, sch. ii, of Act XV of 1877. The Judge observed with reference to this contention as follows :—" No. 179 is only for those cases for which No. 180 does not provide, while No. 180 is clearly intended for all orders of Her Majesty in Council. I cannot hold that Her Majesty in Council was ever intended as an appellate Court in No. 179."

The decree-holder appealed to the High Court, again contending that limitation should be computed from the date of the order of Her Majesty in Council.

The Senior Government Pleader (Lala *Juala Prasad*) and Pandit *Ajudhia Nath*, for the appellant.

Mr. *Conlan* and Pandit *Bishambhar Nath*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court:

OLDFIELD, J.—I hold that the decree which is now being executed is the decree of the High Court, and the law of limitation which will govern the case is art. 179 (2), Act XV of 1879,—" (Where there has

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* First Appeal, No. 154 of 1879, from an order of G. E. Knox, Esq., Judge of Benares, dated the 15th October, 1879.

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been an appeal) the date of the final decree or order of the appellate Court." In the case before us there was an appeal to Her Majesty in Council who affirmed the decree of this Court, the date of the order on that appeal being 12th August, 1876, and the present application is within time from that date.

I see no reason to doubt that the words "appeal" and "appellate Court" in art. 179 (2) are intended to include appeals to Her Majesty in Council, since we find that these appeals are made the subject of legislation in the Act, which in art. 177 provides the limitation for the admission of such appeals, and in art. 180 provides the limitation for enforcing orders of Her Majesty in Council made in course of such appeals. Were it otherwise and were appeals referred to in art. 179 (2) restricted to appeals preferred to the [765] appellate Courts in India, a party who had appealed to Her Majesty in Council from a decree of a Court in India would be in a worse position, in respect of the limitation for the execution of his decree, than a party who had appealed to an appellate Court in India.

I would decree the appeal with costs and set aside the order of the Judge and remand the case for disposal on the merits.

STRAIGHT, J.—I am of opinion that the decree which is now proposed to be executed is the decree of the High Court of the 18th August, 1871, and that the law of limitation which must govern the matter is contained in art. 179, Act XV of 1877, paragraph 2, column 3. In the present case there was an appeal to Her Majesty in Council and the decree of this Court was ultimately affirmed by order of the 12th August, 1876. During the pendency of that appeal, time didnot run and the period of limitation only began on the passing of the final order. The present application by the decree-holder, appellant before us, was made on the 15th July, 1879, and is therefore within time. I see no reason to doubt that the words "appeal" and "appellate Court" are now intended to include appeals to Her Majesty in Council, for we find those appeals made the subject of legislation in Act XV, which by art. 177 provides a period of limitation within which they may be admitted. Moreover, art. 180 establishes a limitation for enforcing orders of Her Majesty in Council, a provision, the presence of which may be accounted for by certain observations contained in the judgment of the Privy Council in the case of *Kristo Kinker Ghose Roy* v. *Burroda Kant Singh Roy* (1), quoted by Mr. Conlan in arguing this matter before us for the respondent. The question that arose there related to Act XIV of 1859 and neither in that Statute nor in Act IX of 1871 were there analogous articles to art. 177 or to the last sentence of art. 180. So far as that decision is concerned, it does not appear to me to be otherwise in any way relevant to the present case.

I agree that the appeal should be decreed with costs, and that the Judge should dispose of the application of the decree-holder on its merits.

Cause remanded.

(1) 17 W.R. 297.

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CRIMINAL JURISDICTION.

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[766] CRIMINAL JURISDICTION.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* O'BRIEN. [6th March, 1880.]

Culpable homicide not amounting to murder—Voluntarily causing hurt—Causing death by negligence—Act XLV of 1860 *(Penal Code)*, ss. 304, 304*A*, 322, 325—*Spleen disease.*

B voluntarily caused hurt to *N*, who was suffering from spleen disease, knowing himself to be likely to cause grievous hurt but without the intention of causing death, or causing such bodily injury as was likely to cause death or the knowledge that he was likely by his act to cause death, and caused grievous hurt to *N*, from which *N* died. *Held*, that *B* ought not to be convicted under s 304A of the Indian Penal Code of causing death by negligence, but under s. 325 of that Code of voluntarily causing grievous hurt.

[R., 3 A. 776 (778)=A.W.N. (1881), 132 ; A.W.N. (1881), 103 ; A.W.N. (1881), 112.]

THIS was a case called for by the High Court under s. 294 of Act X of 1872. The facts of the case are sufficiently stated in the order of the High Court.

ORDER.

STUART, C.J.—The circumstance that the accused, O'Brien, was at the time of the offence of which he was convicted under the influence of drink cannot in the least degree mitigate his guilt. The facts material to the case appear to be these :—On the evening of 2nd September, 1879, the accused O'Brien and a companion named Sharling were dining at the house of a friend in Agra within the Rajputana State Railway lines, and about midnight they sallied forth walking towards the fort. O' Brien perceived a ghari which they wished to hire, but the driver, a man named Wazir, a witness in the case, refused to give it unless the fare was prepaid. O'Brien and Sharling then walked on to a place where an ekka was standing, and presuming that it belonged to a man who was sleeping on a charpoy close by roused him and told him to let them have the ekka. This man was Nathu, the deceased. Nathu explained that the ekka did not belong to him and remarked at the same time that he was ill. Hereupon O'Brien got irritated and committed the assault on the person of Nathu which caused his death. He pulled the charpoy about, causing the deceased to fall out of it, kicked him, and struck him on the side or on the ribs with a stick, and of the injuries the deceased thus received, he died very soon after. The Civil Surgeon in his post [767] mortem examination states that the deceased's spleen had been ruptured in four places in its outer surface, one of which ruptures was very deep, extending to the inner surface of that organ. It would thus appear that the assault by the accused on Nathu was of a very serious nature, rendering a fatal result inevitable. The Magistrate committed O'Brien under ss. 323 and 325 of the Indian Penal Code, but the Judge amended the charge by substituting s. 304 A, Indian Penal Code, for ss. 323 and 325. The case was clearly not one of culpable homicide, and s. 304 A provides that "whoever causes the death of any person by doing any rash or negligent act, not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both," and a plausible argument might be maintained to show that the assault by O'Brien on the deceased was

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within the meaning of that section. But I think it safer to convict O'Brien under s. 325, because I consider that s. 304-A has in view utter indifference as to the possibly or probably fatal consequences of his act, on the part of an offender under it, and s. 325 in my opinion more fairly and accurately satisfies the requirements of the evidence. I would, therefore, set aside the conviction under s. 304-A and convict O'Brien under s. 325 of the Indian Penal Code. As to the sentence, I consider that passed by the Judge inapproopriate and inadequate, and such sentence I would therefore set aside, and in lieu thereof I would sentence the accused G. W. O'Brien to one year's rigorous imprisonment and to pay a fine of Rs. 100, or in default of payment of such fine to suffer a further period of three months' rigorous imprisonment. Of course so much of the fine of Rs. 300 awarded by the Judge as has been paid and exceeds the fine now imposed will be returned to the accused.

SPANKIE, J.—The facts found are not disputed. We had issued notice to the accused to show cause why his sentence should not be revised but he has not appeared. He has been convicted of having assaulted without any provocation an old man sleeping outside his house, and having beaten him with a stick on the sides. The blow ruptured the man's spleen and caused his almost immediate death. The Magistrate who conducted the preliminary inquiry committed the accused under ss. 323 and 325 of the Indian Penal [768] Code. But the Sessions Judge altered the charge into one of s. 304-A of the Code, and sentenced the accused to pay a fine of Rs. 300, or in default to suffer rigorous imprisonment for six months. The attention of the Court was drawn to the case, and the record was sent for.

Section 304-A appears to be wholly inapplicable to the facts as found by the Sessions Judge. The circumstance that the medical evidence established death by rupture of the spleen did not reduce the accused's act to one of culpable rashness or culpable negligence. It has been laid down that "culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstance which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection" (1).

There is no reason to doubt that the act was not done with the intention of causing death, or of causing such bodily injury as the accused knew was likely to cause the death of the old man, nor was the act done with the intention of causing bodily injury to the man, nor was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death, nor did the accused, when striking the man, know that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The offence, therefore, of culpable homicide was not committed. But I think that there can be no doubt that the accused committed the offence of voluntarily causing grievous hurt. He struck deceased on the ribs with a stick and inflicted a hurt which not only endangered his life but actually caused his death, and which he must have known was likely to break a

(1) *Nidamarti Nagabhushnam*, 7 M.H.C.R. 119.

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rib if it did no worse injury. The fact that he was intoxicated at the time cannot alter the nature of the act [769] committed by the accused. Section 86 of the Penal Code applies strictly to this case.

I would set aside the conviction under s. 304-A and convict accused under s. 325 of the Penal Code. Considering the unprovoked character of the attack and the circumstances attending it, it appears to me one which is not sufficiently punished by a fine. I would sentence the accused G. W. O'Brien to one year's rigorous imprisonment, and to a fine of Rs. 100, or a further period of three months' rigorous imprisonment. So much of the fine, if paid, that exceeds the fine proposed, should be returned to the accused.

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2 A. 769.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

MAZHAR ALI KHAN AND ANOTHER (*Defendants*) *v.* SARDAR MAL (*Plaintiff*).* [8th March, 1880.]

Bond—Interest—Penalty.

The defendants on the 8th May, 1869, gave the plaintiff a bond for the payment of Rs. 2,000 on the 16th February, 1870. This amount consisted of two items, *viz.*, Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and its due date. The bond provided that, in default of payment on the due date, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent. per mensem from the date of the bond. *Held*, in a suit on the bond in which interest was claimed at the rate of two per cent. per mensem from the date of the bond, that this provision was penal, and the penalty ought not to be enforced.

[R., 9 C. 689 (693) ; 11 M. 294.]

THIS was a suit on a bond executed by the defendants in favour of the plaintiff on the 8th May, 1869. The material portion of this bond was as follows :—" We Mazhar Ali and Fazal Ali do declare that we have borrowed Rs. 1,650 from Sardar Mal : adding Rs. 350 to this sum on account of future interest, we admit that Rs. 2,000 is payable by us to the lender : we promise to pay that amount without interest at the close of the month of Magh, Sambat 1926 (16th February, 1870) : should we fail to pay the amount of principal and interest entered in the bond at the time [770] fixed then we will pay interest on that amount, *viz.*, Rs. 2,000, at two rupees per cent. per mensem from the date of the bond, in addition to the interest stipulated to be paid as above." The defendants having failed to pay the amount of the bond on the due date, the plaintiff claimed interest on the principal amount sued for at the rate of two rupees per cent. per mensem calculated from the date of the bond to the date of the institution of the suit, *viz.*, the 23rd June, 1879. The defendants contended that the stipulation to pay interest from the date of the bond at two rupees per cent. per mensem, in case of default, was penal and should not be enforced. The Court of first instance disallowed this contention, observing as follows :—" The Court finds that the condition

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* First Appeal, No. 6 of 1880, from a decree of C.W. Moore, Esq., Judge of Aligarh, dated the 23rd September 1879.

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as to paying interest at twenty-four per cent. (per annum) in the event of default, from the date of the execution of the bond, whether penal or not, is not unreasonable: the rate is by no means uncommon, and though no doubt the terms of the bond, in the event of default as regards the period between execution and the first date fixed for payment, may now seem hard to the defendant-debtors, yet they agreed to those terms with their eyes open: nor were they obliged by circumstances to take the loan; the bond shows that they took the money with a view to speculating in indigo, and no doubt they looked for a profit which would much more than cover the rate of interest fixed in the bond: the Court sees no reason why, because or when the defendant-debtors failed in their speculation, they should be allowed to evade their agreement willingly made."

The defendants appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellants.

Munshi *Kashi Prasad* and Lala *Har Kishan Das*, for the respondent.

JUDGMENT.

The judgment of the High Court (PEARSON, J., and SPANKIE, J., was delivered by

PEARSON, J.—The amount of the bond consisted of two items, *viz.*, Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and the 16th February, 1870, the date on which it was [771] stipulated that the whole amount of Rs. 2,000 should be paid. The provision that, in default of payment on the date stipulated, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent. per mensem from the date of the execution of the bond was so far penal that in effect it more than doubled the rate of interest for the period above-mentioned. That penalty ought not, in our opinion, to be enforced. The rate of two per cent. per mensem is not so unusual as to be unreasonable. (The judgment then proceeded to determine what sum was due to the plaintiff).

Decree modified.

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2 A. 771.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* BHUP SINGH. [11th March, 1880.]

Reference to High Court under s. 296 *of Act X of* 1872 (*Criminal Procedure Code*), *by Court of Session.*

A Court of Session, after it had asked the assessors their opinion in a case which was being tried by it, suspended the trial of the case and made a reference to the High Court under s. 296 of Act X of 1872, on a question of jurisdiction which had arisen in the trial of the case. *Held* that it was not intended that that section should be so used, and the Court of Session must dispose of such question itself.

THIS was a case referred to the High Court by Mr. W.C. Turner, Sessions Judge of Agra, under s. 296 of Act X of 1872. The Judge in referring the case observed as follows:—"The assessors unanimously found the accused Bhup Singh guilty of the offence specified in s. 363 of the Penal Code. Section 9 of Act XI of 1872, which was in force at the time

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the offence was committed (committed to Sessions on the 30th September, 1879), provides that no charge as to any offence shall be inquired into in British India, unless the Political Agent, if there be such, for the territory in which the offence is said to have been committed, certifies that, in his opinion, the charge is one which ought to be inquired into in British India. The committing Magistrate appears to have overlooked the section quoted above, and I would therefore submit the case for orders to the Hon'ble Court as to whether the Political Agent [772] should be called on, first, to certify that the charge is one which should be inquired into in British India, and, if his reply be in the affirmative, that a new trial be had, or if, as the accused has not apparently been prejudiced in his defence, and the Political Agent now certifies, as above, judgment can be given on the evidence recorded."

ORDER.

Straight, J.—It appears to me that the Judge has adopted an unusual and very inconvenient course, in suspending the conclusion of the trial of Bhup Singh for the purpose of making a reference to the Court on a question of law that has arisen in the course of it. I do not think it ever was intended that s. 296 should be so used. The Sessions Judge has the whole case fully before him, and is in possession of all the materials necessary for him to give his judgment. If he decides wrongly, there is ample power in the Local Government on the one hand, or the accused on the other, to appeal to this Court and have the matter set right, and I certainly do not think that, at this stage, I am called upon to advise the Sessions Judge as to the view he should take. Upon his own responsibility and in the exercise of his discretion he must dispose of the case, and, if he feels there is substantial force in the point that has arisen in reference to the charge under s. 363, Penal Code, he must not hesitate to acquit. I would point out to him that as yet he has passed no decision upon the charge under s. 420, Penal Code, though he took the opinions of the assessors upon it. Probably in respect of this he will find that no difficulty of jurisdiction arises. The record will be returned and he will dispose of the case.

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2 A. 772.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

Moti Bibi (*Defendant*) *v.* Bikanu (*Plaintiff*).* [15th March, 1880.]

Appeal—Limitation.

B sued *M* and *T* for money due on a bond, and on the 27th April, 1877, obtained a decree against *T*; the suit against *M* being dismissed. *T* applied [773] for a review of judgment, and *B* also made a similar application. On the 25th May, 1877, *T*'s application was granted, and on the 16th July, 1877, *B*'s was rejected. On the 29th June, 1878, the Court re-heard the suit against *T*. and dismissed it. *B* appealed, making *T* and *M* respondents, and impugning in his memorandum of appeal the decree of the 27th April, 1877, as well as that of the 29th June, 1878. The appellate Court, assuming that the appeal was

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* Second Appeal, No. 719 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 12th February, 1879, modifying a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 29th June, 1878.

one from the decree of the 27th April, 1877, preferred beyond time, admitted it after time, and after hearing the case on its merits gave a decree against *M*, and dismissed the suit as regards *T*. *Held* that the appellate Court erred in assuming that the appeal was from the decree of the 27th April, 1877, and that it was at liberty to admit it beyond time, the appeal being from the decree of the 29th June, 1878, that decree being the one which had brought *B* before that court as an appellant, and that the appellate Court was not competent on an appeal from the decree of the 29th June, 1878, to reconsider the merits of the case against *M*, the appeal from the decree of the 27th April, 1877, being barred by limitation, and that decree and the decree of the 29th June, 1878, being separate and distinct, and not appealable in one memorandum of appeal from the latter decree.

[R., A.W.N. (1903), 211.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Munshi *Hanuman Prasad* and Lala *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Babu *Sital Prasad Chattarji*, for the respondent.

The High Court (STUART, C. J., and SPANKIE, J.,) delivered the following

JUDGMENT.

The plaintiff-respondent sued Tara Kishore and Moti Bibi for Rs. 800, under a bond dated 19th March, 1874, executed in favour of Tara Kishore, the plaintiff being the real creditor. Appellant Moti Bibi, defendant, denied that she had borrowed money from plaintiff under any agreement whatever, and also any execution of a bond in his favour: for a particular purpose she had borrowed money from defendant Tara Kishore, executing a bond in his favour, and preserving her property from sale; afterwards arrangements for the sale of the property which had been entered into, previous to the execution of the bond, with Tara Kishore fell through, and a sale was effected with one Ghazi, plaintiff's brother, but as a portion of the consideration was not paid a quarrel ensued which has led to the institution of the present suit by plaintiff upon the bond of the 19th March, 1874. The [774] Subordinate Judge, on the 27th April, 1877, decreed in favour of plaintiff for the amount claimed, but dismissed the claim as against Moti Bibi, defendant. Tara Kishore, defendant, who had not appeared in the suit, applied for a review of judgment, and plaintiff also applied for the same as against Moti Bibi, defendant. The Subordinate Judge on the 16th July, 1877, refused the plaintiff's application for review as against Moti Bibi previously exonerated. But on the 25th May he had already accepted the application of Tara Kishore for review. On the 29th June, 1878, the Subordinate Judge reconsidered the case. He refers to his original judgment, observing that, as there had been no proof of contract between the plaintiff and Moti Bibi, he had dismissed the claim as against her: but on the evidence of Badal and Kali, agents of Tara Kishore, that they had borrowed money from plaintiff on behalf of the said Tara Kishore, he decreed the claim against that defendant: but Tara Kishore now urged that the plaintiff had not claimed the money from him, but from Moti Bibi, and that Badal and Kali were no agents of his, and had not acted upon his authority. The Subordinate Judge held that there was no proof that Badal and Kali were the agents of Tara Kishore or that he had authorised them to borrow the money or had promised to repay it:

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Tara Kishore had denied all knowledge of Moti Bibi, and plaintiff admitted that he was not personally acquainted with Tara Kishore. The lower appellate Court, therefore, dismissed the claim as against Tara Kishore.

The plaintiff then appealed to the Judge, making both defendants respondents, and, referring to the previous decision of the 27th April, 1877, it appeared that he was appealing from that decision as well as from that of the 29th June, 1878. The Judge admits that, so far as the decision of the 27th April, 1877, is concerned, the appeal is barred, but he nevertheless admitted it, as the proceedings of the Subordinate Judge, in granting one application for review and rejecting the other, were of a curious nature. It was, he considered, a case in which the parties might be misled as to the particular date on which the period allowed for appeal would begin to run against them: the appeal of plaintiff was, in his opinion, made *bonâ fide:* the plaintiff had all along proceeded [775] against Moti Bibi as the obligor, having made Tara Kishore defendant *pro forma:* he was merely the nominal obligee, plaintiff being the real creditor: Moti Bibi did not deny that she had received the money on the execution of the bond, pleading, according to the Judge, that Tara Kishore, and not plaintiff, was the party to sue her. The lower appellate Court finds that the money was borrowed for Moti Bibi's use at the instigation of Tara Kishore, and also for his benefit, and he (the Judge) was not satisfied that Tara Kishore had not made himself liable for the money. But he decreed the claim on appeal against Moti Bibi and dismissed it as against Tara Kishore, who, however, would pay his own costs.

It is contended by Moti Bibi that the decision of the 27th April, 1877, not having been appealed within the period prescribed by law, had become final; that the application of plaintiff-respondent for review as against appellant had been rejected, and the order passed upon it was final; and that, as no sufficient reasons for the admission of the appeal after time had been assigned by respondent, the Judge had acted erroneously in admitting the appeal: moreover, the suit had been separated against each defendant and on different dates; there could not be a single appeal against the two decrees; and appellant further contends that there was no contract between herself and plaintiff, nor had she executed the deed of the 19th March, 1874.

There can be no doubt that, if the appeal heard by the Judge is one from the decision of the Subordinate Judge dated 27th April, 1877, it is after time, and that the proper course for respondent, after that decision had been delivered, and a decree had passed against him, was to have appealed the decree. The memorandum of appeal presented to the Judge refers to the decision of the 27th April, 1877, and to the intermediate miscellaneous proceedings with reference to the application of Tara Kishore for review, and that of the plaintiff for the same purpose as against Moti Bibi. But there can be no doubt that it was the decree passed by the Subordinate Judge on the 29th June, 1878, that had brought plaintiff before the Judge as an appellant. The appeal from that [776] decree was admittedly within time. The question arises whether the Judge was at liberty in this appeal to reconsider the merits of the case as against Moti Bibi. It is true that she appeared as respondent and defended the appeal. But in doing so she only acted in obedience to the notice of the Court served upon her; and because she did so we do not think that it can be successfully contended that she should not be allowed to plead now that appeal as against her was barred by lapse of time. The decree of the 29th June, 1878, was not passed against her, but as against

Tara Kishore; she was not a party to the review. If the plaintiff was desirous of appealing as against her from the decree of the 27th April, 1877, he might have done so within the time allowed by law, or if under any misapprehension he had allowed that period to run by, he should have presented his memorandum of appeal and assigned reasons for not presenting his appeal within such period. The Court, had he done so, might then, under s. 5 of Act XV of 1877, have admitted the appeal after time, if satisfied that the appellant had sufficient cause for not making his application within time. This course the plaintiff did not adopt, but waited until the decree of the 29th June, 1878, after the admission of Tara Kishore's application for review, had been made, dismissing the suit as against the said Tara Kishore. It seems to us that the appeal before the Judge was an appeal against the decree of the 29th June, 1878, under cover of which the plaintiff desired to re-open the claim as against Moti Bibi, which had been dismissed on the 27th April, 1877. We do not think that this course was legal, and we hold that the Judge has acted erroneously in assuming that the appeal was one against the decree of the 29th April, 1877, and that he was at liberty to admit it under s. 5 of the Limitation Act. It seems clear to us that the decrees of the 27th April, 1877, and of the 29th June, 1878, are separate and distinct, and that they could not be appealed in one memorandum of appeal from the decree of the 9th June, 1878. We, therefore, decree the appeal and reverse the judgment of the lower appellate Court with costs.

Appeal allowed.

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2 A. 777.

[777] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

JHUNNA (*Plaintiff*) v. RAMSARUP AND OTHERS (*Defendants*).*
[15th March, 1880.]

Hindu Law—Widow—Maintenance.

In a case where a Hindu widow is entitled to maintenance, it is better to award a fixed annual sum and not a share of the income of the estate.

THE plaintiff in this suit was the widow of one Zalim Singh, deceased, who was a member of a joint Hindu family consisting of six brothers. She sued her deceased husband's brothers claiming to be paid an annual allowance, by way of maintenance, of Rs. 48, at the rate of Rs. 4 per mensem, out of his one-sixth share in the family estate, which was in the possession of the defendants. This estate consisted of zamindari shares, gardens, and certain land in a mauza called Rijlaman. The Court of first instance gave her a decree directing that the defendants, and their representatives and assigns, should pay her annually Rs. 48 out of the income of her husband's one-sixth share of the family estate. On appeal by the defendants the lower appellate Court modified this decree, directing that the plaintiff should receive as an allowance one-sixth of the income of the family estate.

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*Second Appeal, No. 742 of 1879, from a decree of R.F. Saunders, Esq., Judge of Farukhabad, dated the 4th April, 1879, modifying a decree of Maulvi Wajid Ali, Munsif of Kaimganj, dated the 18th February, 1879.

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The plaintiff appealed to the High Court, contending that her allowance shoud be fixed.

Babu *Baroda Prasad Ghose*, for the appellant.

Mr. *Chatterji* and Babu *Ratan Chand*, for the respondents.

The Court (OLDFIELD, J., and STRAIGHT, J.) remanded the case to the lower appellate Court, the order of remand being as follows:

ORDER OF REMAND.

STRAIGHT, J.—The plaintiff-appellant is the widow of one Zalim Singh, a brother of the defendants. This suit was brought to have the sum of Rs. 48 fixed as the amount of yearly maintenance the plaintiff was entitled to receive from her husband's family. The first Court passed a decree in her favour for the sum prayed. The lower appellate Court has modified the Munsif's order, allotting the maintenance at one-sixth of the hereditary [778] property in suit, that fraction representing the share to which Zalim would have been entitled had he been alive. The right of the plaintiff to maintenance is clear; indeed, that is positively found by both the lower Courts. We do not, however, agree with the observations of the Judge, that "the income being variable according to the seasons, it is better not to affix a given sum for maintenance, but to let that be determined as the occasion may arise." For reasons of convenience and in order to prevent the recurrence of litigation between the parties, we think it far better that a reasonable fixed sum, having regard to all the circumstances of the case, should be ascertainted and decreed to the plaintiff. (The Court then proceeded to make an order remanding for trial the issue whether Rs. 48 was a reasonable amount of yearly maintenance to be allowed to the plaintiff, and if not, what fixed sum would be).

Appeal allowed.

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2 A. 778

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

GOBIND SINGH (*Defendant*) *v.* KALLU AND OTHERS (*Plaintiffs*).*
22nd March, 1880.]

Suit for redemption of usufrctuary mortgage—Valuation of suit—Jurisdiction—Act VI of 1871 (*Bengal Civil Ciurts Act*), *s.* 22.

The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage-debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interests in the property was below Rs. 5,000; the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit if was contended that the appeal from that decree lay to the District Court and not to the High Court. *Held* that the "subject-matter in dispute" within the meaning of s. 22 of Act VI of 1871, was the mortgage and the mortgagees' rights under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the District Court. Second Appeal, No. 1039 of 1877 (1) dissented from.

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*First Appeal, No. 93 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 30th June, 1879.

(1) Unreported, decided the 18th January, 1879.

[F., 3 A. 822 (824) = 1 A.W.N (1881), 85; 10 A. 524 (528); 13 B. 489 (491); 7 A.W.N. (1887), 262; R., 11 B. 591 (594); 14 C.P.L.R. 154 (155); 8 Ind. Cas. 973 (975) = 5 L.B.R. 208.]

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2 A. 778.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

[779] Munshi *Hanuman Prasad* and Babu *Oprokash Chandar Mukerjee*, for the appellant.

Pandit *Ajudhia Nath* and Lala *Harkishen Das*, for the respondents.

JUDGMENT.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—This is a first appeal from a decision of the Subordinate Judge of Aligarh of the 30th June, 1879. The plaintiffs-respondents sued for possession of Mauza Chiti, pargana Chandos, by redemption of a mortgage for Rs. 2,000 executed, as far back as 1835, by Jai Kishan and others, of whom they are the representatives, to Hardeo Singh, whose rights have come to the defendants by purchase. The plaintiffs alleged that the principal sum and interest secured by the instrument had been discharged out of the profits, and they prayed that the property might be restored to them. The Subordinate Judge dismissed the claim of all the plaintiffs, with the exception of three, Kallu, Gobardhan, and Parsa, in whose favour he gave a decree in part. Gobind Singh alone of all the defendants now appeals to this Court.

Upon the case being called on for hearing before us, it was urged as a preliminary objection by Pandit Ajudhia Nath on behalf of the respondents, that the appeal had been wrongly preferred to the High Court, as the subject-matter in dispute being the mortgage, and the value of the mortgagee's rights under it, which were below Rs. 5,000, it properly lay to the District Judge. The following decisions of this Court were referred to in support of this contention,—Second Appeal, No. 521 of 1869; Second Appeal, No. 511 of 1878; and Second Appeal, from Order No. 51 of 1879 (1).

On the other side the appellant urged that, as by the statement of defence filed, a question of proprietary title to property of the value of Rs. 15,000 was raised, the appeal was cognizable by this Court. In support of this view our attention was called to a decision of Turner, J. and Spankie, J., in Second Appeal No. 1039 of 1877 (2), which, if accurate, is undoubtedly applicable to the present case.

[780] The question thus raised is one of some importance, and, having regard to the precedents already enumerated, we thought it right to take time to consider judgment. The point turns upon the construction of the words "subject-matter in dispute" of s. 22, Act VI of 1871.

In the present case the plaintiff's suit was essentially one for redemption of mortgage, the court-fee payable on which would have to be calculated according to the "principal money expressed to be secured by the instrument of mortgage,"—Art. ix, s. 7 of Court Fees Act. It is true that the defendants by their pleas opened up a wider field for inquiry, involving the consideration of their proprietary title to the property. But we do not think that the character or nature of the subject-matter of the plaintiffs' claim was thereby altered; it continues in its original shape so far as he is concerned, nor is the complexion of it entirely changed because

(1) Unreported.

(2) Unreported, decided the 18th January 1878.

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the defendants put forward certain grounds of defence which, if well-founded, must defeat his right to redeem. We therefore think that the subject-matter in dispute was the mortgage and the mortgagee's right under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the Judge. We regret that the decision should be directly at variance with the judgment of Turner and Spankie, JJ., already mentioned, but the point appears to us so clear, that we feel constrained to differ from the view enunciated by those two learned Judges.

The memorandum of appeal will be returned to the appellant for presentation in the proper Court and the appellant will pay the respondents' costs in this Court.

Order accordingly.

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2 A. 780.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HIRA LAL (*Defendant*) *v.* KARIM-UN-NISA (*Plaintiff*).*
[23rd March, 1880.]

Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Act VIII of 1859 (*Civil Procedure Code*), *ss.* 256, 257, 258—*Act X of* 1877 (*Civil Procedure Code*) ss. 312, 315—*Warranty*—Caveat emptor.

Certain immoveable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, *H*, as the [781] property of this judgment-debtor. *W* objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor, but was endowed property. His objections were disallowed, and the property was put up for sale on the 20th July, 1875, under the provisions of Act VIII of 1859, and was purchased by *K*. *W* subsequently sued *K* to establish his claim to the property and to have the sale set aside and on the 18th August, 1876, obtained a decree setting it aside. Thereupon *K* sued *H* to recover the purchase-money, alleging a failure of consideration. *Held* that, the sale not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but having been set aside in favour of a third party who had established his title to the property, and there being no question of a fraud or misrepresentation on the part of the decree-holder, the suit was not maintainable. *Rajib Lochun* v. *Bimalamoni Dasi* (1) and *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (2) followed. *Makundi Lal* v. *Kaunsila* (3), *Neelkunth Sahee* v *Asmun Matho* (4), and *Doolhin Hur Nath Koonweree* v. *Baijoo Oojha* (5) distinguished.

Held also that the auction-purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation. *In the matter of the petition of Mulo* (6) dissented from.

Per STRAIGHT, J.—That, had the provisions of that section been applicable, instead of instituting a suit, the auction-purchaser should have applied for the return of her purchase-money in the execution of the decree.

[R., 3 Ind. Cas. 672=5 L.B.R. 58 (62).]

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*Second Appeal, No. 883 of 1879, from a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 26th May, 1879, affirming a decree of Mir Anwar Husain, Munsif of Moradabad, dated the 26th November, 1878.

(1) 2 B.L R. C.A. 83=10 W.R. 365.
(2) 4 B.L.R. F.B. 11=12 W R. F.B. 8.
(3) 1 A. 568.
(4) H. C. R. N.W. P. 1871, p. 67.
(5) H.C.R. N.W.P. 1867, p. 50.
(6) 2 A. 299.

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THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Lala *Lalta Prasad* and Lala *Harkishen Das*, for the appellant.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

JUDGMENTS.

The following judgments were delivered by the Court :

OLDFIELD, J.—Hira Lal, defendant, the appellant before us, caused five bighas, fifteen biswas of land to be attached in execution of his decree against Khadim Husain and Isri Husain, as property belonging to the judgment-debtors. One Wilayat Husain objected to the attachment and sale on the ground that the property did not belong to the judgment-debtors, but was endowed property ; his objections were disallowed, and the property was sold by auction, [782] and purchased by the plaintiff for Rs. 505 on the 20th July, 1875, and the money paid over to the defendant, and the sale was confirmed on the 11th September 1875. Wilayat Husain, however, brought a suit to set aside the sale, on the ground that the judgment-debtors had no right and title in the property, which was an endowment, and he obtained a decree on the 18th August, 1876, and the sale was set aside. The plaintiff has now brought this suit to recover from the decree-holder the purchase-money with interest and the Courts below have decreed the purchase-money with interest, at six per cent. It is contended in second appeal that no suit will lie for refund of purchase-money, that plaintiff's proper remedy was to proceed in the execution department under the provisions of s. 315, Act X of 1877, and that interest should not be allowed.

In my opinion the first plea is valid. The sale took place under the provisions of Act VIII of 1859, and, although s. 258 directs that, whenever a sale of immoveable property is set aside, the purchaser shall be entitled to receive back his purchase-money, this provision applies only to cases in which the sale has been set aside for irregularities or the like under ss. 257 and 258 of the Act, and not when a third party succeeds in establishing his title to the property. This view of the law has been held in a course of decisions of the Calcutta Court—*Rajib Lochun* v. *Bimulamoni Dasi* (1), and *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (2), and I am not aware of any by this Court opposed to it. The case of *Makundi Lal* v. *Kaunsila*(3) proceeded on the ground that the decree-holder had fraudulently executed a decree against a person not bound by the decree, and had caused the sale of his property, and is not in point, nor are the two cases referred to by the Munsif. In *Neellkunth Sahee* v. *Asmun Matho* (4) there was no power to bring the judgment-debtor's property to sale under the decree ; and in *Doolhin Hur Nath Koonweree* v. *Baijoo Oojha* (5) the decree-holder had caused property to be sold which though belonging to the judgment-debtor was not saleable in execution of a decree.

[783] The terms of s. 315, Act X of 1877, are different to those of s. 258, and by s. 315, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid. But it is unnecessary to determine whether plaintiff

(1) 2 B.L.R. A.C. 83=10 W.R. 365. (2) 4 B.L.R. F.B. 11=12 W.R. F.B. 8.
(3) 1 A. 568. (4) H.C.R. N.W.P. 1877. p. 67.
(5) H. C.R. N.W.P. 1867, p. 50.

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could succeed under this section, as its provisions cannot have retrospective effect, and will not apply to a sale which has taken place before the Act came into operation; and I am unable to take the view on this point of the learned Judges who decided the case of *Mulo*, petitioner, decided the 7th May, 1879 (1), which was brought to our notice at the hearing.

The liability of a decree-holder must be decided according to the conditions of the sale in force when he caused the property to be sold, and any warranty of title in the judgment-debtor is not ordinarily given by the judgment-creditor in judicial sales held under the Civil Procedure Code; nor can it be held that the decree-holder undertook to warrant the title of the judgment-debtor in the property sold in the case before us. The rule of law in respect of sales in execution of decrees has been declared by the Privy Council in *Dorab Ali* v. *Abdul Aziz* (2). Their Lordships observe: "Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-debtor;" and again: "The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor."

The sale in the case before us not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction [784] or other illegality or irregularity affecting the sale, and there being no question of fraud or misrepresentation on the part of the decree-holder, I am of opinion that the plaintiff cannot succeed in this suit, and it should be dismissed, and the appeal decreed, with all costs, and the decrees of the lower Courts reversed.

STRAIGHT, J.—I am of the same opinion as my honourable colleague. It does not appear to me that the provisions of s. 315 of Act X of 1877 are applicable to a sale which took place in July, 1875, and the relief now afforded to auction-purchasers is not open to the plaintiff. Were there not a Full Bench decision of the Calcutta Court in *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar* (3) as to the construction to be placed upon s. 258 of Act VIII of 1859, I should have had no difficulty in holding that the setting aside of sale contemplated therein is governed by ss. 256 and 257, which gave the Court summary powers to set aside sales on the ground of material irregularity in "publishing or conducting them." In the present case no allegation of that kind is made, but the plaintiff bases her claim to a refund of the purchase-money paid by her, because the consideration for that payment has totally failed. It is not alleged that any fraud or misrepresentation was used at the time of the auction-sale, which took place through the Court, and it is clear that no warranty of title or guarantee of undisturbed possession can be implied to a purchaser.

The following rule of law laid down by Lord St. Leonards in Vendors and Purchasers, 14th edition, p. 1, is relevant:—"If at the time of the contract the vendor himself was not aware of any defect in the estate, it

(1) 2 A. 299. (2) 3 C. 806=5 I. A. 116.
(3) 4 B.L.R. F.B. 11=12 W.R. F.B. 8.

seems that the purchaser must take the estate with all its faults and cannot claim any compensation for them." And in the same work the following passage occurs:—"If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity (1)". In the present case, so far from there being any evidence of *mala fides* on the part of the judgment-creditor, the sale did not take place until Wilayat Husain's objections had been [785] heard and disposed of. There was, therefore, the strongest reason for his believing that the judgment-debtor had a saleable right, title, and interest in the property brought to sale.

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2 A. 780.

Had the provisions of s. 315, Act X of 1877, been applicable, I think that the objection taken in the first ground of appeal by the appellant would have been fatal to the plaintiff's claim, and that, instead of instituting a regular suit, the proper course for an auction purchaser to pursue under circumstances such as those which have arisen in the present case is to apply under s. 312 in the execution department. This appeal must, therefore, be decreed with costs.

Appeal allowed.

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2 A. 785.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

DURGA PRASAD (*Decree-holder*) *v.* RAM CHARAN AND ANOTHER (*Judgment-debtors*).* [24th March, 1880.]

Appeal from order setting aside sale of immoveable property in the execution of decree—Act X of 1877 (*Civil Procedure Code*), ss. 312, 588 (*m*)—*Act XII of* 1879, ss. 90 (16), 102—*Act I of* 1868 (*General Clauses Act*), s. 6.

On the 25th June, 1879, a Subordinate Judge made an order setting aside the sale of immoveable property in the execution of a decree, from which an appeal was preferred, under Act X of 1877, to the District Court on the 25th July, 1879, before Act XII of 1879 came into force. *Held* that as the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution, s. 102 of that Act did not apply, but as the appeal lay to the District Court under the law in force on that date it was competent to dispose of it under the provisions of s. 6 of Act I of 1868.

Appeal from order No. 138 of 1879 (2) and Revision Case No. 38 B. of 1879 (2) observed on.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. The petitioner was a decree-holder, in the execution of whose decree certain immoveable property belonging to his judgment-debtors had been sold. On the application of the judgment-debtors the sale was set aside by the Subordinate Judge of Farukhabad, the Court executing the decree, by an order bearing date the 25th June, [786] 1879. On the 25th July, 1879 or before Act XII of 1879 came into operation, the decree-holder preferred an appeal to the District Judge from the Subordinate Judge's order. On the

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* Application under s. 622 of Act X of 1877, connected with First Appeal, No. 10 of 1880, from an order of R. F. Saunders, Esq., Judge of Farukhabad, dated the 6th December, 1879.

(1) 2 A. 549. (2) Unreported, decided the 11th February, 1880.

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6th December, 1879, Act XII of 1879 having in the meantime come into force, the District Judge held, with reference to ss. 91 and 102 of that Act, that the appeal ought to be heard and determined by the High Court, and returned the memorandum of appeal to be presented to the High Court.

The decree-holder accordingly presented the memorandum of appeal to the High Court, and the High Court admitted the appeal. Subsequently, however, the decree-holder applied to the High Court, under s. 622 of Act X of 1877, for the revision of the District Judge's order on the ground that the appeal, having been preferred to that officer before Act XII of 1879 came into force, was cognizable by him.

Pandits *Bishambhar Nath* and *Nand Lal*, for the petitioner.

Babu *Oprokash Chandar Mukerji* and Munshi *Kashi Prasad*, for the opposite parties.

The High Court (PEARSON, J., and STRAIGHT, J.) delivered the following

JUDGMENT.

The Subordinate Judge's order dated the 25th June, 1879, was appealable to the Judge under s. 588 (*m*), Act X of 1877, and was made the subject of an appeal to him on the 25th July, 1879, before Act XII of 1879 was passed. An order setting aside a sale under the second clause of s. 312, Act X of 1877, is not appealable under s. 588, Act X of 1877, as amended by s. 90 (16), Act XII of 1879. This being so, s. 102 of the latter Act, which provides for the disposal of "every appeal now pending which would have lain if the Act had been in force on the date of its institution," does not apply in this case, for the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution; but, as the appeal lay to the Judge under the law in force on that date, he was competent and bound to dispose of it under the provisions of s. 6, Act I of 1868, which declare that the repeal of any Act shall not affect any proceeding commenced before the repealing Act shall have come into operation. **[787]** As the Judge failed to exercise a jurisdiction vested in him by law in the matter of the appeal, we set aside the order and direct the memorandum of appeal to be transmitted to him for disposal on the merits according to law.

In the course of considering this matter we have had occasion to examine two decisions, passed by us on the 11th of February last, in Appeal from Order No. 138 of 1879 (1) and Revision Case No. 38B of 1879 (1).

We think it right to take this opportunity to say, as regards the first of these, that it was determined under an erroneous conception of s. 102 of Act XII of 1879. It was incorrect to say, that that section was "inapplicable" to that appeal. The order thereby appealed was one "*confirming sale*," and it was appealable both under s. 588 of Act X of 1877 and the amendment of that section contained in Act XII of 1879. Moreover that appeal was pending, when the last-mentioned Act came into force, and should, therefore, have been heard and determined as provided by the amendment to s. 589, namely, by this Court. Accordingly our order sending it back to the Judge for disposal was incorrect.

In Revision Case No. 38B, we were in error in using the expression "had the provisions of Act XII of 1879 been applicable, the appeal from

(1) Unreported, decided the 11th February, 1880.

the Munsif's order *setting aside the sale* would lie, not to the Judge but the High Court"; for s. 588, as amended, enacts, by omission, that appeals from orders setting aside sales can no longer be had. We have thought it right to correct this inaccuracy of expression, though our order in the case was perfectly regular.

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CIVIL JURISDICTION.

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2 A. 787.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

GANPATJI AND ANOTHER (*Plaintiffs*) v. SAADAT ALI AND OTHERS (*Defendants*).* [31st March, 1880.]

Mortgage—Sale in execution of decree—Vendor and Purchaser.

The proprietors of a taluka and mahal called *B*, assessed with revenue at Rs. 6,800-4-7, to which certain lands which had been gained by alluvion [788] appertained, which lands had been formed into a separate mahal and assessed with revenue at Rs. 88, mortgaged it in these terms: "We agree mutually to mortgage the said taluka *B*, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, &c., &c., and all and every portion of our proprietary, possessory and demandable rights, without excepting any right or interest obtained or obtainable, &c." Subsequently, the mahal taluka *B*, "together with original and attached mahal and all the zemindari rights appertaining thereto" was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire taluka *B*, *jama* Rs. 6,800-4-7" but afterwards refused to perform the contract and was sued for its specific performance. The plaint in this suit stated that the subject-matter of the contract was the "entire taluka *B*, *jama* Rs. 6,800-4-7," and the decree which the purchasers obtained for the specific performance of the contract referred to its subject-matter in similar terms.

Held, in a suit by the purchasers for the possession of the alluvial mahal, that the terms of the mortgage were sufficiently comprehensive to include that mahal, and it was not intended by the entry of the *jama* of mahal *B*, exclusive of the *jama* of the alluvial mahal, to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. Also that the alluvial mahal passed to the auction-purchaser at the auction-sale, under the words "attached mahal." Also that the sale to the plaintiffs passed the alluvial mahal, the words "the entire taluka *B*" being sufficient to include it, the entry of the *jama* of mahal *B* in the sale-contract, plaint, and decree being merely descriptive.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Messrs. *Conlan* and *Colvin*, the Senior Government Pleader (Lala *Juala Prasad*), and Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellants.

Pandit *Ajudhia Nath*, Lala *Lalta Prasad* and Munshi *Kashi Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The case of the plaintiffs is that taluka Birpur with all the villages appertaining to it and all existent and contingent rights connected with it had been hypothecated to Nawab Jafar Ali Mirza, for

* First Appeal, No. 50 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 28th February, 1879.

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money lent to Husaini Khanam and Bakya Bibi the proprietors, and the Nawab instituted a suit and obtained a decree against them, and in execution caused the taluka with [789] all rights and interest to be sold, and himself purchased it on 20th November, 1872. After the purchase, the auction-purchaser agreed to sell the property to Jiwan Lal now represented by Ganpatji, who admitted the plaintiff Haridas to an interest in the transfer, and after a suit instituted against the auction-purchaser they obtained a decree compelling the auction-purchaser to execute a sale-deed in their favour in accordance with the agreement. The plaintiffs have been obstructed by the heir of the judgment-debtors, the former owners of taluka Birpur, and by lessees put in by him, in obtaining possession of some alluvial land comprising 110 bighas, 12 biswas, 13 dhurs, which accreted to some of the villages comprising the taluka in 1860 and 1861, and was formed into a mahal and assessed with a revenue of Rs. 88 in 1863 and settled with the proprietors of taluka Birpur, and which the plaintiffs allege was sold at the auction-sale on 20th November, 1872, and passed by that sale to their vendor and to which they are in consequence entitled.

The defendants, one of whom is the heir of the former owners of the taluka, and the other two are lessees on his part, aver that this alluvial land was not hypothecated to Nawab Jafar Ali Mirza, nor included in the property sold at auction; that the property hypothecated and sold was the original mahal of taluka Birpur excluding this land which was formed into a separate mahal recorded under the name of *Gang-barar*; and they further aver that the plaintiffs' vendor, the auction-purchaser, never considered himself the purchaser of this land nor agreed to sell this land, and it was improperly included in the sale-deed which the plaintiffs obtained by a decree of Court; and they further plead that the suit is not maintainable with reference to s. 241, Act XIX of 1873, and is barred by limitation.

The Subordinate Judge rightly held that there was no bar to the institution of this suit on the ground taken; and he proceeded to find that the land in dispute was not included in the hypothecation made by the owners of Birpur to plaintiff's vendor, nor in the auction-sale, nor in the subsequent contract of sale by the plaintiffs' vendor to plaintiffs; and he bases this finding mainly on the following grounds: That the alluvial land formed a separate mahal [790] bearing a separate number in the *tauzi* from that of Birpur, with separate revenue, assessed, *viz.*, Rs. 6,800-4-7 on mahal Birpur and Rs. 88 on mahal *Gang-barar*, and had no connection with taluka Birpur, that all that was entered in the mortgage-deed as subject of mortgage was taluka Birpur, proper, assessed with revenue of Rs. 6,800 and that the sale notification and application for sale made no separate reference to this mahal, and that it was not expressly included in the plaint (dated 19th March 1874) in the suit instituted by plaintiffs against the auction-purchaser, nor in the decree of 21st July, 1874 nor in the sale-contract by plaintiffs' vendor; and the Subordinate Judge argues that, being a separate mahal and not expressly included in the above documents, it cannot be held to have formed part of the property mortgaged and sold.

We are unable to take the same view as the Subordinate Judge. Taluka Birpur is shown to comprise a number of villages forming a mahal, and in 1860 the land in dispute was thrown up and accreted in front of five of these villages, Birpur, Barmara, Ami, Soharpur, and Narainpur, and in 1863 it was formed into a mahal and assessed with the proprietors of the taluka Birpur, and entered as "*Arazi Gang-barar*, mauzas Birpur,

Barmara, Ami, Soharpur, and Narainpur appertaining to taluka Birpur." Thus, although formed into a separate mahal for fiscal purposes, the land would appear to have been attached to the mauzas to which it was an accretion, and at all events it is clear the new mahal after its formation appertained to taluka Birpur. The Subordinate Judge is therefore wrong in considering it had no connection with the taluka; on the contrary it appertained to it as a dependent mahal. By the terms of the mortgage-deed the owners of the taluka "agree mutually to mortgage the said taluka Birpur, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low land cultivated and uncultivated land, inhabited, waste, and saline tracts, stone and wooden presses, *kacha* and *pucca* wells, reservoirs, and tanks, small tanks, and ponds, sir, *baghs*, scattered trees, trees bearing fruits and barren trees, [791] *chauni* houses and dwelling-houses, &c., and all and every portion of our proprietary, possessory, and demandable rights without excepting any right or interest obtained or obtainable.

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Now it seems to us, considering the fact that the alluvial mahal appertained to the taluka, that the above terms are comprehensive enough to include it in the property mortgaged; and if the sum entered as the *jama* was that of the taluka exclusive of the *jama* of the alluvial mahal, there was no intention by that entry to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. But the material point is not what was mortgaged but what was sold at auction. Unfortunately no sale certificate is forthcoming, and it is alleged, and not disputed, that although the sale was confirmed no sale-certificate was obtained by the auction-purchaser, probably owing to the dispute between him and the plaintiffs. But we have in evidence the application for sale and the sale-notification, and in the former the decree-holder applies for the sale of "mahal taluka Birpur, together with original and attached mahal and all zamindari rights belonging thereto," and the sale-notification directs the sale of the "mahal Birpur, together with original and attached mahal and all the zamindari rights appertaining thereto." The attached mahal alluded to can be no other than this alluvial land, and we are at a loss to understand the Subordinate Judge's remark that the sale-notification and application for sale made no separate reference to this mahal.

We can come to no other conclusion than that this alluvial tract, formed into a separate mahal, remained attached to the taluka, and was included in the property sold at auction.

Nor do we agree with the Subordinate Judge that it was excluded from the sale to the plaintiffs, the enforcement of which they obtained under a decree of Court. The Subordinate Judge rests his finding on this point on the fact which he asserts that this land was not included in the sale-contract to plaintiffs, nor in their plaint in their suit to enforce that contract, nor in the decree which they obtained. But the whole force of the Subordinate Judge's opinion rests on an argument formed upon the amount of the *jama* which is entered in those documents as the [792] *jama* of taluka Birpur, and which is said not to include the *jama* of the alluvial mahal. But the entry of *jama* is merely descriptive, while the essential part of the document is the entry in respect of the subject of sale, and this is the "entire taluka Birpur," a term sufficiently comprehensive to include the alluvial mahal appertaining to the taluka, and we may observe that the draft sale-deed, dated 21st January 1874, expressly

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includes alluvial lands, and what is more to the purpose the sale-deed executed by order of the Court which gave the plaintiffs their decree expressly includes the disputed lands as conveyed to them by the auction-purchaser.

We reverse the decree of the lower Court and decree the claim with all costs.

Appeal allowed.

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2 A. 792 (P.C.)=6 C.L.R. 561=7 I.A. 167=3 Shome L R. 211=4 Ind. Jur. 426 =4 Sar. P.C J. 157=3 Suth. P.C.J. 761.

PRIVY COUNCIL.

PRESENT:

Sir J. W. Colville, Sir B. Peacock, Sir M.E. Smith, and Sir R. P. Collier.

[*On appeal from the High Court of Judicature at Allahabad, North-Western Provinces.*]

HIRA LAL (*Decree-holder*) *v.* BADRI DAS AND OTHERS (*Judgment-debtors*). [9th March, 1880.]

Limitation—Proceeding to enforce decree—Act XIV of 1859, *s.* 20.

It was the object of the Legislature in Act XIV of 1859, s. 14, with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bona fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding, taken *bona fide* and with due diligence, before a Judge whom the judgment-creditor believed, *bona fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20.

[F., 28 C. 238 (241)=5 C.W.N. 150 (152); R., 18 B. 734 (736); 7 Ind. Cas. 886 (889).]

APPEAL from a judgment of the High Court of the North-Western Provinces (25th May 1877), affirming a judgment of the Judge of Agra (31st May 1876), allowing the objection of the respondents to the execution in 1874 of a decree obtained in 1867.

In 1867 the decree of which execution was refused in the Indian Courts was obtained by the appellant and one Makhan [793] Lal, since deceased, for Rs. 11,566. A certificate for execution was issued on the 23rd March 1868, by the Judge of that Court who in December 1868, (nothing having been realized under it) ordered that the execution be made over to the Subordinate Judge. The latter in December 1868, ordered issue of attachment; and, on this proving fruitless, the execution-case, on the 3rd April 1869, was struck off the file by the Subordinate Judge. The proceedings taken from time to time by the decree-holders in the Court of the Subordinate Judge to enforce the decree after that date until the re-institution of the proceedings in execution of the decree in the Court of the Judge of Agra, by petition of the 9th April 1874, are stated in their Lordships' judgment.

Mr. *L. Graham* appeared for the appellant.

The respondents did not appear.

Mr. *Graham* referred to the following cases, contending that the proceedings taken by the decree-holders had been sufficient within the

meaning of s. 20 of Act XIV of 1859, to prevent the operation of that section, to bar execution.—*D. A. Dalvi* v. *Lakshuman Hari Patil* (1); *Dheeraj Mahtab Chund* v. *Bulram Singh* (2); *Ram Sahai Singh* v. *Degan Singh* (3); *Roy Dhunpat Singh Roy* v. *Mudhomotee Dabia* (4); *Benoderam Sen* v. *Brojendro Naran Roy* (5).

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JUDGMENT.

Their Lordships' judgment was delivered by

SIR BARNES PEACOCK.—The question in this case is whether the judgment-creditors, who on the 14th of January 1867, obtained in the Court of the Judge at Agra a decree against the respondents, were on the 9th of April, 1874, barred by limitation from executing it. It appears that on the 3rd of December, 1868, the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd of April, 1869, the Subordinate Judge struck the execution-case off the file. On 9th of April, 1874, the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

[794] Between the 3rd April, 1869, when the Subordinate Judge struck the case off his file, and the 9th April, 1874, proceedings were from time to time taken by the decree-holders in the Court of the Subordinate Judge to enforce the decree, but the question is whether those proceedings were sufficient to prevent the operation of the Limitation Act XIV of 1859, s. 20.

It appears that on the 18th February, 1870, an application was made by the decree-holders to the Subordinate Judge to set off a debt of Rs. 1,300, which they owed to a debtor of the respondents, against so much of the amount due to them under the decree, and the Subordinate Judge made an order that the application should be granted, that the decree-holders should file a receipt for Rs. 1,300, and that the case should be struck off the pending file. On the 18th February 1870, therefore, the Subordinate Judge made an order by which a portion of the debt to the extent of Rs. 1,300 was satisfied. Subsequently on the 8th of January, 1872, an application was made to the Subordinate Judge to send a certificate of the decree to the Political Agency at Indore in order that the decree might be executed there, whereupon he made an order that the Judge should be requested to send the record of the execution of decree; but inasmuch as an interval of more than one year had elapsed since the last order it was necessary, under s. 216 of Act VIII of 1859, to serve the judgment debtors with a notice, in order that they might, if they could, show cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post they living out of the jurisdiction of the Court, but it was returned, as the judgment-debtors were not found. That was on the 2nd April, 1872. The Subordinate Judge held that that was not a sufficient service upon the defendants, and ordered the case to be struck off the file of pending cases. On the 3rd May, 1872, he made an order: "That a notice be sent to the judgment-debtors by post in registered cover, fixing the 18th day of May as the date for showing cause, and that the case be brought forward on the said date." On the 30th May, 1872, the nazir of the Court made the following report: "In this case a notice

(1) 4 B.H.C.R.A.C.J 86.
(2) 13 M.I.A. 479.
(3) 6 W.R. Misc. 98.
(4) 11 B.L.R.P.C. 23.
(5) 13 B.L.R.P.C. 169.

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in a registered cover was sent by post to the judgment-debtors. The cover has been returned [795] to-day by the post peon. The cover has a slip attached thereon, in which it is written, in Hindi, that Badri Nath, treasurer (that is one of the judgment-debtors), refuses to take it. Therefore, the cover in question is submitted with this petition." On the 3rd June, 1872, the case again came before the Subordinate Judge, upon which he made the following order: "The case having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment-debtor at Indore, but, the judgment-debtors not having received the cover, it was returned. The judgment-debtors not having taken the cover containing the notice, it must be considered as having been served." It is therefore ordered: "That a report be endorsed on the decree, and made over to the decree-holder's pleader, that he may sue out execution in a competent Court, and recover the amount of his decree, and that the case be struck off the pending file."

Afterwards, on the 24th December, 1873, upon a report of the muharrir that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court. Subsequently, on the 9th January, 1874, in a proceeding from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by ss. 285 and 286, Act VIII of 1859, and copy of the application for execution of decree, be sent to the Agent at the Indore Cantonment." On the 9th April, 1874, the case was re-instituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until 3rd June, 1872, that the decree-holders had a certificate on which they had not acted, and they prayed the Court that, under s. 237, certain 4 per cent. promissory notes for Rs. 25,000 due to the judgment-debtors in the Indore Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097 belonging to the judgment-debtors, and that money was sent to the Judge at Agra by means of a bill. On the 13th May, 1876, the Judge, having received the money from the Indore Agency, ordered that the Rs. 13,097-7-9 be [796] given over to Mir Jaffar Husain, pleader for the decree-holder, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, in which the defendants made the following objection, amongst others: " (i) That the decree-holder's decree is beyond time." Thereupon the Judge on the 18th May, 1876, made the following order: "The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree-holder should get the money till they have been disposed off. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent., in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree-holder, an injunction may be issued to the bank on which it is drawn, not to cash it till further orders." Then comes the decision of the 31st May, 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorised by law, and

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that when the Subordinate Judge removed the case from his files he could not take it up again without a fresh transfer. He also considered that the decree-holders had not shown due diligence in the case and doubted whether any of the proceedings were *bona fide.* He therefore held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution-creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bona fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorised him to take up and dispose of the application then pending and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the application to and orders of the Subordinate Judge if he had had jurisdiction would have [797] been sufficient to prevent the operation of the Statute of Limitations, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. S. 14 of Act XIV of 1859 enacts: "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bona fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating, *bona fide* and with due diligence, before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of s. 20 of Act XIV of 1859, with regard to executions. S. 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order to keep the same in force, within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bona fide* and with due diligence before a Judge whom the party *bona fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of s. 20.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had [798] appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within

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2 A. 792 (P.C.)=6 C.L.R. 561=7 I.A. 167=3 Shome L.R. 211=4 Ind. Jur. 426=4 Sar. P.C.J. 157=3 Suth. P.C.J. 761.

the meaning of s. 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Dhunput Singh Roy* v. *Mudhomotee Dabia* (1), reported in the 11th Bengal Law Reports, page 23. There, "An execution sale was staved by consent for two months, and the execution-suit was struck off the file. During that period the execution-creditor applied to the Court to restore the execution-suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the executing creditor) had attached them; but it turned out that he had attached them in another suit. *Held*,—the application being *bona fide*, that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money; if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion." They therefore came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty that the decree of the High Court was erroneous, and that it be reversed; that in lieu [799] thereof an order be made reversing the order of the Judge of Agra of the 31st May, 1876, and ordering that the Rs. 13,097-7-9, with such interest as they may be entitled to under the order of the 18th May, 1876, be paid to the decree-holder; and that the appellants have the costs in all the lower Courts subsequent to the petition of objection of the 18th May, 1876, and the costs of this appeal.

Solicitors for the appellant: Messrs. *Watkins* and *Lattey*.

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2 A. 799.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

GULZARI LAL (*Defendant*) v. JADAUN RAI (*Plaintiff*).*
[22nd April, 1880.]

Suit to establish Right to attached Property—Jurisdiction.

Held that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. Second Appeal. No. 320 of 1876, decided the 16th May 1876 (2), followed.

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*Second Appeal, No. 526 of 1879, from a decree of W. Young, Esq., Judge of Moradabad, dated the 6th February, 1879, modifying a decree of Maulvi Wajih-ul-lah Khan, Subordinate Judge of Moradabad, dated the 11th April, 1877.

(1) 11 B.L.R. (P.C.) 23. (2) Unreported.

[F., 15 C. 104 (106); 55 P.R. 1906=71 P.L.R. 1906; **Criticised**, 94 P.R. 1908 (F.B.)= 74 P.W.R. 1908; **D.**, 7 A. 230 (235) (F.B.); 9 A. 140 (141)=A.W.N. (1886) 328; 17 A. 69 (72) 73).]

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2 A. 799.

THE plaintiff in this suit claimed a declaration of his proprietary right to certain wheat and gram valued at Rs. 1,200, and the cancelment of an order made by the Munsif of the city of Moradabad on the 17th May, 1876, disallowing his claim to the same. This grain had been attached by the defendant, when in the possession of the plaintiff, as the property of the defendant's judgment-debtor, in execution of a decree for Rs. 222-13-6. The suit was instituted in the Court of the Subordinate Judge of Moradabad, by whom the suit was dismissed. On appeal by the plaintiff the District Judge gave him a decree in respect of the wheat.

On appeal by the defendant to the High Court it was contended that the suit should have been instituted in the Munsif's Court, the value of the subject-matter in dispute being the amount [800] of the decree in execution of which the grain had been attached, which was under Rs. 1,000.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Babu *Ratam Chand*, for the appellant.

Pandit *Bishambhar Nath* and Shah *Asad Ali*, for the respondent.

JUDGMENT.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.) was delivered by

OLDFIELD, J.—We are constrained to allow an objection taken by appellant that the Subordinate Judge had no jurisdiction to try this suit. The claim is to have declared the plaintiff's right to some grain stored in pits, by setting aside an order of the Munsif for bringing the grain to sale in execution of a decree held by defendant against a third party, his judgment-debtor. A course of decisions of this Court has held that the value of the subject-matter in dispute for determining jurisdiction will be in such cases the amount of the decree in satisfaction of which it is sought to bring the property to sale.—S. A. No. 320 of 1876, decided the 16th May, 1876 (1). We decree the appeal and set aside the proceedings in the lower Courts, and direct that the plaint be returned to the plaintiff in order that he may, if so advised, present it in the proper Court. Each party will bear their own costs in all Courts.

Appeal allowed.

(1) Unreported.

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LATE
CIVIL.

2 A. 800.

2 A. 800.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

BIKA SINGH AND OTHERS (*Defendants*) *v.* LACHMAN SINGH AND OTHERS (*Plaintiffs*).* [5th April, 1880.]

Hindu law—Mitakshara—Mortgage by a father of ancestral property—Sale of father's rights and interests in the execution of decree—Liability of son's share.

The undivided estate of a joint Hindu family consisting of a father and his minor sons and grandsons, while in the possession and management of the father, was mortgaged by him as security for the re-payment of moneys borrowed by him. The lender of these moneys sued the father to recover [801] them by the sale of the family estate, and obtained a decree against him directing its sale. The right, title, and interest of the father only in the family estate was sold in the execution of this decree. The auction-purchasers having taken possession of the family estate, the sons and grandsons joined in a suit against them to recover their shares of the estate. *Held*, that the sons and grandsons were entitled to recover their shares of the estate, inasmuch as the auction-purchasers had only acquired by their auction-purchase the rights and interests of the father in the estate, and that, for the same reason, it was unnecessary to inquire into the nature of the debt on account of which the father's rights and interests in the estate were sold. *Deendoyal Lal* v. *Jugdeep Narain Singh* (1), followed. *Girdharee Lal* v. *Kantoo Lall* (2), distinguished.

Held, also that the rulings in those two cases are perfectly consistent.

THIS suit was instituted in the names of the plaintiffs, five of whom were the sons, and two the grandsons, of the defendant Gulab Singh, they being minors, by their next friend, Indra Kuar, wife of Gulab Singh. The plaintiffs claimed to establish their right to, and recover possession of, five-sixths of a defined share of a mauza called Kishorepur. It appeared that on the 17th February, 1876, Gulab Singh had given one Ganga Prasad a bond for the payment of Rs. 154 in which he hypothecated this share as collateral security for such payment. The principal amount of this bond consisted of an old loan of Rs. 54 and a new loan of Rs. 100. Ganga Prasad sued Gulab Singh on this bond and obtained a decree for the recovery of the bond-debt by the sale of the share. The rights and interests of Gulab Singh in the share were put up for sale in the execution of this decree, and of another decree against him and certain other persons held by one Lachmi Narain, on the 23rd August 1878, and such rights and interests were purchased by the defendants in the present suit, who obtained possession of the share. The plaintiffs alleged in support of their claim that they and Gulab Singh formed a joint Hindu family; that the share was the undivided property of the family, although Gulab Singh was recorded as its proprietor in the revenue registers; that the moneys which Gulab Singh had borrowed from Ganga Prasad had been borrowed for unnecessary purposes; that the whole of the joint ancestral property had been improperly put up for sale for the satisfaction of Ganga Prasad's decree; and that, according to Hindu law, father and son had equal shares in such [802] property and Gulab Singh's share was therefore one-sixth, and they were entitled to the remaining five-sixths of the joint ancestral property of the family.

* Second Appeal, No. 1170 of 1879, from a decree of W. Dutboit, Esq., Judge of Shahjahanpur, dated the 28th August, 1869, modifying a decree of Babu Becha Ram Chuckarbati, Munsif of Data Ganj, dated the 10th June, 1879.

(1) 3 C. 198. (2) 1 I.A. 321=14 B. L. R. 187.

The auction purchasers defendants stated in defence of the suit that it had been brought at the instance of Gulab Singh; that the property in suit was not ancestral property, but the separate property of Gulab Singh; that Gulab Singh was a person of good moral character; that the debts for the satisfaction of which the property had been sold were incurred by him for lawful purposes; and that, as under the Hindu law it was the pious duty of the son to pay his father's just debts, and the property in suit had been sold to satisfy such debts, the suit ought to be dismissed. It appeared that before the suit came to be tried the defendant Gulab Singh died.

The second and third issues fixed by the Munsif were as follows:—"(ii) Whether the property in dispute was the joint ancestral property of the plaintiffs and Gulab Singh the father of plaintiffs, and Gulab Singh was in possession thereof as the head of the family or not? (iii) Whether the debt in satisfaction of which the property was sold had been incurred under a legal necessity or not, and what rights have the defendants acquired by the auction-purchase"? With reference to the first of these issues the Munsif found that the property in dispute was the ancestral property of Gulab Singh and his sons, and not the separate property of Gulab Singh, and that Gulab Singh was in possession of it as the head of the family, and that it was not shown how the moneys borrowed from Ganga Prasad had been expended. The Munsif held that it was not necessary to ascertain how these moneys were expended, as whatever might have been the nature of the debt the defendants could not take under the execution-sale more than the right, title and interest of the judgment-debtor. The judgment of the Munsif on this part of the case was as follows:—"But this issue is immaterial in the present suit. This case is exactly on all-fours with *Deendyal Lal* v. *Jugdeep Narain Singh* (1) decided by the Judicial Committee of the Privy Council. In that case their Lordships held that 'whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the **[803]** execution-sale more than the right, title and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the right, title and interest of the father.' This ruling is applicable to this case. The bond was executed by the father and the decrees obtained against him only. The plaintiffs who were not parties to the bonds were not also made parties to the suits in which the decrees were obtained in execution of which the property in suit was sold. Following the ruling of the Privy Council, I hold that the defendants Bika Singh, Narain Singh, Bahlwan Singh, Tika Singh, and Pulandar Singh have acquired by the auction-purchase merely the right, title and interest of Gulab Singh to and in the property in dispute."

The Munsif accordingly gave the plaintiffs a decree. On appeal the District Judge affirmed the Munsif's decision, but varied his decree. The material portion of the District Judge's judgment was as follows:—"The auction-purchasers appeal. The cases of *Girdharee Lall* v. *Kantoo Lall*(2); *Narayanacharya* v. *Narso Krishna* (3), *Venkatasami Naik* v. *Kuppaiyan* (4)

(1) 3 C. 198.
(2) 1 I.A. 321=14 B.L.R. 187.
(3) 1 B. 262.
(4) 1 M. 354.

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have been cited on their behalf. The last-named precedent is so entirely at variance with their contention that it has probably been cited under a misapprehension. There can be no doubt, however, that the two first-noted precedents do support the appellants' case and lay down the rule that the sale of a father's ancestral estate in execution of a decree of Court will bind Hindu sons *in esse*, and there is no doubt that the property in this case was ancestral and that the sons were *in esse*. But there seems also to be no doubt that the principle enunciated in *Muddun Thakoor* v. *Kantoo Lall* (1) has been very materially varied by *Deendyal Lal* v. *Jugdeep Narain Singh* (2), which has been followed by two Madras Full Bench decisions —*Venkatasami Naik* v. *Kuppaiyan* (3); *Venkataramayyan* [804] v. *Venkatasu bramania Dikshatar* (4)—in the latter of which the genesis of the law as now settled is detailed, and it must I think now be taken as certain that, when the sons are not parties to the suit in which the decree is passed, the right, title and interest of the father can alone be considered as sold in execution. I find, therefore, no reason to differ from the lower Court upon the main point in this case, but I am of opinion with reference to the case of *Babaji Lakshman* v. *Vasudev Vinayak* (5) and *Kallapa* v. *Venkatesh Vinayak* (6) that the decree must be varied, and that its form should be in that given in *Babaji Lakshman* v. *Vasudev Vinayak* (5). The lower Court's decree is modified by declaring the plaintiffs entitled to joint possession along with the defendants of Gulab Singh's share in the zemindari estate of mauza Kishorepur. The relative proportions of their interests, if a division *in specie* be desired, must be determined in a suit to ascertain the same or by private arrangements."

The defendants appealed to the High Court.

Pandit *Bishambhar Nath* and Munshi *Sukh Ram*, for the appellants.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—In the case of *Girdharee Lall* v. *Kantoo Lall* (1) and *Muddun Thakoor* v. *Kantoo Lall* (1) decided by the Privy Council on the 12th May, 1874, it was ruled that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him, that it would be a pious duty on the part of the son to pay his father's debts, unless they had been illegally contracted or for immoral purposes, and that, it being a son's pious duty to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts. In the later case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (7), decided by the Privy Council on the 1st [805] February, 1879, reference is made to the above-mentioned decision as an authority for the following proposition, *viz.*, that when a joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes and that the purchasers had notice that they were so contracted.

(1) 1 I.A. 321 = 14 B.L.R. 187. (2) 3 C. 198. (3) 1 M. 354.
(4) 1 M. 358. (5) 1 B. 95. (6) 2 B. 676. (7) 5 C. 148.

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In the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1), decided by the Privy Council in July 1877, it was ruled that the right and interest of one co-sharer in a joint ancestral estate may be attached and sold in execution of a decree obtained against him personally under the Mitakshara law, and that the purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

The rulings in the two cases of 1874 and 1877 appear to be perfectly consistent, and, in our opinion, the lower appellate Court has erred in holding that they are at variance with each other, and that the decision in the earlier case supports the appellants' contention. In that case the whole of the taluqa in which the plaintiffs were co-sharers had been sold by their fathers. The ruling in that case is therefore inapplicable to the present in which it has been distinctly found that the appellants only acquired by their auction-purchase the rights and interests of their judgment-debtor Gulab Singh in the joint ancestral estate in mauza Kishorepur. That finding assimilates the case to that of *Deendayal Lal* v. *Jugdeep Narain Singh* (1).

The reason why it is unnecessary to inquire into the nature of Gulab Singh's debts on account of which his rights and interests were sold is that the rights and interests of the plaintiffs are found not to have been sold to the appellants. The appeal fails and is dismissed with costs.

Appeal dismissed.

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2 A. 806.

[806] CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* DEOKI NANDAN LAL. [12th April, 1880.]

Offence against the Stamp Laws—Act XVIII of 1869 (*Stamp Act*), s. 34—*Act I of* 1879 (*Stamp Act*).

The Collector, being primarily responsible for the prosecution of offences against the Stamp Acts of 1869 and 1879, should not himself try, as a Magistrate, a person accused of an offence against either of those Acts.

[D., L.B.R. (1872—1892) 400 (401).]

THIS was an application to the High Court for the exercise of its powers of revision under s. 297 of Act X of 1872. The petitioner, the purchaser of certain property, had sued the vendor, one Amirta, on the deed of sale, in the Court of the Subordinate Judge of Gorakhpur. This suit having been dismissed by the Subordinate Judge, the petitioner appealed to the District Judge. The District Judge dismissed the appeal, and being of opinion that the full amount of the consideration-money was not stated in the deed, directed the District Magistrate to prosecute the petitioner for an offence under s. 34 of Act XVIII of 1869. The District Magistrate accordingly placed the petitioner on his trial, and finding that the full consideration, money indirectly secured by the deed was not truly stated in that document, convicted him of an offence under s. 34 of Act XVIII of 1869. The petitioner appealed to the District Judge. The appeal

(1) 3 C. 198.

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was transferred for trial to the District Judge of Benares by whom the Magistrate's order was affirmed. Thereupon the petitioner preferred the present application.

Babu *Sital Prasad Chatterji*, for the petitioner.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT

STRAIGHT, J.—The applicant in this case was convicted by the officiating Magistrate and Collector of Gorakhpur of an offence against s. 34 of Act XVIII of 1869, for not having truly set forth in a sale-deed executed by him to one Amrita the full amount of consideration-money thereby secured, and was ordered to pay a fine of Rs. 135. He appealed to the Sessions Judge of Gorakhpur, but under the order of this Court his appeal was transferred for hearing to the Judge of Benares, who on the 3rd February, [807] 1880, dismissed it. He now applies to this Court under s. 297 of the Criminal Procedure Code upon the following grounds :—(i) That a conviction could not properly be had in the absence of the original principal document; (ii) that the Officiating Magistrate and Collector, being by s. 43 of Act XVIII, the actual prosecutor of the case, should not have sat to hear and dispose of it in his judicial capacity.

Dealing with this latter objection first, I am of opinion it is a well-founded one and should prevail. Both the Stamp Acts of 1869 and 1879 recognise the Collector as primarily responsible for the institution of prosecution for offences against those Acts, except where the Local Government generally, or he himself specially, has authorised some other officer to discharge such duty. The letter of the Officiating Judge of Gorakhpur of the 1st September, 1879, and the *rubkar* directing an inquiry under the Stamp Act of 1869 against the present applicant and Amirta were amply sufficient to justify proceedings. But the Officiating Magistrate and Collector should have detailed the case for hearing and disposal to some other qualified Magistrate, more especially when it was almost impossible for him to prevent his mind being influenced by the very forcible language in which the Officiating Judge had couched his letter of 1st September, 1879. The conviction must be quashed and a new trial had before such Magistrate, as the now Officiating Judge of Gorakhpur may select.

(The learned Judge then proceeded to deal with first point urged on behalf of the applicant).

2 A. 807.

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Before Mr. Justice Pearson and Mr. Justice Spankie.

JAGAT NARAIN AND ANOTHER (*Defendants*) v. QUTUB HUSAIN (*Plaintiff*).* [12th April, 1880.]

Mortgage—Contribution.

In March 1864 the owner of an estate mortgaged it as security for the payment of certain moneys. Subsequently portions of such estate were purchased by the plaintiff and the defendants at an execution-sale. Subse-[808]quently again the mortgagee sued the mortgagor and the plaintiff for the mortgage-money, claiming to recover it by the sale of the portion of such estate purchased by the plaintiff. Having obtained a decree, the mortgagee caused a portion of such portion to be sold in the execution of the decree. In order to save the remainder of such portion from sale in the execution of the decree, the plaintiff satisfied the judgment-debt. The plaintiff then sued the defendants for contribution. *Held* that, assuming that the mortgagee, by not including the defendants in his suit upon the mortgage-bond, had put it out of his power to proceed at law by another suit on the basis of the same bond against the properties in the possession of the defendants as purchasers, it did not follow that the plaintiff's equitable right to recover a fair contribution from the defendants on the ground of his having paid the whole debt due to the mortgagee was thereby invalidated.

[F., 20 B. 615 (616) ; 29 M. 217 (225) ; R., 24 M. 96 (108) ; D., 6 C.W.N. 583 (584).]

ON the 23rd March 1864, one Dildar Husain, the owner of an estate called taluqa Asad-ul-lahpur, gave one Ilahi Bakhsh a bond for the payment of certain moneys in which he hypothecated taluqa Asad-ul-lahpur as collateral security for such payment. Ilahi Bakhsh brought a suit on this bond in which, claiming to recover the money due thereon by the sale of the taluqa, he made Qutab Hussain, the plaintiff in the present suit, and one Alopi Din, who had in the meantime each purchased a portion of the taluqa at an execution-sale, defendants. Having obtained a decree, Ilahi Bakhsh caused a portion of the property purchased by the plaintiff, and the property purchased by Alopi Din, to be put up for sale in execution of the decree. The portion sold of the property in the plaintiff's possession realized Rs. 1,800, and the property in Alopi Din's possession realized Rs. 200. In order to save the remainder of the property in his possession from sale, the plaintiff paid the balance of the judgment-debt. In the present suit he claimed contribution from the defendants, who had purchased portions of taluqa Asad-ul-lahpur at the same execution-sale at which he had purchased, in proportion to the value of the portions which they had purchased, claiming to recover such contributions by the sale of such portions. Both the lower Courts gave the plaintiff a decree.

On appeal by three of the defendants it was contended on their behalf that, inasmuch as in the suit brought by Ilahi Bakhsh he had not made them defendants or sought to enforce his lien on the portions of the taluqa in their possession, such portions were not lawfully chargeable with the judgment-debt at the time the plaintiff satisfied it, and consequently were not liable to contribution.

[809] The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellants.

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*Second Appeal, No. 1172 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 19th April 1879, affirming a decree of Rai Makhan Lall, Subordinate Judge of Allahabad, dated the 19th July 1878.

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The Senior Government Pleader (Lala *Juala Prasad*) and Pandit *Ajudia Nath*, for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J., and SPANKIE, J.) was delivered by

PEARSON, J.—The argument set out in the ground of appeal is more ingenious and plausible in appearance than agreeable in substance to reason and equity. The contention is that the properties purchased by the defendants-appellants, which were equally with that purchased by the plaintiff subject to the lien created by the bond executed on the 23rd March 1864 by Dildar Hussain in favour of Ilahi Bahksh, were released from liability, because they were not included in the suit brought by the latter for the recovery of the bond-debt by enforcement of the lien. But the contention seems to be irreconcilable with the doctrine of contribution expounded in Story's Equity Jurisprudence. Assuming that Ilahi Bakhsh by the frame of his suit above mentioned had put it out of his power to proceed at law by another suit on the basis of the same bond against the properties in the possession of the defendants in the present suit as purchasers, we are not prepared to admit, as a necessary consequence of such assumption, that the plaintiff's equitable right to recover a fair contribution from the defendants on the ground of his having paid the whole debt due to Ilahi Bakhsh is thereby invalidated. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 809 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

GANGA SAHAI AND ANOTHER (*Defendants*) *v.* HIRA SINGH (*Plaintiff*).*
[12th April, 1880.]

Award--Estoppel—Hindu law—Inheritance—Act I of 1872 (*Evidence Act*), *s.* 115.

D, who was the natural brother of *H*, but had been adopted into another family, on the one part, and *G*, on the other part, referred to arbitration a [810] dispute between them concerning the succession to the estate of *S* the father of *D* and *H*. *H*, having been born deaf and dumb, was under Hindu law in capable of inheriting his father's estate, and he was not a party to the arbitration proceedings. The award, to which *G*, after it was made, expressed his assent in writing, declared that *H* was the heir to his father's estate.

Held (SPANKIE, J., dissenting), in a suit by *H* against *G* for possession of a portion of his father's estate, that the plaintiff, not being a party to the award, was not bound thereby, and, not being bound thereby, could not claim to take any advantage therefrom; that the award could not confer on him a right which he did not possess by law, nor could it constitute evidence of a right which the law disallowed; that the assent of the defendant to the award could not convey to the plaintiff a right of inheritance which did not devolve on him by law; that it could not be contended that the defendant had made a gift of the property to the plaintiff, inasmuch as it had been adjudged by the award that the property

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* Second Appeal, No. 782 of 1879, from a decree of R. M. King, Esq. Judge of Meerut, dated the 9th May 1879, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 24th December 1877.

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did not belong to the defendant; that the defendant by his assent to the award was not estopped from questioning the plaintiff's right of inheritance by the provisions of s. 115 of Act I of 1872; and that, under these circumstances, the plaintiff could not succeed in his suit.

[Overruled, 20 C. 296 (313) (P.C.) = 19 I.A. 203 = 6 Sar.P.C.J. 224.]

THIS was a suit for possession of a two-thirds share of seven houses situated in a mauza called Asaura. The plaintiff, Hira Singh, stated in his plaint that the houses were the undivided property of the parties to the suit; that he was entitled to a two-thirds share of the houses, and the defendants to a one-third share; that he desired a partition of the property; and that the cause of action arose in July 1876, when the defendants refused to make a partition of it. It appeared that in 1874 a dispute arose between the defendants and certain other persons, on the one part, and Debi Singh, brother of the plaintiff, and adopted son of one Hulas Rai, deceased, on the other part, as to the succession to the estates of Rup Kuar, deceased, widow of Hulas Rai, and of Har Dial, deceased, father of Debi Singh and the plaintiff. On the 26th December 1874, the parties agreed to refer the matters in dispute to arbitration, the points referred being—"(i) as regards the legal heir to the property left by Rup Kuar, Deceased," and "(ii) as regards the heir now and hereafter to the property left by Har Dial." The arbitrator by his award dated the 4th Jaunary 1875, determined on the first point that Debi Singh, as the adopted son of Hulas Rai, was the lawful heir to the property of Hulas Rai and Rup Kuar. On the second point the arbitrator determined as follows:—"Har Dial died in 1871, and then [811] the name of Hira Singh alone (Debi Singh having been adopted by Rup Kuar), who, though dumb, was the sole heir, was entered in the column of proprietorship, and he is in proprietary possession of the property, and enjoys the entire profits thereof. The parties admit that Hira Singh is the exclusive heir and possessor of the property left by Har Dial. Therefore, Hira Singh should, in my opinion, continue to be the owner and possessor of the entire property, as he is, and that, after him, his issue will become owners; that if (God forbid) he has no issue, the said property also will devolve on Debi Singh and his descendants; and that the first party or their descendants will have no right whatsoever to the property left by Har Dial, moveable or immoveable, under any precept of the Hindu law, or according to any legal principle, in the present time, or in future, or any allegation, against Hira Signh and Debi Singh, and their issue." This award was signed by the defendant Amin Singh for himself and the defendant Ganga Sahai. On the same day as the award was given, *viz*, the 4th January 1875, the defendants executed a "*razinama*," in which after reciting the agreement of the 26th December 1874, and the award, they stated as follows: "He (the arbitrator) has recorded a clear finding in the award, which was read to us, word by word, and we have fully understood it, and being in a sound state of mind and reason, we have agreed to it, with free will and consent and without reluctance and coercion; and having assented to it, we have attached our signatures as showing our consent to and our acceptance of it. We have now no objection whatever to the award, and have not, nor shall have any claim now or in future to the inheritance and the property. We have therefore executed this *razinama* to serve as a document."

The present suit was instituted by the plaintiff in November 1876. The property of which he claimed a two-thirds share formed part of Har Dial's estate.

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The defendants contended, *inter alia*, that the plaintiff was not entitled to succeed to his father's estate, being deaf and dumb and an idiot from his birth. The Subordinate Judge fixed for trial the following amongst other issues :—(i) "Are defendants bound as against the plaintiff by the award of arbitration in respect to the inheritance of Har Dial ;" (ii) "If so, can defendants urge the [812] pleas of plaintiff's incapacity to succeed; " (iii) "Is plaintiff born an idiot, and whether by his idiotcy, or by his having been born deaf and dumb, he has forfeited his right to inherit the properties." The Subordinate Judge held as follows with reference to the first and second issues : "On the first point the Court thinks that, as the plaintiff was not a party to the reference to private arbitration, he could not benefit by the award, as much as the defendants could not be bound by it, so far as the plaintiff's right was declared in it. Debi Singh, the younger brother of the plaintiff, who was adopted into another family, did not and could not represent him in that reference to arbitration, and if the award was unfavourable to plaintiff, it could not be said that the plaintiff would be bound by it. It would be contrary to all the rules of equity and law to give the plaintiff the advantage of the award, when he would not have been bound by it if it were unfavourable to him. I do not also find any such admission on the part of the defendants so as effectually to stop their mouths and to prevent them urging a plea of bodily or mental infirmities disqualifying the plaintiff from inheritance. This finding disposes of the second issue also." On the third issue the Subordinate Judge held that, it being admitted that the plaintiff was born deaf and dumb, he had no right of inheritance in his father's estate. In accordance with the determination of these issues the Subordinate Judge dismissed the suit.

On appeal by the plaintiff the District Judge on the 6th June 1878, treating the case as having been disposed of by the Subordinate Judge on a preliminary point, and holding that the defendants were bound by the award, reversed the decision of the Subordinate Judge and remanded the case for re-trial. On appeal by the defendants, the High Court, on the 17th January 1879, set aside the District Judge's order remanding the case, and directed him to dispose of the whole case according to law. The District Judge accordingly proceeded to dispose of the case, and on the 9th May 1879 gave the plaintiff a decree.

The defendants appealed to the High Court. On their behalf it was contended, *inter alia*, that the plaintiff, not having been a party to the reference to arbitration could not benefit by the award, [813] and the defendants were not bound by it, in so far as the plaintiff's right was declared by it; that Debi Singh did not, and, having been adopted into another family, could not, represent the plaintiff in the reference to arbitration; and that there had been no such admission on the part of the defendants as estopped them from contending that the plaintiff was disqualified from inheriting.

The Division Bench (PEARSON, J., and SPANKIE, J.) before which the appeal came for hearing referred it to the Full Bench, the order of reference being as follows :

SPANKIE, J.—In this case the claim was not to establish a right to inherit a share of the paternal property, but to obtain separate possession by partition of certain houses situate in mauza Asaura, in proportion to the share of the landed property already in plaintiff's possession since the death of his father in 1871. There does not appear to be any dispute regarding the family tree. But a quarrel arose between the plaintiff's

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brother Debi Singh and the defendants in 1874 as to the succession to the properties left by Hulas Rai and Har Dial. The plaintiff is the elder brother of Debi Singh, but he is deaf and dumb from his birth, and thereby under the Hindu law admittedly disqualified from inheritance. Debi Singh is said to have been adopted by Rup Kuar, the wife of Hulas Rai, probably by the permission of her husband, as the adoption seems to have been recognized. It would appear that in 1874 defendants were objecting to Debi Singh putting in any claim to his own father's property, because of his adoption into Hulas Rai's family, and that the real subject of dispute between themselves and Debi Singh was Har Dial's property. Har Dial was father of the plaintiff. Debi Singh and defendants submitted their quarrel to the arbitration of Zalim Singh, whose award is dated 4th January 1875. The award distinctly states that the question of succession to the property left by Rup Kuar, wife of Hulas Rai, is beside the real quarrel, which was, "who ought to be now and for the future the heir to the property left by Har Dial, deceased." The arbitrator found that "when Har Dial died in 1871, on account of Debi Singh being the adopted son of Rup Kuar, the name of Hira Singh (present plaintiff) was alone entered in the revenue papers as heir of his father, and he, [814] although he is dumb, alone is in proprietary possession of the estate and receives the income of the estate. The parties admit that Hira Singh is the sole heir and in possession of the propery left by Har Dial and I am of opinion, therefore, that Hira Singh alone should, as heretofore, hold proprietary possession of the property, after him his male heirs will be the proprietors. If, may God forbid it, there be no male heirs, that inheritance will also devolve on Debi Singh and his descendants." The award then declares "that the first party (the present defendants), or their descendants, shall not be competent now, in future, on any plea whatever, to claim any right to moveable or immoveable property left by Har Dial." The award was signed by Amin Singh for himself and party. They subsequently executed a compromise in the matter of their quarrel in which they declare as follows: "The award was read to us, word by word, and we have fully understood it, and being of sound mind and in possession of our senses, we have agreed to its terms, and signified our assent to them, with free will and consent and without coercion, and have attached our signatures as showing our consent to and our acceptance of it. We have no objection to the finding of the arbitrator as to the person declared entitled to inherit the property now and for the future. We have therefore &c."

It is true that Hira Singh was not made a party to the reference to arbitration; that he was not so is probably due to the fact that he was deaf and dumb, and perhaps to the circumstance that Debi Singh was really his manager. It may be said that this is a pure assumption. But I find on record that nearly five years before the award, Hira Singh, plaintiff, was made lambardar in this very village of Asaura "under the management of Debi Singh." In the same way, in cases of infancy, or the nomination of a woman to a lambardari, some person is added as "sarbarahkar" or "manager." At this time Hira Singh was already, according to the award, in possession of Har Dial's share, and though disqualified under the Hindu law, as not being a son competent to perform the obsequies of his father, he does not appear to have been regarded as incompetent as a man of business with his brother as manager for him. I cannot deny that the plaintiff, if suing for a share of his inheritance from his father, [815] is disqualified by the Hindu law. But he is not suing now for any such share.

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He is, rightly or wrongly, with reference to the Hindu law, in possession of the paternal estate, and all that he seeks in regard to the houses is a separation of his interest from the interests of the defendants. In supporting his claim, I think that he is at liberty to use the award and compromise of defendants in the former quarrel as evidence in his own favour and against defendants; for the award and the compromise alike expressly determine and acknowledge his right to retain possession over his father's property. The defendants appear to have confirmed that possession. In a suit for possession in the Calcutta High Court, where plaintiff put in a copy of a compromise to which defendant was not a party, it was held that, although no question of right or title could be decided adversely to the defendant on the basis of that agreement, yet it would be evidence that by an order of Court passed on the compromise the plaintiff was put in possession (1). I do not say that the award, as such, is conclusive against the defendants in the present suit, but it may be that the award and compromise might be proved in this case, and the defendants might be examined upon both documents. The Court would have to determine what weight was to be attached to them in the present suit in proof of the plaintiff's claim. The award finds the fact that Hira Singh was in sole possession in 1875 of his father's property, and that he had been so since the death of his father in 1871. It is a confirmation of that possession rather than a declaration of his title under Hindu law. It states, as a fact, that although he is dumb, he alone is in proprietary possession of the estate, that is I suppose, ostensible proprietary possession, and receives the income of the whole estate. The parties admit that he is recorded as heir and in possession of the property, and the award of the arbitrator is thus made: "I am of opinion, therefore, that Hira Singh alone should, as heretofore, hold proprietary possession of the property left by Har Dial."

The compromise is practically a cession of their own claim by the defendants in favour of Hira Singh. The award and [816] the compromise likewise appear to have been acted upon as Hira Singh remained as heretofore in possession of the property, and it may be that the cession by the defendants in favour of the plaintiff may confer, *as far as they are concerned*, a new title upon him, and that he may take henceforth by cession what he could not have inherited under the Hindu law. But the question is one of considerable difficulty, and I am desirous of obtaining the opinions of my honorable colleagues on the point. I would suggest that we should refer the case to a Full Bench.

The difficulty I feel is, whether or not, under the circumstances of this case, the plaintiff's claim must necessarily fail because the Hindu law disqualifies him from inheritance, or whether the award and compromise may not, if properly proved, be used as evidence against the defendants in favour of the plaintiff's case, and whether, if proved, they may not also be evidence of a family arrangement, or cession of claim by the defendants, which might be enforced as against the defendants, although the plaintiff, on the death of his father, had no title under the Hindu law to succeed to his father's property.

PEARSON, J.—I was prepared to deliver judgment in this case, but in deference to the wish expressed by my honorable colleague I assent to his proposal to refer the case to a Full Bench.

Mr. *Ross* and Pandit *Nand Lal*, for the appellants.

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(1) *Sreemutty Dossee* v. *Pelaram Dossee*, 15 W.R. 261.

Mr. *Conlan*, Munshi *Hanuman Prasad*, and Pandit *Bishambhar Nath*, for the respondent.

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JUDGMENTS.

The following judgments were delivered by the Full Bench :

PEARSON, J.—The plaintiff in this suit claimed to obtain separate possession by partition of a share which he alleged to belong to him by right in certain houses being ancestral property. The exact nature of his right he did not define. But it is not disputed and is not open to dispute that he is not entitled to the share or any share in the property in question by right of inheritance, inasmuch as he was admittedly born deaf and dumb and incapable of inheriting property under the Hindu law. The ground on which the lower appellate Court has allowed his claim is that his right as heir to his father's estate was declared by an award dated 4th January 1875, to which the defendants in the present suit assented. The plaintiff [817] was not himself a party to the agreement to refer to arbitration the question who was Har Dial's heir, and the Judge is wrong in supposing that Debi Singh, the plaintiff's natural brother, agreed to the arbitration as his guardian and represented him before the arbitrator. The award could only bind the parties to the arbitration, and the plaintiff, not being a party thereto, is not bound by it, and, not being bound by it, cannot claim to take any advantage from it. It could not confer on him, who was not a party to the arbitration, a right which he did not possess by law, nor can it constitute evidence of a right which the law disallows. The award does not profess to be based on the Hindu law, but rather seems to have been wilfully made in contravention thereof. Nor could the defendants' assent to the award convey to him a right of inheritance which did not devolve on him by law. The lower appellate Court is mistaken, I conceive, in holding that either they, or the arbitrator, could by anything done by them in the arbitration proceedings bestow on the plaintiff, who was not a party to them, a right which the law has refused to him, the law notwithstanding, and could cure the legal defect in his title. It has been urged and may be granted that a person who was not originally a party to arbitration proceedings may subsequently become party to them ; but it does not appear that the plaintiff ever became a party to the proceedings which terminated in the award dated 4th January 1875. Had the award recognised the defendants' right to the inheritance, they might doubtless have made a gift of the property or any portion of it to him ; but it seems impossible to contend that they could make a gift of what was adjudged not to belong to them.

The circumstance that he may have been allowed to continue as before in joint possession of the property is explained by the consideration that he is, under the Hindu law, though excluded from inheritance, entitled to maintenance. It has been suggested that the defendants, by their assent to the award, are estopped from questioning the plaintiff's right of inheritance in this suit by the provisions of s. 115 of the Indian Evidence Act ; but that section, which is understood to embody the rule of the English law, seems to me to be inapplicable. "The doctrine of estoppel," says Mr. Justice Story, "is based on a fraudulent [818] purpose and a fraudulent result. If, therefore, the element of fraud be wanting, there is no estoppel. There must be deception and change of conduct in consequence." Now it can hardly be contended that the defendants in expressing their acquiescence in the award intended to

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deceive the plaintiff or that he was deceived thereby, and led to take any action which has put him in a different position from that which he occupied before in respect of the property in suit. The plaintiff then having no right in him either by the law of inheritance or under the award, or by reason of any conveyance made in his favour by the defendants, cannot possibly succeed, if they be not estoppel from calling his right in question.

I conclude, therefore, that the Court of first instance rightly decided the first three of the issues laid down by it for trial and rightly dismissed the suit.

I must add that the Zila Judge failed to apprehend rightly this Court's order of the 17th January last, which directed him to dispose of the case according to law. The law by which his procedure should have been regulated is contained in ss. 565, 566, and 567, Act X of 1877.

I would decree the appeal with costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

STUART, C. J.—The judgment of Mr. Justice Pearson in this case is so entirely satisfactory to my mind that I cannot hesitate, to express my concurrence in it. A distinction at the hearing appeared to be taken between incapacity to take by inheritance and the capacity to enjoy by permitted actual possession of property, and the conduct of some members of Hira Singh's family would appear to recognise a legal status in him for that purpose. But that does not get rid of the disability, which cannot from its nature be removed. Hira Singh is entitled to maintenance, but he has not other rights or status whatever. The appeal must, therefore, be disposed of according to the order proposed by Mr. Justice Pearson.

OLDFIELD, J.—I concur.

STRAIGHT, J.—I entirely concur in the judgment of Mr. Justice Pearson.

[819] SPANKIE, J.—I retain the opinion I have already expressed, and hold that the documents referred to may be used in evidence by the plaintiff. I do not think that the circumstance that he is deaf and dumb disqualifies him necessarily from bringing the suit. This is not a claim to establish his right to succeed as heir of his father. Were it so, the suit would fail, as he could not succeed as heir under the Hindu law. But if he can show as against the defendants that they have recognised his possession, and confirmed it by ceding their own claims in his favour, there is nothing to prevent his doing so: a gift in favour of a deaf and dumb man would seem to be valid.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

THAKUR OF MASUDA (*Plaintiff*) *v.* THE WIDOWS OF THE THAKUR OF NANDWARA (*Defendants*).* [5th April, 1880.]

Reference to the High Court by the Chief Commissioner of Ajmere and Mairwara—Ajmere Courts Regulation I of 1877, ss. 17, 18, 21, 36, 37—Reference to Chief Commissioner by Commissioner of Ajmere—Appeal from Commissioner's decree made in accordance with Chief Commissioner's judgment.

On the appeal from a decision in a civil suit of the Assistant Commissioner of Ajmere to the Commissioner of Ajmere, the latter, feeling doubtful on a question of the nature specified in s. 17 of the Ajmere Courts Regulation I of 1877, referred such question, under s. 36 of that Regulation, to the Chief Commissioner of Ajmere and Mairwara. The Chief Commissioner dealt with the case as prescribed in s. 37 of that Regulation, and returned it to the Commissioner, who dismissed the suit in accordance with the Chief Commissioner's judgment. The plaintiff preferred an appeal to the Chief Commissioner from the Commissioner's decision. The Chief Commissioner did not make any order on the memorandum of appeal admitting it, or directing that it should be registered, or that the respondent should be summoned, or that the appellant should appear on a certain day under s. 551 of Act X of 1877; but issued a notice to the appellant's counsel to appear on a certain day. The appellant's counsel appeared on that day, and the Chief Commissioner intimated that he was acting under s. 551 of Act X of 1877. The appellant's counsel then proceeded to address the Chief Commissioner, and was heard for some time, and then stopped, in consequence of the Chief Commissioner resolving to refer to the High Court the question [820] whether the appeal from the Commissioner's decision lay to him or to Her Majesty in Council. The Chief Commissioner subsequently referred such question to the High Court.

Held by the Full Bench (SPANKIE, J., dissenting), on a reference by the Division Bench before which the Chief Commissioner's reference came, that such question arose "in the trial of an appeal" within the meaning of s. 21 of the Ajmere Courts Regulation I of 1877, and was properly referred to the High Court.

Held by the Division Bench (SPANKIE, J., and STRAIGHT, J.) that the appeal from the Commissioner's decision lay, in this particular case, not to the Chief Commissioner, but to Her Majesty in Council.

[R., 30 A. 290=5 A.L.J. 584 (586); 8 A.W.N. (1908) 109; 8 P.R. 1903 (Rev.).]

THIS was a reference to the Full Bench by a Division Bench (SPANKIE, J., and STRAIGHT, J.) of the High Court before which a reference to the High Court by the Chief Commissioner of Ajmere and Mairwara, under s. 21 of the Ajmere Courts Regulation, 1877, came for disposal. The points of law referred by the Chief Commissioner to the High Court, and by the Division Bench to the Full Bench, appear from the Division Bench's order of reference, which was as follows :—

SPANKIE, J.—I feel great difficulty in disposing of this reference. The Chief Commissioner of Ajmere and Mairwara has, under s. 21 of the Ajmere Courts Regulation I of 1877, asked for a ruling from this Court on the case stated as follows :—

On an appeal from the decision of the Assistant Commissioner of Ajmere, the Commissioner feeling doubtful on a point of the nature specified in s. 17 of the above Regulation, referred the point under s. 36 to the Chief Commissioner. The Chief Commissioner dealt with the case as prescribed in s. 37, and returned it to the Commissioner, who disposed of

* Reference, No. 4 of 1880, by the Chief Commissioner of Ajmere and Mairwara.

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it in accordance with the Chief Commissioner's judgment. Upon this, the plaintiff-appellant, considering that the Commissioner's decision, in accordance with that of the Chief Commissioner's judgment on the point referred, was final, applied to him for a certificate to appeal to Her Majesty in Council. The Commissioner did not consider his judgment to be final within the meaning of s. 595 of the Civil Procedure Code, and therefore declined to entertain the application for a certificate. Appellant then filed an appeal in the Chief Commissioner's Court against the judgment of the Commissioner, passed in [821] accordance with the ruling of the Chief Commissioner. The Chief Commissioner is doubtful whether he ought to proceed with the appeal, as it may be that the Commissioner's decision was final for the purposes of s. 595, Civil Procedure Code, and that therefore the application for a certificate should have been entertained by that officer. The question referred is, "Should the Commissioner's decree, given in conformity with the Chief Commissioner's ruling, be considered final for the purpose of an appeal to Her Majesty in Council?"

The wording of s. 21, Regulation I of 1877 (The Ajmere Courts Regulation, 1877) is expressed thus:—" When an appellate Court in the trial of a civil appeal entertains a doubt in respect of a question of the nature specified in s. 17, such Court may refer such question in manner provided by s. 18;" and a reference under the section shall be dealt with in the manner provided by ss. 19 and 20.

The nature of the question specified in s. 17 is (i) doubt on a question of law; (ii) usage having the force of law; or (iii) the construction of any document; (iv) the admissibility of any evidence affecting the merits of the case; and it will be observed from the wording of s. 21 that the doubt must be entertained by the appellate Court making the reference " in the trial of a civil appeal."

The doubt would seem to be on one of the four points arising within the case itself, and it must arise in or on the trial of the appeal. It is clear that the Chief Commissioner has not as yet proceeded to the trial of the appeal. The case has been formerly entered as an appeal, but the doubt has not arisen in trial, on the pleadings or otherwise, as far as I am in a position to judge. The doubt was in the Commissioner's mind rather than in that of the Chief Commissioner, in whose Court the appeal is pending. The Chief Commissioner is himself of opinion that the appeal lies direct to the Privy Council from the Commissioner's judgment passed under s. 37.

I am disposed to think that the Chief Commissioner ought himself to determine, at the hearing, whether or not the Commissioner's decree having been appealed to him, the appeal is or is [822] not cognizable in his Court. The question seems to me merely one of procedure, and not strictly one of those questions arising in a case specified in s. 17, and one of which must give rise to the doubt to be referred when the appellate Court is actually trying the case.

I would suggest that we ask the Full Bench of this Court to settle the preliminary doubt entertained. If the Court at large hold that the question was properly referred, there will be no difficulty in determining the question submitted to us.

STRAIGHT, J.—I concur in the suggestion of Mr. Justice Spankie, that the preliminary question should be referred to the Full Bench.

Mr. *Colvin* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the plaintiff.

Babu *Ratan Chand*, for the defendants.

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JUDGMENTS.

The following judgments were delivered by the Full Bench:

STUART, C. J.—The question referred to us by the Division Bench (SPANKIE, J., and STRAIGHT, J.) is whether, under the circumstances, the reference by the Chief Commissioner to this Court was competently made. As the record shows, the case proceeded on its course at Ajmere until it came before the Chief Commissioner on appeal from the Commissioner. It was stated to us by Mr. Colvin that notice had been given that the appeal would be heard by the Chief Commissioner, under s. 551 of the Code of Procedure, and that he himself appeared on that notice and he was arguing the case on that footing when the Chief Commissioner stated that he entertained a doubt whether the appeal was validly before him, or whether the judgment of the Commissioner must not be regarded as a final one, and as such the judgment to be appealed to Her Majesty in Council. The Division Bench are on their part doubtful whether the Chief Commissioner could make such a reference to this Court and themselves refer their doubt to this Full Bench.

Section 21 of the Ajmere Regulation I of 1877 provides that "when any appellate Court on the trial of a civil appeal entertains a [823] doubt in respect of a question of the nature specified in s. 17, such Court may refer such question in manner provided by s. 18." The question referred to in s. 18 is a question of the nature specified in s. 17, and must therefore be "a question of law, or usage having the force of law, or the construction of any document, or the admissibility of any evidence affecting the merits of the case." Upon these provisions of the Regulation two questions arise, (i) whether the Court of the Chief Commissioner was under the circumstances an appellate Court within the meaning of the section, and (ii) whether the proceeding before the Chief Commissioner was in the nature of a "trial" of a civil appeal. My answer to the first question is that the Chief Commissioner's Court was clearly an appellate Court within the meaning of s. 21, and in the second place that the proceeding before the Chief Commissioner as such appellate Court was a trial within such meaning. For it was, although a proceeding under s. 551 and therefore *ex parte* of such a nature that judgment upon it against the appellant finally disposed of the case on the merits, the only other possible judgment being notice to the respondent to appear under s. 552 and following sections. Such a proceeding having such an effect must, in my judgment, be deemed a trial to all intents and purposes as intended by s. 21, and these questions being questions of law could legally be referred by the Chief Commissioner to the High Court.

Such is my answer to our colleagues of the Division Bench. But as I have made a careful examination of the record of the case, I trust they will allow me to point out to them certain irregularities of procedure on the part of the judicial authorities of Ajmere. The original suit appears to be of the nature described in s. 34 of the Ajmere Regulation, *viz.*, a suit in which a question of succession was clearly raised, and the Subordinate Judge gave his judgment on the 12th June 1877, dismissing the claim. From such judgment an appeal was taken to the Commissioner. The date of this appeal does not appear from the record, nor does the memorandum of appeal itself bear any date: the appeal nevertheless proceeded, and while it was pending, and before giving his judgment, the Commissioner [824] referred to the Chief Commissioner a question of the nature mentioned in s. 17, which the Chief Commissioner

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answered, and thereupon the Commissioner disposed of the appeal before him according to the Chief Commissioner's opinion by a judgment dated the 28th February 1879, reversing that of the Subordinate Judge and dismissing the suit. The appellant in that appeal, considering that the Commissioner's decision so given was final for the purpose of s. 595, Civil Procedure Code, applied under ss. 598 and 600, Civil Procedure Code, to the Commissioner for a certificate that the case was a fit one for appeal to Her Majesty in Council. But the Commissioner did not consider his judgment final in that sense and refused the application, whereupon the appellant lodged a formal appeal in the Court of the Chief Commissioner against the judgment of the Commissioner. The Chief Commissioner ordered the case to be heard before him under s. 551, but while it was proceeding he was visited by the doubt to which I have referred. It is, however, to be observed that these proceedings took place without any apparent regard to the provisions of the Civil Procedure Code, the record showing no order to admit it or directing it to be placed on the register of appeals, and it might therefore be doubted whether in strictness there was any appeal at all before the Chief Commissioner. It might at least be very fairly contended that the record did not show any appeal to the Chief Commissioner which could go direct to the Privy Council from his Court.

Pearson, J.—The point for consideration appears to be whether the doubt in respect of the question of law referred to the High Court by the Chief Commissioner was entertained by him in the trial of the appeal preferred to him by the plaintiff in the suit.

That an appeal had been formally lodged in his Court is shown by the Chief Commissioner's statement. The counsel for the appellant informs us that he received a notice on behalf of his client to appear in the Chief Commissioner's Court on the 18th December last, and that when he appeared on that date the Chief Commissioner intimated that he was acting under the provisions of s. 551, Act X of 1877. The learned counsel further informs us that he then proceeded to address the Court, and was heard for sometime and then stopped by the Court, in [825] consequence of its resolving to refer to the High Court the question of its competency to proceed with the appeal, or, in the form in which it is referred, the finality of the order appealed.

Under the circumstances I am of opinion that the Chief Commissioner had commenced to hear and try the appeal, when the doubt which he desires the High Court to solve in respect of the question of law referred was entertained by him, and that the question was properly referred. The question whether an appeal can be heard is doubtless one which must be tried before the appeal can be tried on the merits, but the trial of that question is included in the trial of the appeal.

Spankie, J.—I am willing to acquiesce in the opinions of my honourable colleagues. At the same time I cannot help regarding the reference as made before the case came on for trial. The appeal appears to have never been formally admitted; there is no order upon the memorandum of appeal either admitting it or directing that it should be registered. There is no order upon it summoning the respondent or directing that the appellant should appear on a certain date under s. 551 of the Civil Procedure Code. I cannot realise that the Chief Commissioner was acting under s 551 of the Civil Procedure Code, which applies to procedure in the Ajmere Courts, having been made applicable thereto by the Ajmere Code. The object of s. 551 is to hear appellant *without*

summoning respondent, and if the Court think that there is no case, it *confirms* the decision of the Court below on the merits. I can understand the Chief Commissioner's entertaining a doubt whether he should not reject an appeal as being beyond his jurisdiction. But if he rejected it, he would not be confirming the decision of the Court below, for there would have been no trial in his Court. What has been done now is that the difficulty appears to have arisen before the case came to trial, and therefore the position is not the same as that in s. 17 of the Ajmere Code.

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OLDFIELD, J.—The Court seems to have been proceeding with the trial when it made this reference on the question of its jurisdiction, and I see no reason for supposing that the reference was not properly made.

[826] STRAIGHT, J.—I think that this reference was properly made by the Chief Commissioner of Ajmere, and that it should be disposed of by this Court.

The case having been again laid before the Division Bench (SPANKIE, J., and STRAIGHT, J.) the following opinion was given by the Division Bench :

STRAIGHT, J.—The Chief Commissioner appears to be right in his view, that the appeal of the Thakur of Masuda lies to Her Majesty in Council from the Commissioner's Court in this particular case.

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2 A. 826.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

LACHMIN NARAIN (*Defendant*) v. KOTESHAR NATH (*Plaintiff*).*
[5th April, 1880.]

Mortgage—Condition against alienation—Lis pendens.

The proprietor of certain immoveable property mortgaged it in July 1875 to *K* and in September 1875 to *L*. In October 1878 he sold the property to *K*. In November 1878 *L* obtained a decree on his mortgage-bond for the sale of the property. The suit in which *L* obtained this decree was pending when the property was sold to *K*. *K* sued *L* to have the property declared exempt from liability to sale in the execution of *L*'s decree on the ground that the mortgage to *L* was invalid, it having been made in breach of a condition contained in *K*'s mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid.

Held, that the purchase by *K* of the equity of redemption did not extinguish his security, it being his intention to keep it alive, and that the purchase of the property by *K* while *L*'s suit was pending did not prevent *K* from contesting the validity of *L*'s mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor.

[Expl., 4 A. 518 (523).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Oldfield, J.

Munshi *Hanuman Prasad* and *Sukh Ram*, for the appellant.

[827] Munshi *Kashi Prasad* and Lala *Lalta Prasad*, for the respondent.

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* Second Appeal, No. 1126 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakhpur, dated the 26th July 1879, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 6h June 1879.

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JUDGMENTS.

The following judgments were delivered by the Court:

OLDFIELD, J.—The plaintiff held a mortgage of the property in suit under a deed dated 9th July 1875, whereby the obligor stipulated that he would not make any mortgage of the property till the plaintiff's debt was satisfied, and on the 10th October 1878 the property was conveyed to plaintiff under a deed of sale in consideration of the debt secured by the mortgage. The defendant obtained a mortgage of the same property under a deed dated the 5th September 1875 from the obligor, notwithstanding the stipulation made to plaintiff, and having brought a suit on his bond he obtained a decree on 9th November 1878, this suit being still pending when the sale-deed was executed in favour of plaintiff. The object of the suit now brought by the plaintiff is to have the property declared exempt from liability to be sold in execution of the defendant's decree. The lower Courts have decreed the claim and the decrees are not open to objections.

There is no doubt that the defendant's rights cannot be affected by the purchase made by plaintiff, since it was made while the suit brought by the defendant was pending, but neither will that purchase deprive the plaintiff of any right he may otherwise have against the defendant based on his prior mortgage and the condition in his bond against subsequent mortgages by his obligor. The purchase of the equity of redemption does not necessarily extinguish the original security when, as in this case, it was manifestly the intention of the plaintiff to keep it alive,—Story's Equity Jurisprudence, 11th ed., vol. ii, s. 1035 c.—and there is nothing to prevent plaintiff from contesting the validity of the mortgage made to defendant so far as it affects him, on the ground that it is an infringement of the stipulation in the contract between him and his obligor. The appeal fails and is dismissed with costs.

SPANKIE, J.—I concur with my honourable colleague in his view of the case.

Appeal dismissed.

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2 A. 828.

[828] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAM NARAIN SINGH (*Defendant*) *v.* MAHTAB BIBI (*Plaintiff*).*
[6th April, 1880.]

*Sale in execution of decree—Warranty—*Caveat emptor.

In a sale in the execution of a decree of the rights and interests of a judgment-debtor in an estate of which he is the recorded proprietor in the revenue registers, it is usual to describe such rights and interests in the sale-proceedings as recorded in such registers, but such description does not amount on the part of the decree-holder or the officer conducting the sale to a warranty that such rights and interests are correctly described.

Where, therefore, according to the usual practice, the rights and interests of a judgment-debtor in a share of a village of which he was the recorded proprietor in the revenue registers were proclaimed for sale in the execution of a decree and sold, described, as recorded, and the sons of the judgment-debtor subsequently sued the auction-purchaser to recover their interests in such share and obtained a

* First Appeal, No. 89 of 1879, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 26th June 1879.

decree for such interests, and the auction-purchaser thereupon sued the decree-holder for a refund of the purchase-money proportionate to such interests and for the costs of defending such suit, *held*, there being no fraud or misrepresentation on the part of the decree-holder, or anything of an exceptional nature showing an express or implied warranty on his part, that the suit was not maintainable. *Neelkunth Sahee* v. *Asmun Mathoo* (1), distinguished.

[Appr., 23 A. 60 (62); R., 23 A. 355 (357).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. *Colvin* and Pandits *Bishambhar Nath* and *Nand Lal*, for the appellant.

Mr. *Conlan*, Mir *Akbar Hussain*, and Shah *Asad Ali*, for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

OLDFIELD, J.—The two defendants in this case have instituted separate appeals which may be disposed of by one judgment. The defendants held decrees of the Revenue Court against Khair-unnisa Bibi, and in course of execution of these decrees a share in mauza Dohowa, described as 11 annas, 5 kants, 3 jaus, was attached, and the rights of the judgment-debtor were sold and bought by the plaintiff in this suit. Subsequently the sons of the judgment-debtor brought a suit fo the declaration of their right and possession in a portion of the said shar and obtained a decree, and the [829] plaintiff, auction-purchaser, has brought this suit against the two appellants to obtain a refund of the sale-price proportionate to the interest which she had to give up and for the costs incurred by her in defending the suit. Amongst the pleas urged in answer to the suit, those material to the disposal of the appeals before us were that the plaintiff purchased the rights and interests of the judgment-debtor without any guarantee on the part of the decree-holders of their extent, and being a sister-in-law of the judgment-debtor and mother-in-law of one of those who succeeded in the suit for the recovery of a share, she bought with a full knowledge of the extent of the judgment-debtor's interest. The Subordinate Judge has held that there was a guarantee that the entire 11 annas 5 kants 3 jaus belonged to the judgment-debtor, and he has decreed the greater portion of the claim.

We are of opinion that the grounds of appeal, so far as they take up the objections which we have above noticed, are valid. In judicial sales in execution of decrees of Court there is ordinarily no warranty of the title of the judgment-debtor in the property sold, on thepart of the decree-holder or officer conducting the sale. In sales of rights and interests in immoveable property, the extent and nature of the interest of the judgment-debtor as described in the revenue registers, are notified at the time of sale under the rules in force, but the description so given is not intended by the decree-holder or the officer conducting the sale or taken by the purchasers at those sales to convey any warranty of the correctness of the description of the judgment-debtor's interest given in the revenue registers, or any warranty of the extent and nature of those interests. The subject of sale is nothing more than the right, title and interest of the judgment-debtor described in the revenue register to be of a particular extent and

(1) H.C.R. N.W.P. (1871), p. 67.

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character. Such will be the rule if the usual and ordinary practice be observed in the publication and conduct of these sales; and in the case before us nothing of an exceptional nature has been brought to our notice to show that there was any express or implied guarantee on the part of the decree-holders, nor are the fact such as will support any imputation of fraud or misrepresentation against the decree-holders. The application for sale is in the usual form for the sale of the rights and [830] interests of the judgment-debtor, and the proceeding of the Collector, dated 22nd February 1875, at the close of the sale, shows very distinctly that the rights and interests of the judgment-debtor, whatever they might be, in the 11 annas 5 kants 3 jaus entered in the statement, were sold, and refute any supposition of express or implied warranty.

The plaintiff's case seems to rest on proceedings not so much with reference to the sale of the share in Dohowa, the subject of this suit, as to proceedings connected with the sale of the same judgment-debtor's interests in another mauza, *i.e.*, mauza Pakri. It appears that the sons of the judgment-debtor also claimed an interest in the share in mauza Pakri entered as that of the judgment-debtor and brought a suit, and that the defendants then denied that they had any interest, and asserted the share belonged to the judgment-debtor, and their suit was dismissed by the Court of first instance, though ultimately decreed in appeal, and it was before the decision of the appeal that the sale with which we are concerned took place. But those proceedings show nothing more than that the defendants, the decree-holders, *bona fide* contested the claim set up, which they were quite at liberty to do, and not that they induced the auction-purchaser in the case before us by fraud or otherwise to believe that the judgment-debtor had an interest which they knew she had not, or guaranteed that she had any particular interest. Moreover, looking to the relationship between the plaintiff and the judgment-debtor and the circumstances under which the sale took place, there is every reason to believe that the plaintiff was aware at the time of her purchase of the true character and extent of the judgment-debtor's interests which were put up for sale. The case of *Neelkunth Sahee* v. *Asmun Mathoo* (1) was brought to our notice by the counsel for respondent, but that case is to be distinguished from the one before us. There the decree under which a judgment-debtor's rights and interests had been sold and the sale so far as affected him were set aside and the property recovered by the judgment-debtor. We decree the appeal and reverse the decree of the lower Court and dismiss the suit with all costs.

Appeal allowed.

(1) H.C.R. N.W.P. (1871), p. 67.

2 A. 831.

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[831] APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

WILAYAT HUSAIN (*Plaintiff*) v. ALLAH RAKHI (*Defendant*).*
[6th April, 1880.]

Muhammadan Law—Dower—Restitution of conjugal rights.

A Muhammadan cannot, according to Muhammadan law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is "prompt" and has not been paid. *Abdool Shukkoar* v. *Raheem con-nissa* (1), followed.

[Overruled, 8 A. 149 (161) (F.B.)=A.W.N. (1886) 53; F., 3 A.L.J. 432=A.W.N. (1906) 136; A.W.N. (1882) 96; R., 15 Ind. Cas. 747=15 O.C. 127.]

THIS was a suit by a Muhammadan (Shia) against his wife for restitution of conjugal rights. The parties were married to each other in January 1873, and cohabited until September 1878, when the defendant separated from the plaintiff. The defendant set up as a defence to the suit *inter alia*, that the plaintiff had settled a "prompt" or "exigible" dower on her of Rs. 5,000; that he had not paid the dower-debt; and that, until he paid the same, he was not entitled, according to Muhammadan law, to restitution of conjugal rights. The Court of first instance decided that the defendant's dower was "prompt;" that it amounted to Rs. 1,000; and that the plaintiff had paid the dower-debt in June 1877 by conveying certain immoveable property to the defendant of equal value; and in the event gave the plaintiff a decree. On appeal by the defendant the lower appellate Court decided that the dower-debt was Rs. 5,000, and that the plaintiff had paid no portion of it, and, holding that, according to Muhammadan law, he was not entitled to restitution of conjugal rights until he had paid it, dismissed the suit.

The plaintiff appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellant.

Pandit *Nand Lal*, for the respondent.

JUDGMENT.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The only ground of appeal seriously urged before us was, that the lower appellate Court had erred in holding [832] that the plaintiff's suit failed by reason of his inability to prove payment of "exigible" dower. It was argued on his behalf that a wife cannot refuse herself to her husband after such consummation or complete retirement as was proved in the present case by the cohabitation of the parties from 1873 to 1878. This contention was supported by a quotation from Baillie's Digest, p. 125; but upon careful consideration of it and a judgment of this Court, which appears directly in point, *Abdool Shukkoar* v. *Raheem-oon-nissa* (1) we are of opinion that the views propounded by Aboo Haneefa should be followed, and that a woman entitled to dower,

* Second Appeal, No. 1074 of 1879, from a decree of H. G. Keene, Esq., Judge of Meerut, dated the 16th August 1879, reversing a decree of Maulvi Azma Ali Khan, Munsif of Bulandshahr, dated the 28th March 1879.

(1) H.C.R.N.W.P. (1874) 94.

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that is "*maujjil*" or "prompt" may, even after consummation or valid retirement, deny her husband access to her person or her society, if it remains unpaid. Dower it must be remembered is the woman's right, and she may decline him the use of her person in order to enforce the man's pecuniary obligation to her. Of course where the dower is "*maujjil*" or "deferred," other considerations arise, which it is unnecessary to discuss. It may be added that passages will be found favouring the opinion we have expressed in Macnaughten's Muhammadan Law, Ed. of 1870, p. 281; Baillie's Imameea, p. 73 (the plaintiff being a *Shia*); and Grady's Manual of Muhammadan Law of Inheritance and Contract, p. 246.

The lower appellate Court has found that the amount of dower in the present case was Rs. 5,000, that it was prompt, and that the plaintiff has not paid it. The respondent's plea was therefore established and the plaintiff's claim has been properly disallowed. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 832.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

RAMLAL (*Plaintiff*) v. HARRISON (*Defendant*).* [6th April, 1880.]

Amendment of plaint—Limitation—Act X of 1877 (*Civil Procedure Code*), *s.* 53—*Act XV of* 1877 (*Limitation Act*), *s.* 4—*Mortgage—Oral Evidence—Documentary Evidence—Act I of* 1872 (*Evidence Act*), *ss.* 92, 95.

The plaint in a suit for money charged upon immoveable property which described such property as "the defendants' one-biswa five-biswansi share [833] within the jurisdiction of the Court," was presented on the 21st November 1878 within the period of limitation prescribed for such a suit by Act XV of 1877. It was subsequently returned for amendment, and, having been amended by the insertion of the words "in mauza *S*, pargana *S*," after the word "share" was presented again on the 8th January 1879 after such period. *Held* that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court did not constitute a fresh institution of the suit.

The obligors of a bond for the payment of money describing themselves as "sons of *R*, zemindar and pattidar, resident of mauza *S*" hypothecated as collateral security for such payment "their one-biswa five-biswansi share." *Held* in a suit on the bond to enforce a charge on the one-biswa five-biswansi share of the obligors in mauza S, that, under proviso 6, s. 92 and s. 95 of Act I of 1872, evidence might be given to show that the obligors hypothecated by the bond their share in mauza *S*.

[F., 9 B. 373 (402); 7 C.W.N. 817 (821); R., 4 A. 37 (39) = A.W.N. (1881), 129; 12 A. 129 (145) (F.B.); 20 C. 41 (44).]

THE plaintiffs in this suit claimed Rs. 1,039-10 on a bond dated the 23rd November 1866, praying, *inter alia*, that the property hypothecated in the bond might be brought to sale, in case the defendants did not satisfy the judgment-debt. The suit was instituted on the 21st November 1878, the heirs of the original obligors of the bond, and one Harrison,

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* Second Appeal, No. 899 of 1879, from a decree of C.W. Moore, Esq., Judge of Aligarh, dated the 5th May 1879, modifying a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 13th February 1879.

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the representative of a subsequent mortgagee of the property alleged to have been hypothecated by the bond to the plaintiffs, being made defendants. In the bond the original obligors, describing themselves as "the sons of Risal Singh, caste Thakur Bunder, zamindar and pattidar, resident of mauza Sakhauli," agreed to repay the sum advanced to them by the obligees, Rs. 500, with interest at twelve annas per cent. per mensem, on demand, and as collateral security for such payment hypothecated "their one-biswa five-biswansi share." In the original plaint in the suit the plaintiffs described the property as "the defendants' one-biswa five-biswansi share within the jurisdiction of the Court." On the 8th January 1879 the plaint having been returned for amendment, the amended plaint was filed. The amendment consisted of the insertion after the word "share" of the words "in mauza Sakhauli, pargana Sikandra Rao." The Court of first instance gave the plaintiffs a decree as claimed. On appeal by the defendant Harrison, the lower appellate Court held, *inter alia*, that the claim to enforce a charge upon the one-biswa five-biswansi [834] share in mauza Sakhauli must be taken to have been instituted on the date on which the plaint was amended, and, as limitation ran from the date of the bond, was barred by limitation.

The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

The Court (OLDFIELD, J., and STRAIGHT, J.) remanded the case to the lower appellate Court for the trial of the issues indicated in the order of remand, which was as follows:—

ORDER OF REMAND.

OLDFIELD, J.—The plaintiffs sue to recover money due on a bond by sale of a one-biswa five-biswansi share in mauza Sakhauli hypothecated in the bond. They made the obligors and T. B. Harrison defendants, the latter being the representative of a subsequent mortgagee, and who has objected to the sale of the mortgaged property. The first Court decreed the claim. The lower appellate Court has dismissed that part which seeks to make the property liable. The Judge holds that the period of limitation will run in this suit from the date of the bond, 23rd November 1866, and though the suit was instituted on the 21st November 1878, yet since the property mortgaged was not indicated by name in the original plaint, and not until 8th January 1879, when an amended plaint was filed to the effect that the property hypothecated and claimed is in mauza Sakhauli, therefore the suit, so far as it affects the property, must be held to have been instituted on the 8th January, or after the expiry of the term of limitation; and the Court further holds that the deed does not distinctly show that the share of one biswa five-biswansis hypothecated in the deed is a share to that amount in mauza Sakhauli; and on the above grounds the Judge dismissed the suit.

We are of opinion that the decision cannot be maintained. The date of amendment of a plaint will not affect the question of limitation for the institution of a suit; the limitation is determined with reference to the date of institution of a suit, and by s. 4 of the Limitation Act a suit is instituted in ordinary cases when the plaint is presented to the proper officer, and its return for amendment and subsequent presentation and acceptance by the Court will not [835] constitute a fresh institution of the suit.—(See cases referred to in note to s. 53, Broughton's Civil Procedure Code, Act X of 1877). It is true that when after the institution of

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the suit a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party, but this rule is inapplicable to the case before us, where the defendant Harrison had been made a party at the first institution of the suit. The principal ground, therefore, on which the Judge has dismissed the claim to bring the property to sale is invalid, and his remarks on the indistinctness of the deed as indicating that the share in mauza Sakhauli was mortgaged do not adequately dispose of the claim. It is for the Judge to determine whether as a matter of fact the parties to the deed did mortgage the share in Sakhauli by the bond, and evidence on the point may be adduced.—See *Proviso* 6, s. 92, and *Illustration* to s. 95, Evidence Act. The Judge must also decide the question (raised by one of the pleas taken by the respondent) whether, looking to the conduct of the plaintiffs at the time the second mortgage was made, they are debarred now from enforcing their prior lien.

We remand the case for trial of the issues indicated. On submission of the finding ten days will be allowed for filing objections.

Cause remanded.

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2 A. 835.

CRIMINAL JURISDICTION.

Before Mr. Justice Straight.

EMPRESS OF INDIA *v.* NAWAB AND ANOTHER. [13th April, 1880.]

Security for Good Behaviour—Act X of 1872 (*Criminal Procedure Code*), *s.* 506.

Held that s. 506 of Act X of 1872 solely relates to the calling upon persons of habitually dishonest lives and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised.

Where, therefore, the evidence adduced before the Magistrate did not show that a person was "by habit a robber, house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen," but [836] showed only that he had been guilty of acts of violence, *held* that the Magistrate could not, under s. 506 of Act X of 1872, order such person to furnish security.

Observations regarding the evidence on which the procedure of s. 506 should be enforced.

[R., 6 A. 132 (137); 16 C.L J. 467=17 C.W.N. 238=14 C.L.J. 5=18 Ind. Cas. 149.]

THIS was an application to the High Court to revise an order of Mr. F. W. Porter, Magistrate of the first class, dated the 7th February 1880. The petitioners, Nawab and Mukta, were charged before the Magistrate under s. 323 of the Penal Code with voluntarily causing hurt. The Magistrate found them not guilty and acquitted them, but at the same time, with reference to s. 506 of Act X of 1872, ordered that they should furnish two respectable and sufficient sureties for their good behaviour, in the sum of Rs. 500 each surety, for a period of three years, and that, if they did not comply with the order, they should (subject to the sanction of the Court of Session) be rigorously imprisoned for such period. The reasons which induced the Magistrate to pass this order appear from the following extract from his decision in the case: "I do not think, however, that these men should either of them be allowed to go at large

without heavy security for their future good behaviour. The reluctance of the witnesses to say anything about them, and their evident terror at having to give evidence at all showed clearly what an evil influence these two prisoners have. They are notorious in the city for bullying and are the terror of all quiet citizens of Allahabad. Their previous convictions show clearly the course of life they have led. Mukta since 1867 and Nawab since 1872 have hardly ever either of them been out of jail except under security to keep the peace. Nawab was imprisoned in 1872 for hurt and criminal trespass: in 1873 he was bound over for one year to keep the peace. In 1876 he was a second time bound over to keep the peace for another year. Hardly had this expired when he was again imprisoned for rioting coupled with hurt, and he has not been released from jail above three or four months when he is again brought before the Criminal Courts. The same with Mukta. In 1867 he was imprisoned for two years for grievous hurt: in 1872 was fined for assault. Again in 1872 he was sentenced to two years' rigorous imprisonment for [837] rioting coupled with grievous hurt. In 1873 he was required to find security to keep the peace for one year, and in 1876 was again imprisoned for two years for grievous hurt and at the expiry of that period had to find security to keep the peace for one year. This term had hardly expired when he was brought up in the present case. There is no doubt that these two men are a terror to the inhabitants and a pest to the city of Allahabad. Their former history as above detailed shows that they are men so dangerous that their release without security is not to be thought of, and also that the limited period of one year is insufficient to meet the requirements of the case."

The nature of the grounds upon which the High Court was asked to revise the Magistrate's order appears in the judgment of the Court.

Mr. *Colvin*, for the petitioners.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the Crown.

JUDGMENT.

STRAIGHT, J.—In this case the applicants were charged under s. 323 of the Penal Code with voluntarily causing hurt. The Magistrate, upon a careful consideration of all the evidence, acquitted them, but being of opinion that they were persons of violent and dangerous character, under s. 506 of the Criminal Procedure Code, directed them each to furnish two sureties in the sum of Rs. 500 for their good behaviour for a period of three years, or in default to undergo rigorous imprisonment for a like term. I am of opinion that this order cannot be sustained. The Magistrate has misapprehended the terms of s. 506, which do not apply to a case like the present where the original charge was one of injury to the person. That section solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised. It is not pretended that either of the applicants has been an habitual "robber, house-breaker or thief, or receiver of stolen property;" on the contrary, all the convictions standing against them are for acts of violence. Entertaining this view it does not appear [838] to me necessary to discuss the sufficiency or insufficiency of any evidence before the Magistrate, though

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I would remark in passing, that the mere fact of a previous conviction or of previous convictions of offences involving dishonesty, is not sufficient to justify the putting in force the powers of s. 506, unless there is some additional evidence to show that the person complained against has done some act or resumed avocations that indicate upon his part an intention to return to his former course of life and to pursue a career of preying on the community. The greatest thief is entitled to a *locus penitentiæ*, when he has served out his punishment; it is only when he outrages that grace which is extended to him and thereby shows he is unreformed that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for society that he will not commit further depredations upon it. The order of the Magistrate of the 7th February last must be quashed. But upon a consideration of all the circumstances of the case, I think it right to direct that this record be forwarded to the Magistrate of the district for his consideration, in order that he may, should it appear to him proper to do so, himself take steps under s. 491 of the Criminal Procedure Code to call upon the applicants to find sureties of the peace in such amount as to him may appear adequate.

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2 A. 838.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice and Mr. Justice Straight.

GUMANI (*Plaintiff*) *v.* RAM PADARATH LAL AND OTHERS (*Defendants*).* [14th April, 1880.]

Act X of 1877 (*Civil Procedure Code*), *ss.* 13, 43—*Act XII of* 1879, *s.* 7—*Bond for the payment of money hypothecating property as collateral security for such payment—Omission of claim.*

The obligee of a bond for the payment of money, hypothecating immoveable property as collateral security for such payment, sued for the moneys due on the bond, but omitted to claim the enforcement of his lien, and obtained a decree only for the payment of the amount of the bond-debt. He subsequently sued to enforce his lien. *Held* that, under s. 43 of Act X of 1877, as amended by s. 7 of Act XII of 1879, he could not be permitted to sue to enforce his lien.

[R., L.B.R. (1893—1900), 14 (16).]

THE defendant Ram Padarath Lal, on the 1st May 1875, gave the plaintiff a bond for the payment of Rs. 130, in which he hypothecated [839] his four-pie share of a mauza called Khoria as collateral security for the payment of that amount and interest. On the 21st August, 1876, his four-pie share of mauza Khoria was put up for sale in execution of a money-decree which the other defendants had obtained against him on the 16th December, 1874, and was purchased by the other defendants. Subsequently the plaintiff sued the defendant Ram Padarath Lal on her bond, asking for a money-decree only, which she obtained on the 11th December, 1876. She now sued to recover the amount of this decree, Rs. 189-3-9, by the sale of the property hypothecated in the bond. Both the lower Courts held that the suit was barred by the provisions of s. 13

* Second Appeal, No. 1219 of 1879, from a decree of R. G. Currie, Esq., Judge of Gorakpur, dated the 9th July 1879, affirming a decree of Maulvi Nazar Ali, Munsif of Bansi, dated the 7th May 1879.

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of Act X of 1877, the lower appellate Court further holding that it was also barred by the provisions of s. 43 of that Act.

On appeal by the plaintiff to the High Court it was contended that the suit was not barred by either of those sections.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Sukh Ram*, for the respondents.

JUDGMENT.

The judgment of the Court (STUART, C. J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—Section 43 of Act X of 1877, as amended by Act XII of 1879, is more apposite to the present case than s. 13 An obligation and a collateral security for its performance constitute the cause of action, and a plaintiff cannot be permitted to sue first in respect of the money-debt due on a bond hypothecating property, and afterwards, in respect of the same cause of action, for enforcement of lien. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 839.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

ASHGAR ALI SHAH (*Plaintiff*) v. JHANDA MAL AND ANOTHER (*Defendants*).* [15th April, 1880.]

Determination of title or of proprietary right—Act XIX of 1873 (*N.W.P. Land Revenue Act*), ss. 113, 114—Res judicata.

In the case of an objection to a partition raising a question of title, it is only when the Collector or Assistant Collector records a proceeding [840] declaring the rights of the parties, after an adjudication of the objection on its merits, that his order becomes an order under s. 113 of Act XIX of 1873, within the meaning of s. 114 of that Act.

Where, therefore, an Assistant Collector made an order disallowing an objection to a partition raising a question of title, on the ground that such question had been determined against the objector in a suit for profits between the parties, *held* that such order was not a decision of a Court of Civil Judicature, within the meaning of s 114 of Act XIX of 1873, but that it could be contested by a suit in the Civil Court. *Rameshur Rai* v. *Sukhoo Rai* (1); *Bukhta* v. *Ganga* (2); and *Harsahai Mal* v. *Mahdraj Singh* (3) distinguished.

[R., 6 O.C. 372 (376); 7 O.C. 161 (162).]

THE facts of this case were as follows:—The defendants, Jhandu Mal and Diwan Singh, applied for the perfect partition of a specific quantity of land, being their share of a certain mahal. The plaintiff, Ashgar Ali, who was a co-sharer in the mahal, objected to the partition on the ground that the defendants were claiming a larger quantity of land than they were entitled to. The Assistant Collector, on the 25th April, 1878,

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* Second Appeal, No. 1313 of 1879, from a decree of R. M. King, Esq., Judge of Meerut, dated the 24th June, 1879, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 25th February 1879.

(1) H C.R, N.W.P. 1869, p. 35, 10th April.
(2) H.C.R. N.W.P. 1868, p. 161. (3) 2 A. 294.

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disallowed the objection, and decided that the partition should be made, on the ground that it had already been decided in a suit for profits between the parties that the defendants were entitled to the quantity of land which they claimed. The material portion of the Assistant Collector's decision was as follows:—"The claimants for partition state that the objection raised has been formerly determined. I am of opinion that a finding has been made on a former occasion; because in the case of Jhandu Mal and Diwan Singh, plaintiffs, claimants for partition, against Akbar Ali Shah, guardian of Ashgar Ali Shah involving a claim for Rs. 368, principal, and Rs. 34-5-0, interest on the arrears of profits for 1283 fasli, the objector's first objection was the same as the one taken in this case. There the amount of the plaintiffs' share has been held to be correct. The above is sufficient for the rejection of the objector's application and continuance of the partition proceedings." The plaintiff did not appeal from this decision of the Assistant Collector, but on the 24th July, 1878, instituted the present suit for possession of the land which the defendants had obtained in excess of the quantity to which he had alleged in the partition-proceedings that they were entitled to. Both the lower Courts held that they were not competent to try the suit, inasmuch [841] as the matter in issue had been heard and finally decided by the Assistant Collector, under the provisions of s. 113 of Act XIX of 1873.

On appeal by the plaintiff to the High Court it was contended on his behalf that the matter in dispute had not been decided by the Assistant Collector under the provisions of s. 113 of Act XIX of 1873, and the lower Courts were consequently competent to try the suit.

Munshi *Hanuman Prasad*, for the appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for the respondents.

JUDGMENTS.

The Court (PEARSON, J., and OLDFIELD, J.) delivered the following judgments:

OLDFIELD, J.—This is a suit for possession by establishment of right to a certain share of lands. In the course of proceedings for a partition in the Revenue Court under Act XIX of 1873 instituted on the application of defendant, the plaintiff objected to the extent of the share claimed by defendant and asserted his own right to the share he now claims. His objection was disallowed with reference to a decision in a suit for profits, which had been brought against the plaintiff as lambardar, which the Assistant Collector held to have finally determined the extent of the plaintiff's interest, and the Assistant Collector made an order for the partition to proceed. Both Courts have held that the order of the Assistant Collector in those proceedings is an order of the nature of a decision of a Court of Civil Judicature, under s. 114, Act XIX of 1873, which may be open to appeal, but cannot be contested in a regular suit, and this is the question before us in appeal.

Under the provisions of s. 114 it is only orders or decisions passed under s. 113 of the Act for declaring the rights of parties which are held to be decisions of Court of Civil Judicature and open to appeal to the District or High Court under the rules applicable to those Courts; and we have to see if the Assistant Collector passed any such order in the course of the partition-proceedings. Section 113 is as follows:—"If the objection raises any question of title, or of proprietary right, which has not been already [842] determined by a Court of competent jurisdiction, the Collector of

the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to inquire into the merits of the objection. In the latter case the Collector of the District or Assistant Collector, after making the necessary inquiry and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interests of the party or parties applying for the partition, and any other party or parties who may be affected thereby;" and then follow directions as to the procedure to be observed. It will be seen that the provisions of this section are only to be applied in cases where there has been no decision on the question of title raised by a competent Court, and it is only in such cases that the provisions of the section could properly be put in force, and the section allows the Collector two courses, either to decline to grant the application until the question has been determined by a competent Court, or to proceed to inquire into the merits, and make necessary inquiry and take such evidence as may be adduced, and having done so to record a proceeding declaring the rights of the parties. What it contemplated is clearly an adjudication on the merits, and it is only when the Collector records a proceeding declaring the rights of the parties after such adjudication that his order will be an order passed under that section.

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In the case before us the Assistant Collector held that there had been a decision by a competent Court on the question of title. This finding put it out of his power to proceed under the section, and as a matter of fact he did not proceed under the section, for he simply gave effect to the former decision and summarily rejected the plaintiff's objection and ordered the partition to proceed; there was no order for declaring rights of parties after adjudication on the merits such as the section contemplates. The Assistant Collector was in error in holding that the former decision was one of a competent Court determining the question of title, but this error on his part does not alter the character of the order which he passed. The cases noticed by the Judge,—*Rameshur Rai* v. *Subhoo Rai* (1), **[843]** *Bukhta* v. *Gunga* (2)—are to be distinguished from the one before us. They were cases under Act XIX of 1873, and there had been an adjudication apparently on the title, but the procedure observed had been irregular. A case was brought to our notice at the hearing—*Har Sahai Mal* v. *Maharaj Singh* (3)—that was also a case of partition made under Act XIX of 1873 and the same remarks apply to distinguish it from the case before us.

I would reverse the decree of the lower Courts and remand the case to the Court of first instance for trial on the merits. Costs to abide the result.

PEARSON, J.—I concur.

Case remanded.

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(1) H. C. R. N-W. P. 1869, p. 35, 10th April.
(2) H.C.R. N.W.P. 1868, p. 161.
(3) 2 A. 294.

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FULL BENCH.

2 A. 843 (F.B.).

2 A. 843 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

MOHAN LAL (*Plaintiff*) *v.* RAM DIAL AND ANOTHER (*Defendants*).*
[22nd April, 1880.]

Act X of 1877 *(Civil Procedure Code)*, s. 13—Res judicata.

M sued *R* in the Court of the Munsif for a bond, alleging that he had satisfied the bond-debt, and for a certain sum which he alleged had been paid by him to *R* in excess of the bond-debt. On the 24th November, 1875, the Munsif having taken an account and found that Rs. 188-7-4 of the bond-debt were still due, made a decree dismissing the suit. *R* appealed to the Subordinate Judge, who on the 16th September, 1876, finding that Rs. 520-2-2 of the bond-debt were still due, affirmed the Munsif's decree. *M* appealed to the High Court on the ground that an appeal by *R* did not lie to the Subordinate Judge, as *R* was not aggrieved by the Munsif's decree. The Division Bench before which the appeal came, on the 10th August 1877, holding that *R* was not competent to appeal to the Subordinate Judge, set aside the proceedings of the Subordinate Judge. In deciding the case the Division Bench made certain observation to the effect that the account between the parties was not finally settled, but might be taken again in a fresh suit. In November 1877, *M* instituted a fresh suit against *R* to recover the bond on payment of Rs. 188-7-4, the sum found by the Munsif in the former suit to be due by him to *R*. *Held*, on the question whether the finding of the Munsif in the former suit was final and conclusive between the parties or the account might be again **[844]** taken, that, that finding, being a finding on a matter directly and substantially in issue in the former suit which was heard and finally decided by the Munsif, was final and conclusive between the parties and the account could not be again taken.

Held, also that the observation of the Division Bench in the former suit were mere "*obiter dicta*" which did not bind the Courts disposing of the fresh suit.

[R., 7 A. 606 (614) (F.B.)=A.W.N. (1885), 89; 17 A. 174 (196).]

THIS was a reference to the Full Bench by a Division Bench (SPANKIE, J., and OLDFIELD, J.) The facts giving rise to the reference and the point of law referred appear from the order of reference which was as follows:

OLDFIELD, J.—The facts of this case are stated in our order of remand dated the 19th May, 1879. The plaintiff entrusted a sum of Rs. 5,000 to his agent, with the object of paying off some mortgages, under certain bonds due to the defendants, on property which plaintiff had purchased, and the agent was directed to effect mutation of names. The agent had an account taken with the defendants, and the result was that the mortgage-debts under two bonds were held to be satisfied by the payment of the above money, and those bonds were returned by defendants, and the property mortgaged restored, and mutation of names effected in plaintiff's favour, but a third bond for Rs. 850, dated 16th February, 1869, was retained by the defendants, a balance in their favour being found due. The plaintiff, being dissatisfied with his agent's acts and the account taken, instituted a suit in the Court of the Munsif of Mainpuri to recover the said bond as satisfied, and also a surplus sum of Rs. 20-15-7, including interest, which he alleged was due to him out of the sum of Rs. 5,000, which he had sent by his agent and which had

* Second Appeal, No. 1246 of 1878, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 27th August, 1878, affirming a decree of Munshi Bansi Dhar, Munsif of Mainpuri, dated the 28th March, 1878.

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been paid to defendants. The Munsif dismissed the suit on 24th November, 1875; he held, after going into the accounts on all the bonds and crediting plaintiff with the Rs. 5,000 which he had paid, that Rs. 188-7-4 were still due by the plaintiff to the defendants. The defendants appealed and the Subordinate Judge, on 16th September, 1876, while affirming the decree dismissing the suit, held that Rs. 520-2-2 were due by plaintiff to defendants. A special appeal was preferred to the High Court by the plaintiff who objected that the defendants could not appeal from the Munsif's decree to the Subordinate Judge. The High Court allowed this objection and set [845] aside the proceedings in the Subordinate Judge's Court; they remark in their judgment, which is dated the 10th August, 1877: "inasmuch as the suit was dismissed, the plaintiff now urges in special appeal that the defendants could not appeal; they were not aggrieved by the decree, but by the Munsif's judgment on a particular issue collateral to the issue decided by the decree. We must allow the force of the objection. It is to be regretted that, if the parties are again obliged to come into Court, the account must be again taken, and the plaintiff's suit might and should have been so framed as to avoid this; but as it was framed, the plaint merely claiming to get back the bond for Rs. 850, the Munsif properly passed a decree simply dismissing the suit, and it was not competent to the defendants to present an appeal from that decree,—*Pan Kooer* v. *Bhugwant Kooer* (1). We must set aside the proceedings in the Subordinate Judge's Court, but as the plea was not taken in that Court and the frame of the suit has led to the unsatisfactory result that the account has not been finally settled, we order each party to bear his own costs in the lower appellate Court and in this Court."

The plaintiff has now instituted the present suit in the Court of the Munsif of Mainpuri for recovering the same deed, by payment of the sum which the Munsif, in the former suit, found to be still due by him. The Munsif dismissed the suit on the ground that he had no jurisdiction with reference to the value of the claims. On appeal to the Subordinate Judge, he disallowed this ground of dismissal, but dismissed the suit on another ground, namely, that the plaintiff was bound by the act of his agent, when he settled the accounts with the defendants. The plaintiff has preferred a second appeal before us, and considering that the Subordinate Judge had not properly tried the issues which he had laid down for trial, as to whether the agent acted within the scope of his authority and whether his acts were collusive, we remanded the case with directions that he should re-try those issues. The Subordinate Judge has now found that there was no clear authority given for adjusting the account of the mortgage-debt.

[846] We accept this finding and at the same time observe that, under any circumstances, the plaintiff would be at liberty to set aside the adjustment of the account, if he could show mistake or fraud. But another question is raised in the appellant's third ground of appeal, namely, that the Munsif in his judgment dated 24th November, 1875, has decided that a sum of Rs. 188-7-4 is due by plaintiff to defendants, after account was taken, on the several mortgage-bonds, and that this decision, which was not set aside when the decision of the Subordinate Judge in appeal from it was set aside by the High Court, by their judgment dated the 10th August, 1877, is final and conclusive on the matter between the parties, and the account cannot be re-opened, notwithstanding

(1) H. C. R. N. W. P. 1874, p. 19.

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anything said to the contrary in the judgment of this Court, dated the 10th August, 1877.

We think it desirable that this question be referred for the opinion of the Full Bench of the Court and we refer it accordingly.

Pandits *Ajudhia Nath* and *Nand Lal*, for the appellant.

The Junior Government Pleader (Babu *Dwarka Nath Banarji*) and Munshi *Hanuman Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench :

STUART, C. J.—On full consideration of this case and of the former appeal which was disposed of by Turner, J., and myself, I am not prepared to dissent from the conclusion arrived at by my colleagues. I am always unwilling to prevent the re-opening of an account where any material error can be shown, and I am not clear that s. 13 of the Procedure Code would bar such a proceeding in the present case, but the inconvenience of again opening up such an account as this would be so great and the result so uncertain (in no event, I believe, material) that I feel quite willing that the case should be decided according to the opinions recorded by the other members of the Court.

PEARSON, J.—The remark of the High Court Bench in the judgment of the 10th August, 1877, that "if the parties are again obliged to come into Court, the account must be again taken" **[847]** must, in my opinion, be regarded as a mere *obiter dictum* which does not bind the Courts disposing of the present suit.

I am further of opinion that the Munsif's finding in the former suit that Rs. 188-7-4 was due by the plaintiff to the defendants was a finding on a matter directly and substantially in issue between the parties in that suit, and has become final. In that suit not only was the recovery of the bond claimed on the ground that the bond-debt had been discharged, but Rs. 20-15-7 were also claimed as having been over-paid, and, for the purpose of disposing of the latter claim, it was necessary to determine by taking accounts whether Rs. 20-15-7 as claimed were due to the plaintiff or whether on the contrary as pleaded by the defendants a larger sum was due to them.

SPANKIE, J.— I am disposed to hold that the account cannot now be re-opened. On looking into the former case it seems clear that the state of the account was really in issue. The plaintiff could not under any circumstances claim the return of the mortgage-bond, if there were still any sum due under it, and the defendants had contended that the entire sum had not been paid off. As this contention referred to the particular deed which the plaintiff sued to recover, the question whether the money had been paid or not had to be determined.

It is to be regretted perhaps that a remark in the judgment of this Court in the former case has induced the defendants to contend that the accounts are still open and can be gone into again. But the wording of s. 13 as amended is peremptory. I would, therefore, say that the account was settled by the Munsif's judgment of the 24th November, 1875, and cannot be re-opened.

OLDFIELD, J.—It appears clear to me that the decision of the Munsif dated 24th November, 1875, has never been set aside and that it has finally decided that a sum of Rs. 188-7-4 was due by plaintiff to defendants on the several mortgage-bonds, and I hold that the accounts cannot now be re-opened.

The plaintiff in the former suit averred that a debt due to defendants on those bonds had been satisfied ; and he sought to have [848] one of those bonds returned to him and to recover a sum of Rs 20-15-7, including interest, due to him after satisfaction of the debt due on the bonds. The defendant pleaded that a large sum of money was still due to him on the bonds. The question as to what was the unpaid balance was necessarily on these pleadings directly and substantially in issue between the parties, and the decision on it has become final and cannot be re-opened in a fresh suit.

I am altogether unable to agree in the remarks made by the learned Judges in their order, dated 10th August, 1877, in second appeal in that case, that the accounts could be re-opened in a fresh suit, and obviously those remarks cannot amount to a judicial determination that the accounts might be re-opened, for that was a point which could only be determined judicially at the hearing of any fresh suit which might be brought and by the Court deciding such suit. Moreover, holding as the learned Judges did that no appeal lay from the Munsif's judgment, they were powerless to make any decision on the merits of the case.

STRAIGHT, J.—I am of opinion that the objection raised by the plaintiff-appellant in his third ground of appeal should prevail, and that the finding of the Munsif of the 24th November, 1875, is a bar to the defendants re-opening the accounts between themselves and the plaintiff. The claim of the plaintiff in his original suit was to recover the bond for Rs. 850, and to recover the Rs. 20-15-7 which he alleged had been improperly paid by his agent in excess of the amount due from him to the defendants for redemption of the bond. Two specific heads of claim were therefore included in his plaint, both of which the defendants were called upon to answer, or in default judgment must have passed against them. As to the Rs. 20-15-7, not only did they deny it was due, but they alleged a much larger amount was owing to them by the plaintiff. Here therefore was a matter alleged by the plaintiff and expressly denied by the defendants in respect of which the relief asked by the plaintiff was refused him, and not only that, for the decree went on to state that Rs. 188-7-4 was due and owing from the plaintiff to the defendants. The judgment of the Munsif was final except in so far as he could have altered it on review, and equally so that of the lower appellate Court until it was disturbed by the [849] decision of this Court, which had the effect of restoring the Munsif's findings and his determination of the whole case. The state of the litigation, then, was that the plaintiff's claim was dismissed, and he was decreed to owe the defendants Rs. 188-7-4. With great respect to the two learned Judges who decided the former appeal to this Court, it would appear as if they had entirely lost sight of the second head of the plaintiff's claim and the provisions contained in s. 216 of the Civil Procedure Code, so far as they affected the plea put forward by the defendants. Moreover, it appears to me that the terms of s. 43 of Act X of 1877 were imperative upon the plaintiff, in suing for the recovery of the bond, to claim the Rs. 20-15-7, for that was directly involved and had reference to the question whether the bond had or had not been satisfied. I take it to be a well-established principle that, unless there is any specific provision prohibiting a plaintiff from joining causes of action, he is bound to do so when they accrue at the same time and in respect of the same subject-matter. For a defendant is not to be subjected to the unnecessary expense and annoyance, either of defending or bringing a second suit, when all matters in difference between himself

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and a plaintiff can be disposed of in one. The state of the pleadings was such in the original suit between the now appellant and respondents, that the whole of the monetary dealings and accounts between them were opened up and evidence was taken and full consideration given to the proofs put forward on the one side and on the other. In the result the Munsif decreed Rs. 188-7-4 to be due and owing by the plaintiff to the defendants, and the latter appealed to the lower appellate Court, with the result that the full amount of their counter-claim was admitted by the Judge. It is beside the question now before me to criticise the decision of the learned Chief Justice and Turner, J., the effect of which was to leave the defendants entitled only to what the Munsif had decreed them. The plaintiff has accepted the Munsif's finding as binding on him, and has tendered the Rs. 188-7-4 to the defendants, who have refused to accept it. Hence the present suit. The remarks made by the two learned Judges in their judgment which are set out in the reference to the Full Bench are mere "*obiter dicta*," and can have no force or effect to alter the legal rights and disabilities of the parties.

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2 A. 850.

[850] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

TEJ SINGH (*Plaintiff*) *v.* GOBIND SINGH AND OTHERS (*Defendants*).*
[2nd April, 1880.]

Sale in Execution of decree—Pre-emption—Act X of 1877 (*Civil Procedure Code*), s. 310.

A co-sharer in undivided immoveable property of which a share is sold in the execution of a decree does not, under s. 310 of Act X of 1877, acquire the right of pre-emption as against a stranger to whom such share has been knocked down, by merely asserting such right at the time of sale, and fulfilling the conditions of sale required by ss. 306 and 307 of that Act. He must bid at the sale and as high as the stranger before he can acquire a right of pre-emption under that section.

[**F.**, 3 A. 827 (828) = A.W.N. (1881), 86; **D.**, 3 A. 15 (17).]

ON the 21st January, 1878, two shares of an undivided share of a village called Jarara were put up to auction-sale in the execution of a decree, and were purchased by the defendants in this suit. At the time of sale the plaintiff in this suit, who was a co-sharer in such undivided share, asserted his right of pre-emption in respect of the property sold; and he, as well as the defendants, paid the deposit required by s 306 of Act X of 1877, and the full amount of the purchase-money as required by s. 307 of that Act. The plaintiff did not bid at all for the property at the sale. The Court executing the decree rejected the plaintiff's claim to pre-emption and confirmed the sale in favour of the defendants. The plaintiff thereupon brought the present suit against the defendants to establish his right of pre-emption under s. 310 of Act X of 1877 in respect of the property. The Court of first instance gave him a decree. On appeal by the defendants, the lower appellate Court held that the suit was not maintainable and dismissed it, its reasons for so holding being as follows: "In the view of the appellate Court the meaning and substance of s. 310,

* Second Appeal, No. 1142 of 1879, from a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 11th July, 1879, reversing a decree of Munshi Mata Prasad, Munsif of Akrabad, dated the 22nd April, 1879.

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Act X of 1877, are not those that the Court of first instance has described; on the contrary, the appellate Court is of opinion that the aim and substance of that section is merely this, *viz.*, that the share-holder ought also to bid at auction, and that, if the amount of the last bid by a stranger and the share-holder is the same, preference of purchase should be given to the [851] share-holder; that is to say, if the amounts bid by the stranger and the share-holder at auction be equal, it shall be knocked down to the share-holder. The rule as to the right of pre-emption in pattidari villages which was fixed under s. 14, Act XXIII of 1861 with a view to assimilating it to Act I of 1841, has been annulled by this section: and since it is admitted that the plaintiff made no bid at auction, the defendant alone having bid, and the officer conducting the sale knocked the same down to the bid of the latter, the plaintiff under such circumstances is in no way entitled to bring a suit in the Civil Court on the ground of pre-emptive right by virtue of his having filed an application for pre-emption before the officer conducting the sale on the date of the sale, and having paid earnest-money, and having paid the remainder of the purchase-money within the period of fifteen days, and for the Court to have made a decree for maintenance of pre-emptive right."

The plaintiff appealed to the High Court.

Babu *Jogindra Nath Chaudhri*, for the appellant.

Pandit *Bishambhar Nath*, for the respondents.

JUDGMENT.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—The construction put by the lower appellate Court on the terms of s. 310, Act X of 1879, appears to us to be correct. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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2 A. 851 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

LACHMAN DAS (*Plaintiff*) v. DIP CHAND (*Defendant*).*
[22nd April, 1880.]

Optional and compulsory registration—Act VIII of 1871 (*Registration Act*)*—Act III of* 1877 (*Registration Act*), s. 50*—Act I of* 1868 (*General Clauses Act*), s. 6*—Registered and unregistered document.*

Held, in the case of a document executed while Act VIII of 1871 was in force, the registration of which under that Act was optional, and which [852] was not registered thereunder and of a document executed after Act III of 1877 had come into force, the registration of which under that Act was compulsory, and which was registered thereunder, both documents relating to the same property, that under the provisions of s. 50 of Act III of 1877 the registered document took effect as regards such property against the unregistered document, the provision of s. 6 of Act I of 1868 notwithstanding.

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* Second Appeal, No. 402 of 1879, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 10th January, 1879, modifying a decree of Maulvi Munir-ud-din, Munsif of Jalesar, dated the 22nd November, 1878.

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2 A. 851 (F.B.).

[F., 5 A. 593 (594) = A.W.N. (1883), 136; 7 C. 570 (573); 11 C. 661 (665); R., 6 B. 168 (192) (F.B.); 18 B. 92 (95); 20 B. 158 (164); 27 B. 452 (467) = A.W.N. (1881), 127; Cons., 6 A. 164 (169) = A.W.N. (1884), 29; 4 A. 227 (230, 231) (F.B.) = A.W.N. (1882) 19; D., 7 A. 577 (581) = A.W.N. (1885), 115]

THE plaintiff in this suit claimed to recover Rs. 82-2-3 on two bonds, dated respectively the 11th June, 1875, and the 24th July, 1876, by the sale of the property hypothecated in such bonds The bond dated the 11th June, 1875, was for Rs. 25, payable in demand with interest at the rate of Rs. 2-8-0 per cent. per mensem. The bond dated the 24th July, 1876, was for Rs. 21, payable on demand with similar interest Neither of the bonds were registered. The defendant Dip Chand, to whom the other defendants had transferred the property hypothecated in these bonds, under a deed of sale, dated the 13th July, 1878, contended that the deed of sale, being duly registered under Act III of 1877, took effect as regards the property in suit as against the unregistered bonds. The Court of first instance did not determine this contention, but gave the plaintiff a decree in respect of the property. The lower appellate Court allowed the contention, having regard to s. 50, Act III of 1877, and reversed the decree of the Court of first instance so far as it affected the property.

On appeal by the plaintiff to the High Court it was contended on his behalf that Act VIII of 1871, and not Act III of 1877, was applicable and, inasmuch as under the former Act the registration of the deed of sale was compulsory while the registration of the bond was optional, the former instrument did not take effect as regards the property in suit as against the latter instruments. The Division Bench (Stuart, C. J., and Oldfield, J.) before which the appeal came for hearing, having regard to the fact that there were conflicting rulings of the Calcutta and Allahabad High Courts,—*Oghra Singh* v. *Ablakhi Kooer* (1); S.A. 1896 of 1878 decided the 5th August, 1879, (2)—referred to the Full Bench the following question:—"Whether the provisions of s. 50, Act III of 1877, apply to give effect to the defendant's registered deed against [853] plaintiff's deeds, so as to prevent the plaintiff enforcing his mortgage against the property brought by defendant."

Munshi *Hanuman Prasad*, for the appellant.

The respondent did not appear.

JUDGMENTS.

The following judgments were delivered by the Full Bench:—

STUART, C. J.—There cannot be the least doubt or difficulty as to the meaning and application of s. 50, Act III of 1877, to such a case as the present. I have held that opinion ever since that Act came into operation, and I lately gave effect to it in a judgment on a Division Bench, not then anticipating the present reference. As to s. 6 of the General Clauses Act, it is idle to contend that it has any bearing whatever in such a case as this.

PEARSON, J.—S. 50, Act III of 1877, declares that registered documents relating to land of which registration is optional shall take effect against unregistered documents; and the word "unregistered" is defined in the explanation thereunder to mean, in cases where the document is executed after the first day of July, 1871, not registered under Act VIII of 1871 or the Act of 1877. That definition appears to me to preclude and negative the view that an unregistered document of 1876 could be

(1) 4 C. 536. (2) Unreported.

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protected by s. 6, Act I of 1868, from being affected by s. 50, Act III of 1877. Whether such a view could be maintained was stated to be the point for consideration.

SPANKIE, J.—In reply I would say that the provisions of s. 50, Act III of 1877, do apply to this case. I do not think that s. 6 of the General Clauses Act would apply to a case of this nature.

OLDFIELD, J.—The registration of the plaintiff's deeds is optional, and by s. 50 of Act VIII of 1871, which was in force at the time they were executed, they would take effect in preference to such a deed as that of the defendant though registered, since the registration of the latter is compulsory.

By the terms of s. 50, Act III of 1877, however, every registered document, whether its registration be compulsory or optional, shall take effect against every unregistered document relating to the same property, and hence the defendant's document executed since the Act came into force will now take effect in preference to [854] the plaintiff's. The effect upon the plaintiff's is of course that a document, which was perfectly valid and effective at the time it was executed against any such registered document as that of defendant which might subsequently be executed, has now become ineffectual against such a document.

I was at first inclined to consider that the Legislature could not have intended such a result, particularly as no provision is made for enabling parties to register within a reasonable time those unregistered documents affected for the first time by the provisions of the new Act; and I was inclined to think that the right of persons circumstanced like the plaintiff might be saved by the provisions of s. 6, General Clauses Act, whereby the repeal of any Statute, Act, or Regulation shall not affect anything done before the repealing Act shall have come into operation. But a careful examination of s. 50 and the explanation annexed to it has satisfied me that the application of s. 6 of the General Clauses Act will not save plaintiff's document from being affected by the provisions of s. 50, for Act III of 1877 does more than merely repeal Act VIII of 1871. It contains in s. 50 an express provision by which all unregistered documents executed at the time the former laws referred to in the section were in force are to be defeated by all registered documents of the nature of those mentioned in the section. I would, therefore, answer the reference in the affirmative.

STRAIGHT, J.—It appears to me that s. 50 of the Registration Act of 1877 is conclusive, and that the defendant's registered deed takes precedence of the plaintiff's unregistered bonds.

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APPELLATE CIVIL.

2 A. 854.

2 A. 854.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

GHULAM MUSTAFA (*Plaintiff*) *v.* HURMAT AND ANOTHER (*Defendants*).* [27th April, 1880.]

Muhammadan Law—Gift—Dower.

Held that the provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower doubt, which is really of the nature of a sale.

[F., 12 Ind. Cas. 457 = 21 M.L.J. 958 = (1911) 2 M.W.N. 412 ; R., 13 C.W.N. 160 ; 135 P.R. 1907.]

[855] THE plaintiff in this suit claimed under a deed of sale possession of a five-biswansi share of a village called Benipur, on payment of Rs. 52-8-0, being the dower-debt due to the defendant Hurmat by her deceased husband, Nur Muhammad. The property in suit was a portion of a ten-biswas share of Benipur which had belonged to Nur Muhammad, who died on the 25th August, 1875 On the 21st August, 1875, or four days before his death, Nur Muhammad executed a deed of gift transferring his ten-biswas share of Benipur to the defendant Hurmat. The consideration for this transfer purported to be Rs. 1,600, being part of a sum of Rs. 2,500 which was alleged to be due by him to his wife on account of dower. Under this transfer the defendant Hurmat obtained possession of the share. On the 11th February, 1879, the defendant Ali Ahmad, asserting himself to be the owner of seven biswas and a half out of the ten-biswas share, by inheritance from Nur Muhammad, executed the deed of sale in favour of the plaintiff under which he claimed, transferring five biswansis of the property to him. The plaintiff contended that the deed of gift executed by Nur Muhammad in favour of the defendant Hurmat was invalid, since it had been executed when Nur Muhammad was suffering from a fatal disease, and consequently according to Muhammadan law, when he was incapable of transferring his property. Both the lower Courts found as a fact that the deed of gift was executed by Nur Muhammad while in full possession of his senses, and held that the Muhammadan law applicable to gifts made by a person labouring under a fatal disease did not apply to a gift made in consideration of a dower-debt.

On appeal to the High Court the plaintiff again contended that the gift to the defendant Hurmat was invalid according to Muhammadan law, having been made while the donor was suffering from a fatal disease.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

Mr. *Conlan* and Mir *Zahur Husain*, for the respondents.

JUDGMENT.

The judgment of the Court (PEARSON, J. and OLDFIELD, J.) was delivered by

PEARSON, J.—The provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not [856] apply to a so-called gift made in lieu of a dower-debt, which is really of the

* Second Appeal, No. 1286 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 14th August, 1879, affirming a decree of Shah Ahmad-ul-lah, Munsif of Bareilly, dated the 30th May, 1879.

nature of a sale. Case No. 21 in Macnaughten's Precedents of marriage, dower, divorce, and parentage is on all fours with the present case and entirely supports the decision of the lower Courts. The just claims of the heirs are not interfered with by the payment of debts which must be paid before the heirs can enter upon the inheritance. The lower Courts have found on the evidence that the executant of the deed in question in the present case was in his sound senses when he executed the deed; and from the medical evidence it is doubtful whether he was then labouring under the disease which caused his death shortly afterwards. The appeal fails and is dismissed with costs.

Appeal dismissed.

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2 A. 856.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

BHAGWAN PRASAD (*Judgment-debtor*) *v.* SHEO SAHAI (*Decree-holder*).*
[28th April, 1880.]

Execution of decree—Act X *of* 1877 (*Civil Procedure Code*), *s.* 326.

S. 326 of Act X of 1877 does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under s. 326.

THE decree in this case, bearing date the 16th August, 1878, had been made in a suit on a bond for the payment of certain money charging certain land paying revenue to Government with such payment. Among the reliefs asked for in the suit was the sale of such land for the satisfaction of the bond-debt. The decree directed, *inter alia*, the sale of such property in satisfaction of such debt. The property having been attached in the execution of the decree, the Collector, with reference to s. 326, Act X of 1877, represented to the Subordinate Judge, the Court executing the decree by a proceeding dated the 17th December, 1878, that the sale of the land was objectionable, and that the decree might be satisfied by instalments within eight years by a lease of the land for that term; and asked the Subordinate Judge to postpone the sale of the land which was fixed to take place on the 20th December, and to authorize him [857] to provide for the satisfaction of the decree in the manner recommended by him. The Subordinate Judge accordingly postponed the sale, and on the 11th March, 1879, made an order sanctioning the Collector's recommendation. On appeal by the decree-holder from this order, the District Judge set it aside, having regard to the case of *Womda Khanum* v. *Rajroop Koer* (1).

The judgment-debtor appealed to the High Court, contending that there was nothing in s. 326 of Act X of 1877 confining its provisions to money-decrees.

Munshis *Hanuman Prasad* and *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath*, for the respondent.

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* Second Appeal, No. 25 of 1880, from an order of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 19th January, 1880, reversing an order of Babu Ram Kali Chaudhri, Subordinate Judge, dated the 11th March, 1879.

(1) 3 C. 335.

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2 A. 856.

JUDGMENT.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.) was delivered by

PEARSON, J.—Reading s. 326 with s. 322 of the Code, we are of opinion that the lower appellate Court's order, referring to a decree which directs the sale of immoveable property in pursuance of a contract specifically affecting the same, is right; and we therefore dismiss the appeal with costs.

Appeal dismissed.

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2 A. 857.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.

MUMFORD (*Plaintiff*) *v.* PEAL AND ANOTHER (*Defendants*).*
[29th April, 1880.]

Bond—Waiver—Act IX of 1871 (*Limitation Act*), *sch. ii, art.* 75—*Cause of Action.*

The mere acceptance by the obligee of a bond payable by instalments, which provides that in case of failure to pay one or more instalments the whole amount of the bond due shall become payable, of instalments after default does not constitute a "waiver," within the meaning of art. 75, sch. ii, of Act IX of 1871 of the obligee's right to enforce such provision.

In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default.

[**N.F.**, 4 C P.L.R. 21 (22); **F.**, 14 C. 397 (399); 12 M. 192 (195); 39 P.R. 1899; **R.**, 20 B. 109 (113, 115); 31 C. 83 (87)=8 C W.N. 66; 12 Ind. Cas. 741=7 N.L.R. 147; 14 Ind. Cas. 685=8 N.L R. 44; **D.**, 5 A. 289 (292)=A.W.N (1883), 33; 11 A. 482 (484)=A.W.N. (1889), 186.]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Straight, J.

[858] Mr. *Colvin* and the Junior Government Pleader (Babu *Dwarka Nath Banarji*), for the appellant.

Messrs. *Hill* and *Howard*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court :—

STRAIGHT, J.—This is a suit brought by the plaintiff to recover from the defendants the sum of Rs. 3,917-8 6, being the amount of principal and interest due upon a bond bearing date the 27th September, 1871, and executed by one James Giddens, deceased, of whom defendant No. 1 is the widow, by Robert Peal, defendant No. 2, and by one George Richards, who has not been included in the proceedings. The plaintiff also seeks to realize the amount of his claim by sale of a certain bungalow, hypothecated by the before-mentioned James Giddens as security for the above sum of Rs. 3,917-8-6, and the cause of action is alleged to have accrued on the 27th September, 1874, the date before which the amount covered by the bond was agreed to be repaid.

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* Second Appeal, No. 912 of 1879, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 18th April, 1879, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 2nd September, 1878.

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2 A. 857.

Defendant No. 1 in reply states that the plaintiff voluntarily undertook to discharge the amount of the said bond, of which the Uncovenanted Service Bank was the obligee, and that as security for doing so he had possession given him of the hypothecated bungalow and received the rents therefrom for a long period of time; that he promised not to charge interest for any payments made by him to the Bank; and that she is willing the bungalow should be sold to satisfy the principal debt due to the plaintiff, but not to pay any interest, which he had promised not to demand. Defendant No. 2 pleads that, as he was no party to the deed by which the plaintiff became assignee of the bond of the 27th September, 1871, and had no notice of the assignment, he is not liable to plaintiff, and that the bond was not assignable by law; that upon the death of the obligor, James Giddens, he wrote to the manager of the Bank, requiring him, in consequence of defaults that had been made in the payment of instalments, to enforce hypothecation by sale of the mortgaged bungalow, but that the Bank failed to do what he requested, and he (the defendant No. 2) is accordingly freed from all liability; that he was only a surety for the obligor and not a co-obligor; that the suit is [859] barred by limitation, as any cause of action the plaintiff might have had arose on the 11th October, 1872, the date of the death of James Giddens, or on some prior day when the last payment in liquidation of the bond was made. The first Court, holding the plea of limitation to be fatal to the plaintiff's claim as against the persons of the two defendants, dismissed it to that extent, but gave him a decree against the property, and this decision was upheld by the lower appellate Court.

The plaintiff now appeals to this Court, and the only argument seriously urged before us was that, inasmuch as the obligee of the bond took no steps to sue on the default by the obligor to pay his instalments, and accepted payments after default made, he must be taken to have waived the breach of the contract that had then been made.

The case is one of some complication, and in order to satisfactorily consider it, it is necessary to detail the following facts. One James Giddens, a Government employee and resident of Allahabad, in the year 1871 seems to have been in pecuniary difficulties, and in order to tide over them he had recourse for assistance to the Uncovenanted Service Bank, of which a Mr. Fairlie was the Agent and Manager. He ultimately effected a loan of Rs. 3,350, and the transaction was completed on the 27th September, 1871, by the execution of a joint and several bond for that amount by himself, his brother-in-law by marriage, Mr. Robert Peal, and one George Richards, in which it was agreed that the Rs. 3,350 should be repaid by regular monthly instalments of Rs. 80 each, together with interest "at 12 per cent. payable monthly by deduction from each remittance or payment or otherwise added to the principal at the end of each half-year, namely, on the 30th June and the 31st December." The first instalment was to become payable on the 10th November 1871, and it was further provided, "that in the event of failure in the payment of any one or more instalments, and whether advice be or be not given of such default, we hereby jointly and severally render ourselves liable to pay up the full amount or such balance thereof as may become due according to the account-current of the said Bank, with all interest and other charges that may or shall be incurred on account of the said loan." [860] Concurrently with the execution of this bond James Giddens by deed mortgaged a bungalow in Allahabad to the Bank, and gave authority therein to the Bank to sell the same to the best advantage either publicly

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or privately, "should the loan of Rs. 3,350 be not liquidated with all other charges within the time and in the manner agreed upon in the bond, or in case of my death in the interim before the discharge of the said debt."

It is an admitted fact in the case that the Rs. 3,350 were paid to James Giddens, and that he alone had the benefit and the use of the money. The instalments, it will be observed, had to be paid on the 10th of each month, and those for November and December, 1871, were punctually discharged. But this regularity was not continued with those that followed, the payments being made on the following dates:—

			Rs.
January	10th	1872	50
,,	17th	,, ...	30
February	12th	,, ...	80
March	8th	,, ...	80
May	8th	,, ...	80
August	3rd	,, ...	40
		or in all	360

On the 11th October, 1872, James Giddens died, and at that time there were five monthly instalments due—that is Rs. 400, and this independent of interest, in respect of which nothing had been paid. Soon after Giddens' death Mr. Fairlie wrote to Mr. Richards and Mr. Peal, inquiring of them what arrangements they proposed to make to liquidate the unpaid balance owing on the bond, and on the 14th November, 1872, the latter replied as follows:—"As you hold a collateral security in the mortgage of Mr. Giddens' house, and as this mortgage was executed with the object of securing his securities from becoming liable, or at least incurring any loss in the event of any contingency preventing Mr. Giddens liquidating the debt, I request you will foreclose the mortgage and pay off the Bank's debt. The widow of Mr. Giddens wrote to me [861] the other day stating that she had called on you with the object of requesting you to take possession of the house and with it pay off the Bank's claim, but that you were out. I shall feel obliged if you will communicate with her and let me know the result." Upon receipt of this letter Mr. Fairlie does appear to have threatened to put the powers of the Bank under the mortgage into force, and thereupon the plaintiff, Mumford, a step-brother of the deceased James Giddens, at the earnest solicitations of his widowed sister-in law, first introduced himself into the matter by paying on the 19th December, 1872, the sum of Rs. 450 to the Bank on account of the bond. In passing it may be remarked that at that date seven instalments, or in other words Rs. 560, was the amount actually due. Mumford afterwards made the following further payments:—

			Rs.
January	28th, 1873	... ...	225
February	20th ,,	... ...	225
March	20th ,,	... ...	225
			675

From this latter date to the 26th January, 1874, the principal and interest were allowed to accumulate till they reached Rs. 2,540, which sum on the 26th January, 1874, was liquidated in full by Mumford, who thus out of the Rs. 4,185 actually received by the Bank in respect of the bond

had found no less than Rs. 3,665. On the 18th February, 1874, Mr. Fairlie on behalf of the Bank whose claim had been satisfied, assigned to Mumford by deed all its rights, interests, and powers in the bond of the 27th September, 1871, and the collateral mortgage of the same date. About this time an account was opened in the books of the Bank headed "James Giddens, Esq., in loan account with E. A. Mumford, Esq.," the first item of which on the debit side was as follows :—"27th January, 1874—To amount paid to the Uncovenanted Service Bank, Rs 3,653-4-0." It is clear that Mumford had then been put in possession of the hypothecated bungalow by defendant No. 1, and indeed the facts establish it beyond question, for on the credit side of the same account will be found a succession of [862] entries down to October 2nd, 1874, recording the receipt of the rent of it, apparently by Mumford direct, and after that date until the 12th August, 1875, through defendant No. 1. The total of the former is Rs. 410 and of the latter Rs. 750, or Rs. 1,116 in all. The balance appearing as due for the principal debt on the 12th August, 1875, was Rs. 3,145-8-6, and for interest Rs. 772, making a total of Rs. 3,917-8-6, for recovery of which sum the plaintiff instituted his present suit on the 17th September, 1877.

It has been necessary to go at this length into the facts in order to make the point taken in appeal intelligible. The case was most ably and exhaustively argued before the learned Chief Justice and myself on three different occasions, and we took time to consider our judgment, in order to examine the numerous authorities quoted on either side. The simple and sole point for our consideration is whether the Uncovenanted Service Bank, the obligee of the bond of the 27th September, 1871, by accepting payments after default had been made in the instalments, waived the benefit of its provisions, within the meaning of art. 75, sch. ii, Act IX of 1871.

It does not appear to me that any question properly arises as to the competency of the plaintiff to bring this suit, or as to the primary liability of defendant No. 2 under the bond. I see no reason to hold that the assignment of the Bank by the deed of 18th February, 1874, was otherwise than legal, and the plaintiff stands in no better or worse position than his assignor. The terms of the bond preclude the contention that defendant No. 2 was only a surety, and it is clear that he made himself jointly and severally liable as an obligor with the other two persons executing it. It is much to be desired that the bond were equally plain and explicit in other respects. Its terms as to mode of payment are so singularly contradictory that if strictly interpreted they could not have been carried out. For it was absolutely impossible to discharge a sum of Rs. 3,350 within three years from the 27th September, 1871, by monthly instalments of Rs. 80, the first of them commencing on the 10th November, 1871. To the 27th September, 1874, by which date the bond was redeemable, would be exactly 35 months, which multiplied by 80 gives Rs. 2,800, or Rs. 550 short of the principal sum covered by it, to say nothing [863] of interest. The contracting parties are not to be congratulated on their arithmetic, and by their carelessness they have raised a difficulty which with ordinary circumspection might have been avoided. It seems to me, however, that the bond must be regarded as one payable by instalments, on default in payment of one or more of which the whole principal amount then due could at once be demanded. To this extent its language is certain and precise, and I do not know that, for the purpose of disposing of this appeal, we are called upon to determine what the intentions of

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the parties were, as to when and how the balance over and above the 35 instalments should be discharged, though that it was, in some way and at some time, within the three years, to be forthcoming seems plain. Then comes the question whether default was made in the instalments, and if so, whether the conduct of the Uncovenanted Service Bank in accepting subsequent payments amounts in law to a waiver.

Both the lower Courts have in substance answered the first of these propositions in the affirmative and the latter in the negative. The ground upon which we are invited to disagree with their decisions is, that the finding on the latter point is in the teeth of the evidence, and that the mere fact of money having been received on account of the bond by the Bank is sufficient of itself to constitute a legal waiver. I cannot for a moment accede to this view. On the contrary, I think that the most cogent and conclusive proof must be demanded to establish that a party to a contract has abandoned a right accruing to him under its provisions on breach, and has entered into some fresh parol arrangement condoning such breach and creating new relations with the party in default. "A waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both parties understood the term of this substituted agreement."—*The Earl of Darnley* v. *The London, Chatham and Dover Railway Co.* (1). In the present case the first default occurred on the 10th January, 1872, when only Rs. 50 instead of Rs. 80, the proper instalment, was forthcoming; and though it is true that the remaining Rs. 30 were paid on the 17th of that [864] month, the fact is not altered that a cause of action had accrued to the Bank under the terms of the bond. In February the payment was two days late; in March two days before time. In April, however, nothing was forthcoming, and it was not until the 8th May that another Rs. 80 found its way to the Bank. Then there was a further suspension during June and July, and finally on the 3rd August there was a payment of Rs. 40, the last ever made by James Giddens prior to his death. At that date, irrespective of interest, only Rs. 520 had been paid as against Rs. 720 due, and consequently during the period between November, 1871 and July 1872, no less than three instalments, or Rs. 240, had fallen into arrears. Even could we hold that the two payments in January 1872 were so near to one another as not to constitute a default, it would be impossible to place a similar construction upon the absence of any payment in April, 1872. Looking at all these facts, I see nothing whatever to establish that the Bank entered into any arrangement or understanding to forego the cause of action that had arisen on the 10th January, 1872, or that any fresh parol agreement qualifying the provisions of the bond of 27th September, 1871 was ever made. But even were there evidence of these to bind Giddens and his representatives, it appears to me that an insurmountable obstacle lies in the plaintiff's way, in the circumstance that there is not a particle of proof that defendant No. 2 was ever a party to any such subsequent verbal contract. On the contrary, as far as there is material for forming an opinion, it would seem as if Mr. Peal was all along in ignorance that any default in the payment of instalments had been made, until he received the letter from Mr. Fairlie, shortly after Giddens' death, asking him what arrangement he proposed to make to liquidate *the unpaid balance of the loan.* It is not attempted to

(1) L.J. 36 Eq. 404.

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be set up by the plaintiff that as between Peal and the Bank there was any agreement or understanding come to in abrogation or substitution of the terms of the bond under which he had contracted, and the argument for appellant therefore really comes to this, that we are to hold defendant No. 2 bound by a parol arrangement of which he had no knowledge and to which he never gave his acquiescence. The plaintiff is on the horns of [865] a dilemma, either the bond of September, 1871, was superseded and rescinded, or it was not. If it was, the defendant No. 2 was no party to its supersession and rescission ; if it was not, the cause of action arose on the 10th January, 1872, and his claim is barred by limitation. To contend that the acceptance of subsequent payments by the bank from the plaintiff has any binding effect upon defendant No. 2 proceeds upon an entire misconception of the principle on which the doctrine of waiver is based, nor is the fact itself worthy a moment's serious consideration in face of the demand made upon defendant No. 2 by the Bank, immediately after Giddens' death, for "*the unpaid balance of the loan*," a pretty strong indication that at that time its right to the whole principal sum covered by the bond was considered to have accrued. The plaintiff by his assignment of the 18th February, 1874, took the position, theretofore occupied by his assignor with all the rights, interests, and disabilities pertaining thereto and he had abundant time, between that date and the 10th January, 1875, when limitation finally barred him, even after the 27th September, 1874, the day before which the bond had to be satisfied, to take his claim into Court. Upon what principle the plaintiff alleged his cause of action to have accrued on the 27th September, 1874, is far from intelligible. The bond was, as has already been pointed out, payable by instalments, on default in one or more of which the whole amount became due and payable, and the law is perfectly clear upon the point, that the cause of action in such a case accrues on the first default, from the date of which limitation begins to run. Decisions without end to this effect may be found, but it is sufficient for me to refer to *Hemp* v. *Garland* (1) ; *Madho Singh* v. *Thakoor Pershad* (2) ; and *The Uncovenanted Service Bank* v. *Khetter Mohan Ghose* (3). It therefore appears to me that the cause of action, which accrued to the Bank and was passed on with the bond to the plaintiff by the assignment, arose on the 10th January, 1872, and that the present suit is barred by limitation. The plea of waiver entirely fails. I would accordingly dismiss this appeal and confirm the judgment of the Courts below with costs.

[866] STUART, C J.—I am so entirely satisfied with the examination of this case, in fact and in law, afforded by the judgment of my colleague Mr. Justice Straight, that I feel I need add nothing to what he has so clearly and satisfactorily stated. The case of *Madho Singh* v. *Thakoor Pershad* (2) was a judgment of my own concurred in by my colleague Mr. Justice Spankie, and is correctly stated as an authority in support of the opinion that the cause of action in the case of an instalment-bond accrues on the first default, whence limitation begins to run. The appeal is dismissed with costs in all the Courts.

Appeal dismissed.

(1) 12 L.J. B. 134=4 Q.B. 519. (2) H.C.R. N.W.P. (1873) 35.
(3) H.C.R. N.W.P. (1874) 88.

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APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

BUJHAWAN LAL (*Defendant*) *v.* SUKHRAJ RAI (*Plaintiff*).*
[30th April, 1880.]

Attachment—Cross-decree—Act VIII of 1859 (*Civil Procedure Code*), *s.* 209.

In April, 1877, *M* sued *S* for money and on the 10th May, 1877, *S* sued *M* for money, both suits being instituted in the same Court. In the meantime, on the 9th May, 1877, *B* applied for the attachment of the money claimed by *M* in his suit, and obtained an order prohibiting *M* from receiving and *S* from paying, any sum which might be found in that suit to be due by *S* to *M*. On the 23rd June, 1877, *M* obtained a decree in his suit against *S*, and *S* obtained a decree in his suit against *M*, *S's* decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of *S's* decree for so much as remained due. At the same time *S* objected to *B's* attachment but his objection was disallowed. *Held*, in a suit by *S* against *B* to have the order disallowing his objection set aside and the propriety and legality of the set-off above mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if *B* had followed up that order and attached *M's* decree against *S*, that step would not have put him in a better position, for the same section being followed and the decrees being essentially cross-decrees, that for the smaller sum became absorbed in the one for the larger, and attachment could not affect it.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

[867] Munshi *Kashi Prasad*, for the appellant.

Munshi *Hanuman Prasad*, for the respondent.

JUDGMENT.

The judgment of the High Court (PEARSON, J., and STRAIGHT, J.) was delivered by

STRAIGHT, J.—The following facts must be recapitulated in order to make the grounds upon which this appeal is based intelligible. On the 24th April, 1877, Mahadeo Lal, defendant No. 2, brought a suit for work done and materials provided against Sukhraj Rai, the plaintiff. On the 10th May, 1877, Sukhraj Rai, the plaintiff, instituted a suit on a bond against Mahadeo Lal, defendant No. 2. On the 23rd June, 1877, the claim in each case was decreed, that of Sukhraj Rai, the plaintiff, being for the larger amount. Meanwhile, namely, on the 9th May, 1877, Bujhawan Lal, defendant No. 1, lodged an application for attachment of the amount pending in the suit of Mahadeo Lal, defendant No, 2, against Sukhraj Rai, the plaintiff, and an order was made to that effect. It is alleged by defendant No. 1, appellant before us, that notice was issued to Mahadeo Lal, defendant No. 2, not to receive, and to Sukhraj Rai, plaintiff, not to pay, any sum that might be found to be due by the latter to the former. The receipt of any such intimation is denied by Sukhraj Rai, the plaintiff, but the matter is not very important either one way or the other in the decision of this case. On the 23rd June, 1877, the plaintiff Sukhraj Rai, having obtained leave in the execution department to set off the amount of defendant No. 2's decree against him, gave credit for the amount of that decree, and deducting it from his

* Second Appeal, No. 1139 of 1879, from a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 25th July, 1879, reversing a decree of Babu Nilmadhab Roy, Munsif of Ghazipur, dated the 14th May, 1879.

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own decree against Mahadeo Lal, defendant No. 2, applied for execution in respect of the balance thereafter remaining due. About the same time Sukhraj Rai the plaintiff made an objection in the execution department to defendant No. 1's attachment of the 9th May, 1877, but it was disallowed and the present suit is brought to have the Munsif's order to that effect set aside and the propriety and legality of the set-off already mentioned established. On the 25th July, 1877, Bujhawan Lal, defendant No. 1, obtained an order for the attachment of the decretal amount of Mahadeo Lal, defendant No. 2's decree against Sukhraj Rai, the plaintiff, and on the [868] 15th March, 1879, he brought to sale and purchased it. The present suit was dismissed by the Munsif, but upon appeal the lower appellate Court decreed the claim, and Bujhawan Lal, defendant No. 1, now appeals on the following grounds :—(i) that the decree of Mahadeo Lal against Sukhraj Rai having been previously attached, it was not competent for Sukhraj Rai to apply it as a part set-off to his decree against Mahadeo Lal; (ii) that as the decrees were not being simultaneously executed, no set-off could be made, and even if it could, it required to be sanctioned or refused in the execution department and cannot be made the subject of a regular suit.

The substantial point for consideration appears to be whether the order of the Munsif of the 9th May, 1877, attaching the amount of claim pending in the suit of Mahadeo Lal against Sukhraj Rai, was a good and valid one, and could effectually bar Sukhraj Rai from making a subsequent set-off of the amount of that decree in execution of a decree of his own against Mahadeo for a larger sum.

The provisions of Act VIII of 1859 are applicable to the case. It will be observed that, at the time the order of the Munsif was passed, no amount had been ascertained to be due from Sukhraj Rai to Mahadeo, and for aught that might appear to the contrary nothing was due. As a matter of fact, there was no debt owing from Sukhraj Rai to Mahadeo Lal but Mahadeo Lal was indebted to him in a much larger amount, and when the two decrees were passed on the 23rd June, he being the holder of the decree for the larger amount was bound by the provisions of s. 209 of the old Procedure Code to take out execution for so much only as remained due to him, after deducting the amount due to Mahadeo Lal as to which satisfaction had to be entered up. As Mahadeo Lal had no claim against Sukhraj Rai and no debt was due, the order of the Munsif could have no operation or effect, and though it was possibly a wise precaution of Bujhawan Lal to get it made, his proper course would have been to follow it up by attaching the decree of Mahadeo Lal against Sukhraj Rai. This step, however, would not have put Bujhawan Lal in a better position, because s. 209 being followed and the decrees being essentially [869] cross-decrees, that for the smaller amount became absorbed in the one for the larger, and attachment could not affect it. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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2 A. 869.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

OSTOCHE (*Plaintiff*) *v.* HARIDAS AND ANOTHER (*Defendants*).*
[3rd May, 1880.]

Declaratory Decree—Consequential Relief—Court-fees—Act VII of 1870 (*Court Fees Act*), *ss.* 7 (*iv*), *sch. ii*, 17 (*iii*).

In a suit for a declaration of proprietary right in respect of a house in which the removal of an attachment of such house in the execution of a decree was sought, the plaintiff did not, as s. 7 of the Court Fees Act directs, state in his plaint the amount at which he valued the relief sought, nor did the Court of first instance cause him to supply this defect. On appeal by the plaintiff from the decree of the Court of first instance dismissing his suit, the lower appellate Court demanded from the plaintiff Court-fees in respect of his plaint and memorandum of appeal computed on the market-value of such house, the plaintiff having only paid in respect of those documents respectively the Court-fees payable in a suit for a declaration of right where no consequential relief is prayed. *Held* that the market-value of the property could not be taken by the lower appellate Court to be the value of the relief sought, as the plaintiff did not seek possession of the property, and that as the valuation of the relief sought rested with the plaintiff and not the Court, and as in this instance the declaration of right claimed necessarily carried with it the consequential relief sought, of which the value was merely nominal, further Court fees could not be demanded by the lower appellate Court from the plaintiff.

[**F.**, 17 B. 56 (60); 111 P.R. 1913=23 P.L.R. 1914=228 P.W.R. 1913; **Appr.**, 32 C. 734 (739)=9 C.W.N. 690; **R.**, 6 C.L.J. 427=11 C.W.N. 705 (709, 710).]

THE original plaintiff in this suit, which was instituted in the Court of the Subordinate Judge of Jaunpur, was one Abdul Rahman. He stated in his plaint that he had purchased a certain house at a sale in the execution of a decree against one Sarah Matthews, that he was unable to obtain possession of it, as it was in the possession of a mortgagee, and that his cause of action was the proclamation of the house for sale in the execution of a decree held by the defendant Hari Das against Sarah Matthews; and he claimed a declaration of his proprietary right to the house "by setting aside the order of the 13th May, 1878, maintaining the attachment of the property" in the execution of Hari Das' decree. He further stated [870] in his plaint that the market-value of the house was Rs. 1,441. He paid in respect of his plaint a Court-fee of Rs. 10, being the fee payable under No. 17 (iii), sch. ii of Act VII of 1870, in a suit to obtain a declaratory decree where no consequential relief is prayed. The house having been put up for sale in the execution of Hari Das' decree while the plaintiff's suit was pending, the purchaser was subsequently made a defendant in the suit. The defendants contended *inter alia*, that the plaintiff should have paid in respect of his plaint a Court-fee computed on the market value of the house, which they alleged was not less than Rs. 3,500. The Subordinate Judge held as follows with regard to this contention:—"I think the plaintiff has properly paid his fees according to No. 17 (iii), sch. ii of Act VII of 1870, as no consequential relief is asked; if the plaintiff proves his proprietary right, the attachment and sale in execution of defendant's decree will *ipso facto* be void and set aside by moving the Court in the

* Second Appeal, No. 1342 of 1879, from a decree of G. E. Knowx, Esq., Judge of Benares, dated the 16th September, 1879, affirming a decree of Pandit Jagat Narain, Subordinate Judge of Jaunpur, dated the 19th June, 1878.

execution-department: this view is confirmed by the ruling in *Chunia* v. *Ram Dial* (1): in this case the sale took place after the institution of the suit and the plaintiff did not sue for its annulment: the market-value of the property may be assumed to be Rs. 2,000, at which the plaintiff had valued it in his objection filed under s. 278, Civil Procedure Code." The Subordinate Judge then proceeded to determine the suit on the merits and dismissed it. Abdul Rahman having subsequently conveyed his rights and interests to one Ostoche, the latter appealed to the District Judge, paying in respect of his memorandum of appeal the same Court-fee as had been paid in respect of the plaint. The District Judge held that the plaintiff was seeking consequential relief and ordered Ostoche to pay within a fixed period, in respect of the plaint, an additional Court-fee Rs. 200, and similar additional Court-fee in respect of his memorandum of appeal. These fees were computed on the amount alleged by the defendants to be the market-value of the house, *viz.*, Rs. 3,500. Ostoche having failed to carry out this order, the District Judge dismissed his appeal, the material portion of his decision being as follows:—"The prayer in the plaint is for cancelment of a miscellaneous order bearing date May 13th, 1878, which in turn confirmed an order of attachment and brought to sale the property in suit, and for establishment of plaintiff's proprietary [871] right. The plaintiff-appellant is the *locum tenens* of one Abdul Rahman, who says he purchased the property claimed from Mrs. S. Mathews on the 24th August, 1876. There is on the record a paper dated 13th May, 1878, in which it is set forth by the lower Court, and admitted by both parties, that Abdul Rahman himself admits that he had never up to that date obtained possession of this property, but that it was still in the possession of one Abdullah, a mortgagee of the aforesaid Mrs. S. Mathews. This fact is also set forth in the appellant's plaint before the lower Court. It follows, therefore, that appellant's prayer cannot be looked upon as a prayer for a mere declaratory decree: such a decree could only declare him to be the purchaser of Abdul Rahman's rights—rights which have never been reduced to possession, and for which he could not sue in this way, seeing that he was able to seek further relief and omitted to do so. The prayer for establishment of proprietary right must be looked upon as a prayer for a declaratory decree with consequential relief; this being the case, appellant was directed to file the deficient duty amounting to Rs. 400 on or before the 16th of this month: as he has failed to do so, his suit must stand dismissed, and the appeal also be dismissed with costs."

The plaintiff appealed to the High Court.

Mr. *Spankie*, for the appellant, contended that possession of the house was not the relief sought in the plaint, but the removal of the attachment. The Court-fees cannot be computed according to the value of a relief which is not sought. In a suit to obtain a declaratory decree where consequential relief is prayed, the Court-fee should be computed according to the amount at which the relief sought is valued, and the plaintiff should state the amount at which he values it—(s. 7, iv, Court Fees Act). The plaintiff in this suit did not state the amount at which he valued the relief sought, nor was he called upon by the Court of first instance to do so. He cannot now be called upon to state it. The value of the relief sought is nominal, as, if the plaintiff obtains a declaration of right, he

(1) 1 A. 360.

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obtains all the relief required. The plaint and memorandum of appeal are therefore sufficiently stamped.

Mr. *Conlan* and Munshi *Hanuman Prasad*, for the respondents.

JUDGMENT.

[872] The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—The lower appellate Court has dismissed the appeal preferred to it apparently on the ground that the appellant had not paid a sum of Rs. 400 demanded from him as Court-fees due in respect of the consequential relief sought by him in the suit on the plaint and the memorandum of appeal, and has on the same ground also dismissed his claim which had been dismissed on the merits by the Court of first instance. The lower appellate Court has assumed Rs. 3,500 the market-value of the property as alleged by the defendants, to be the value of the consequential relief sought, but the consequential relief sought was not the possession of the property, but the removal of an attachment from it.

The value of the relief sought should have been stated in the plaint. It is not stated therein ; and the Court of first instance did not cause the defect to be supplied. The plaint states the value of the property to be Rs. 1,441, but that amount cannot be taken to be the value of the relief sought. Under the Court Fees Act, the valuation of the relief sought rests with the plaintiff and not with the Court. In this particular instance the declaration of the right claimed necessarily carried with it the consequential relief sought, of which the value was merely nominal. We accordingly set aside the lower appellate Court's decree and remand the case to it for fresh disposal on the merits. The costs of this appeal will follow the event.

Cause remanded.

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2 A. 872.

APPELLATE CIVIL.

Before Sir Robert Stuart Kt., Chief Justice, and Mr. Justice Spankie.

THAKURYA (*Defendant*) *v.* SHEO SINGH RAI AND ANOTHER (*Plaintiffs*).* [4th May, 1880.]

Suit for money due on accounts stated—Act IX of 1871 (*Limitation Act*), *sch. ii, art.* 62 *—Act XV of* 1877 (*Limitation Act*), *s.* 2, *sch. ii, art.* 64*—Title acquired under Act IX of* 1871*—Suit for money lent.*

The plaintiff sued the defendant for money due upon accounts stated between them in December, 1874, when Act IX of 1871 was in force. Such [873] accounts were not signed by the defendant. The suit was instituted after Act XV of 1877, which repealed Act IX of 1871, had come into force. *Held* that the plaintiff's right to sue upon such accounts within three years from the date the same were stated was not a "title" acquired under Act IX of 1871 within the meaning of s. 2 of Act XV of 1877, which, under the provisions of that section, was not affected by the repeal of Act IX of 1871, and the suit was not governed by the provisions of Act IX of 1871, but by those of Act XV of 1877, and that, therefore, the accounts not being signed by the defendant, the plaintiff could not claim the

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* Second Appeal, No. 937 of 1879, from a decree of R. M. King, Esq., Judge of Meerut, dated the 20th June, 1879, reversing a decree of Babu Kashi Nath Biswas, Subordinate Judge of Meerut, dated the 24th December, 1878.

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benefit of art. 64 of sch. ii of the latter Act, but must be regarded as suing merely for money lent.

[N.F., 23 A. 502 (503)=A.W.N. (1901) 150; Appr., 3 A. 148 (150) (F.B.); R., 37 B. 513 =15 Bom. L.R. 533=20 Ind. Cas. 162.]

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court remanding the case to the lower appellate Court.

Mr. *Conlan* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *Colvin* and Munshi *Hanuman Prasad*, for the respondents.

The High Court's (STUART, C. J., and SPANKIE, J.) order of remand was as follows:—

ORDER OF REMAND.

The plaintiff-respondent sued to recover a sum of money upon an account stated on the 14th December 1874, between defendant and himself, which, however, was not signed by the defendant or his agent duly authorised in this behalf. The Subordinate Judge held that the claim was barred by art. 64, sch. ii of Act XV of 1877, the new law of limitation. It is not necessary to give his reasons, which indeed are not very clear: one item of Rs. 15, however, the Subordinate Judge thought might be in time under art. 64. On the merits, however, he held that there had been no adjustment of accounts on the day named, and he appears to have discredited the plaintiff's claim altogether, including the item of Rs. 15 referred to above, and he dismissed the suit. The plaintiff in appeal to the Judge urged that Act IX of 1871 applied and not the more recent Act. The Judge, considering the bearing of s. 2, Act XV of 1877, of the words "nothing herein shall be deemed to affect any title acquired under Act IX of 1871," held that plaintiff had acquired a right under that Act to sue on accounts stated within three years from the date upon which the accounts were stated, and also that Act XV of 1877 did not bar the claim. On the merits the defendant had contended that all his accounts with plaintiff had been settled and closed in 1927 Sambat. He had failed to establish this plea, producing no accounts of his [874] own, though on a former occasion he had relied upon his books in proof of money being due to him. On the other hand, the Judge, for reasons assigned by him, held the books produced by plaintiff and other evidence on his behalf to be entirely satisfactory in proof of the truth of the claim, which he decreed in full with costs, reversing the decree of the Subordinate Judge.

It is contended that the suit is certainly governed by the provisions of Act XV of 1877, that no balance in adjustment of account was proved, and that the reasons assigned by the Judge for accepting the plaintiff's accounts were insufficient. It appears to us that the Judge has misapprehended s. 2, Act XV of 1877. The words "title acquired, or to revive any right to sue barred under that Act, or under any enactment thereby repealed," do not affect the claim in the way suggested by the lower appellate Court: a right of action is one thing and the completion of a title is another thing. The plaintiff's right of action did not accrue by reason of Act IX of 1871, but because, according to his averment, on a certain day a sum of money was found to be due to him from the defendant on accounts stated between them. The limitation law simply provided a period within which the right of action must be exercised. The plaintiff acquired in this case no "title," to use the words of the Act, under Act

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IX of 1871, or any other Acts thereby repealed. Act XV of 1877 is certainly the law of limitation to be applied to the suit.

But the claim as brought upon an account stated is not covered by art. 64, Act XV of 1877, inasmuch as the accounts though stated in writing are not signed by the defendant or his agent duly authorised in this behalf. The plaintiff, therefore, cannot claim the benefit of this article, and if the suit is to be entertained at all, the claim must be brought under some other article in sch. ii, if the plaintiff desires to save limitation. The Judge has found in favour of the correctness of the plaintiff's accounts and the indebtedness of the defendant, and has, on the evidence, held that defendant did not settle and close accounts with plaintiff as contended in Sambat 1927. Assuming, then, that the plaintiff cannot avail himself of the limitation provided in art. 64, Act XV of 1877, he may be regarded as suing merely for money lent to the defendant, and [875] it may be that some portion of the moneys lent may not be barred by limitation and therefore is claimable from the defendant, and under the Judge's view of the case any such sum would still be due. The Subordinate Judge has suggested that Rs. 15 are within the period of limitation, if art. 64 does not apply to the claim, but this would not be sufficient to enable us to dispose of the appeal.

The Judge should ascertain and determine whether any and what sums included in the claim are within the period of limitation of three years from the dates of the loans of such sums, and return his finding on this issue. On receipt of the finding one week will be allowed for objections, and at the expiration thereof the appeal will be decided.

Cause remanded.

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2 A. 875.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

SHEO PARTAB NARAIN SINGH (*Defendant*) *v.* SHEO GHOLAM SINGH (*Plaintiff*).* [4th May, 1880.]

Appeal when presented—Memorandum of Appeal insufficiently stamped—Act X of 1877 *(Civil Procedure Code)*, s 54 (*b*)—*Limitation.*

For the purposes of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the momorandum of appeal is insufficiently stamped and is returned in order that the deficiency may be supplied, it is again presented (1).

When an appellate Court returns an insufficiently stamped memorandum of appeal in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied (1).

[Cons., 12 A. 129 (145) (F.B.)]

THE defendant in this suit preferred an appeal from the decree of the Court of first instance on the 23rd June, 1879, within the period of

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*Second Appeal, No. 1322 of 1879, from an order of J. W. Power, Esq., Judge of Ghazipur, dated the 18th July, 1879, rejecting a memorandum of appeal from a decree of Munshi Manmohan Lal, Munsif of Ghazipur, dated the 26th May, 1879.

(1) See also *Jagan Nath* v. *Lalman*, 1 A. 260, and the Indian Limitation Act, s. 4, Explanation.

limitation allowed by law. The lower appellate Court, on the 5th July, 1879, being of opinion that the memorandum of appeal was written upon paper insufficiently stamped, returned it to the defendant in order that the requisite stamp-paper might be supplied, without fixing any time within which the same should be supplied. On the 18th July, 1880, the defendant, having supplied the requisite stamp-paper, again presented the memorandum of [876] appeal to the lower appellate Court. The lower appellate Court rejected it on the ground that the time prescribed by law for the appeal had expired.

The defendant appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the appellant.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

The portion of the judgment of the Court (PEARSON, J., and STRAIGHT, J.) material to the purposes of this report was as follows:—

PEARSON, J.—The memorandum of apreal to the lower appellate Court was presented on the 23rd June, 1879, admittedly within time. The lower appellate Court was therefore wrong in declaring, on the 18th July following, that the appeal was not within time. The orders passed by the lower appellate Court on the 23rd June and 5th July in the matter of the deficiency of the Court-fee were not in accordance with the provisions of s. 54 (*b*), Act X of 1877. The Judge should have fixed a time within which the deficiency was to be paid up, and on the expiry of that period, in the event of its not being paid up, should have rejected the appeal.

Having regard to the irregularity of the lower appellate Court's procedure, we must allow the appeal, and, reversing the Judge's order, direct him to place the appeal on his file and proceed to dispose of it according to law. We make no order as to costs.

Appeal allowed.

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2 A. 876 (F.B.).

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield and Mr. Justice Straight.

ISRI SINGH (*Defendant*) v. GANGA AND ANOTHER (*Plaintiffs*).*
[5th May, 1880.]

Wajib-ul-arz—*Pre-emption—Act XIX of* 1873 (*N.W.P. Land-Revenue Act*), *ss.* 61, 65, 91, 257—*Record-of-Rights.*

A *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records, such [877] evidence being open to be rebutted by any one disputing such custom. When such a *wajib-ul-arz* records a right of pre-emption by contract between the shareholders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the shareholders assented to the making of the record and in consequence were consenting

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* Second Appeal, No. 720 of 1879, from a decree of G. E. Knox, Esq., Subordinate Judge of Allahabad, dated the 28th March, 1879, reversing a decree of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 20th November, 1878.

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parties to the contract of which it is evidence, and it will be for those shareholders repudiating such contract to rebut such presumption.

[F., A.W.N. (1881) 114; A.W.N. (1885) 189; Appr., 8 A. 434 (437); 12 A. 234 (257) (F.B.); R., 7 A. 720 (727); 25 A. 90 (96); 26 A. 549=1 A.L.J. 278; 33 A. 196=7 A.L.J. 1040=7 Ind. Cas. 680; A.W.N. (1901) 29.]

THIS was a reference to the Full Bench by a Division Bench (STUART, C.J., and STRAIGHT, J.). The facts giving rise to the reference and the points of law referred will be found stated in the order of reference, which was as follows:—

ORDER OF REFERENCE.

STUART, C.J.—This is a second appeal from the judgment of Mr. G. E. Knox, acting with powers as a Subordinate Judge in the district of Allahabad, in a suit in which the plaintiffs claim a right of pre-emption in preference to the vendee, Babu Isri Singh, defendant No. 5, who is a stranger. The clause in the *wajib-ul-arz* is paragraph twelve, and is in these terms:—"A sharer in the patti shall have a right to purchase at the time of sale and mortgage at the price offered by a stranger in preference to a sharer in another patti." This is certainly not very clear, and it is difficult to know what is meant by it unless we hold that "stranger" and "a sharer in another patti" are synonymous, which was probably intended, indeed, must have been intended, for otherwise the paragraph has no meaning. We may take it, then, that the paragraph means that a sharer in a patti shall have a right of pre-emption over a stranger vendee.

The Munsif found that the *wajib-ul-arz* had not been signed by the vendors, and that there was no evidence to show that they consented to be bound by its terms, and he, therefore, held that the *wajib-ul-arz* was not binding upon them or the defendant-vendee. In appeal to Mr. Knox, he found that the *wajib-ul-arz* in the case had been prepared in accordance with the rules prescribed by the Board of Revenue for the guidance of Settlement Officers under Act XIX of 1873, s. 257, and the conclusion he arrived at was, that although the *wajib-ul-arz* had not been signed by the vendors, the right of pre-emption had been "recognized" by the shareholders, and was binding on each one of the brotherhood. He therefore held that the vendors were bound to offer the share to the plaintiff **[878]** before disposing of it to a stranger. The Subordinate Judge therefore decreed the appeal to him, reversed the decree of the Munsif, and granted the plaintiff the right of pre-emption claimed.

In second appeal to this Court it is contended, as had been found by the Munsif, that the *wajib-ul-arz*, having not only not been signed, but not having been assented to by the vendors, the paragraph respecting the right of pre-emption was not binding on them.

The word "recognized" used by the Subordinate Judge is rather a loose term in a judicial finding, but taken in connection with the Subordinate Judge's decretal order, it must mean that the *wajib-ul-arz*, though not actually signed, had been assented to and accepted by the shareholders, and the question before us is whether such assent, without actual signature, is sufficient to hold all the sharers bound by the *wajib-ul-arz* generally, and in particular by the proviso respecting the right of pre-emption. It is also to be observed that the record-of-rights in the case appears to have been prepared under s. 62 of the Revenue Act, which provides, among other things, that the record shall contain a list of all the co-sharers; and by s. 90 of the same chapter of the Act it is provided

that the Board shall, from time to time, prescribe the form in which the record is to be made up. The Board have, in fact, issued rules for the formation of the record-of-rights which is to consist of three statements, the third being the *wajib-ul-arz*, which is defined to be a record of village-customs, such being the character of the record-of-rights in the case before us, it must be presumed that the condition of pre-emption in the *wajib-ul-arz* was known to the vendors, and it was not enough to contend that it was not binding on them and their vendee simply because the *wajib-ul-arz* was not signed by them, and that there was no other evidence to show that they had expressly consented to its terms.

I have carefully examined the rulings of this Court in pre-emption suits and the following appear to be the principle of these:—In *Chowdhree Brij Lall* v. *Goor Suhai* (1) it was held that the *wajib-ul-arz* is to be regarded rather as an official record of usages or agreement than as a contract. In *Sheoumber Sahoo* v. *Bhowanee* [879] *Deen* (2) it was ruled that claims of pre-emption might be made both on contract and custom. In *Dabee Dutt* v. *Enait Ali* (3) it was laid down that a *wajib-ul-arz* is not a mere contract, but a record of rights made by a public officer, and it would, therefore, follow that without attestations or signature by the sharers the *wajib ul-arz* was entitled to weight as evidence of custom. In *Chadami Lal* v. *Muhammad Bakhsh* (4) it appears to have been decided that the *wajib-ul-arz* is a special agreement, and that it excludes evidence of custom. This perhaps, as a general proposition, is a doubtful ruling, especially in regard to another definition which has been given of the *wajib-ul-arz*, that it is a record of custom, and it is so called in the Revenue Act, XIX of 1873. In *Maratib Ali* v. *Abdul Hakim* (5), it also appears to have been ruled, although not very clearly, that the *wajib-ul-arz*, must be held to exclude evidence of custom, but that depends on the terms of the *wajib-ul-arz*, and the nature and scope of the custom, the two might not be inconsistent. And there are numerous cases not reported, in which the decisions appear to have been hastily written on the paper-books, to the effect that the *wajib-ul-arz* was *prima facie* evidence of custom, and that to be binding on sharers it was not absolutely necessary to be signed by them, but by their silence showing acquiescence, they must be understood to have accepted or acquiesced in its terms.

No exception can be taken to the record-of-rights in the present case, seeing that it has been prepared according to the provisions of the Revenue Act, XIX of 1873, and the rule I deduce from the Revenue Act, and the rulings I have referred to is, that the *wajib-ul-arz* is a public record-of-rights *prima facie* binding on all the co-sharers; that it is not binding on any sharer in the patti who has expressly repudiated it, but that it becomes a contract binding on all who may have signed it, or who may be taken by their acquiescence, express or implied, to have accepted its provisions.

Such is my understanding of the law on the subject, but I desire to refer the matter to the Full Bench of the Court with the following [880] questions:—(i) Is the *wajib-ul-arz* to be regarded as a public record-of-rights *prima facie* binding on all the co-sharers, but which may be repudiated by any of the sharers on coming into the patti? (ii) Does the *wajib-ul-arz* become a contract when it is either expressly or by necessary implication or acquiescence assented to by the co-sharers?

(1) H.C.R. F.B. N. W. P. (1866-67) 128.
(2) H.C.R. N.W.P. (1870) 223. (3) H.C.R. N.W.P. (1870) 395.
(4) 1 A. 563. (5) 1 A. 567.

1880 MAY 5. — FULL BENCH. — 2 A. 876 (F.B.).

STRAIGHT, J.—I fully concur in the reference to the Full Bench of the two questions propounded by the learned Chief Justice.

Mr. *Conlan*, Mr. *Colvin* and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath*, Babu *Oprokash Chandar Mukarji*, and Lala *Ram Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Full Bench :—

STUART, C. J.—After hearing the argument addressed to us in Full Bench, I remain substantially of the opinion expressed in my referring order ; but I desire now to add one or two observations. In the first place I have to express my regret that my statement of the case of *Chadami Lal* v. *Muhammad Bakhsh* (1) is not quite accurate and scarcely does justice to my colleagues, Pearson, J., and Oldfield, J., who decided it. I state that by their judgment "it appears to have been decided that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom," adding that "this perhaps as a general proposition, is a doubtful ruling," and so it undoubtedly would be as a general proposition. But again looking into the report of the case I find that the suit was for pre-emption founded on a special agreement which the *wajib-ul-arz* in that case was considered to be, "and not," as the judgment states, "on any well-established custom apart from the contract made under the administration-paper." So that the case really lays down no general principle of law excepting perhaps this, that a *wajib-ul-arz* may be a contract or agreement complete in itself under which evidence of any contradictory custom would be excluded.

I have next to remark that, as s. 91 of the Revenue Act, XIX of 1873 was suggested at the hearing as supplying an answer to the [881] first question in the order of reference, that section has not in my opinion such effect. It simply provides that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." But it does not necessarily follow that such entries are *prima facie* binding on the co-sharers. On the contrary, I believe that, according to the practice recognized by the Revenue Department of these Provinces, entries in the record-of-rights are not binding on those who have attested and signed it, but they may be contested and the parties allowed to prove that the record is wrong, unless the entries have been made by order of the Settlement Officer when they would appear to be considered *prima facie* binding.

In regard to the second question in the order of reference, I have been struck by a remark made by my colleague Mr. Justice Spankie that, if the *wajib-ul-arz* is to be looked upon as a contract, it might be required to be stamped, and he would prefer that entries of such a nature should rather be regarded as evidence of the agreement. I gladly adopt this view which, besides stating the law in very appropriate terms, has the merit of avoiding any infringement of the Stamp Act. With these modifications, I would answer both questions put to the Full Bench in the referring order in the affirmative, leaving any further expression of my views till the case which gave rise in the reference comes back to my colleague Straight, J., and myself as the referring Division Bench.

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(1) 1 A. 563.

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OLDFIELD, J.—The *wajib-ul-arz* or administration-paper forms part of the record-of-rights of a mahal which is prepared under the provisions of s. 61 and following sections of the Land Revenue Act, and with reference to the provisions of s. 65 and the rules framed under s. 257, it is a public record, *inter alia*, of customs and rights affecting the share-holders of the mahal and including such as relate to pre-emption. The right of pre-emption may be founded on the Muhammadan law, or, as is more generally the case, where it affects Hindus, on long established custom having the force of law, or on special contract between the share-holders, and the *wajib-ul-arz* may record the practice of pre-emption as based on any of these grounds, and the entry may be either evidence of custom or of the contract. The law (s. 90, Land Revenue Act) prescribes that the record-of-rights shall be drawn up in a form and attested in a manner to be [882] prescribed by the Board of Revenue, and s. 91 of the Act directs that "all entries in the record so made and attested shall be presumed to be true till the contrary is proved." Such being the legal presumption in favour of the truth of the entries the record-of-rights, and considering the public character of the document and the publicity with which it is prepared, there can be no doubt, when it has been prepared and attested in the term and manner prescribed by the Board of Revenue, that the *wajib-ul-arz* becomes *prima facie* evidence of the existence of any custom of pre-emption which it records, open to be rebutted by any one disputing the custom; and when it records right of pre-emption by contract between the share-holders, it is evidence of a contract binding all the parties to it and their representatives, and there will be a presumption that all the share-holders assented to the making of the entry, and in consequence were assenting parties to the contract of which it is evidence, and it will be for those repudiating the contract to rebut this presumption.

A case,—*Chadami Lal* v. *Muhammad Bakhsh* (1),—which was decided by Mr. Justice Pearson and me, has been noticed in the order of reference of the learned Chief Justice, and I wish to add with reference to some remarks on the judgment in that case, that I do not find that we ruled "that the *wajib-ul-arz* is a special agreement and that it excludes evidence of custom." All we said was that the plaintiff in the case before us had brought his claim on the contract in the recent administration-paper and not on any well established custom, and we refused to allow him to shift the ground of his action, but we expressly observed that an entry of the right of pre-emption in a former administration-paper might be evidence towards proving a custom though it does not necessarily establish it.

PEARSON, J.—I concur in the remarks of my learned colleague Mr. Justice Oldfield on the questions referred to the Full Bench.

SPANKIE, J.—In reply to the first question I would say that s. 90 of Act XIX of 1873 authorises the Board of Revenue from time to time to prescribe the form in which the record to be made under the provisions of Chapter III of the Act shall be drawn up [883] and the manner in which it shall be attested. Accordingly, orders have been drawn out by the Board, and the *khewat* and the *wajib-ul-arz*, which form a portion of the record-of-rights, are to be attested by the Settlement or Assistant Settlement Officer in the presence of all the lambardars of each mahal or their authorised agents, and as far as possible of all other persons whom they may concern and shall be signed by the Settlement Officer or Assistant

(1) 1 A. 563.

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Settlement Officer and by all the lambardars and the patwari. When a document has been so attested, all the entries in the record shall be presumed to be true until the contrary is proved, as provided by s. 91. Such a record is *prima facie* binding on all the co-sharers, and cannot be repudiated by any one succeeding to or acquiring a share except as permitted by s. 91.

As to the second question, I would say that the *wajib-ul-arz* is a record of those arrangements made by the Settlement Officer in accordance with the provisions of s. 65, cl. (*e*), of which includes in the record so formed any other matters which the Settlement Officer may be directed to record under rules framed under s. 257 of the Act, and the documents must be attested and drawn up as provided by s. 90; amongst other matters the Settlement Officer is required to record the custom relating to pre-emption in the village. The *wajib-ul-arz* then is a record of village-customs. But when it relates to pre-emption, it may record the custom existing in the mahal or the agreement which the share-holders have already made amongst themselves. I do not look upon it as the contract itself, for as such it might require to be stamped, but when it recites the fact of the existence of any agreement amongst the share-holders as to the condition under which pre-emption might be claimed, I would regard the entry as evidence of that agreement. In either case, the custom, if it exists, is binding upon the share-holders, or they are bound by an agreement which can be proved, and the nature of which has been recorded in the administration-paper for the guidance and information of all the share-holders, a document in which the truth of the entries is to be presumed until the contrary be shown.

STRAIGHT, J.—I agree with my honorable colleague Mr. Justice Spankie.

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2 A. 884.

[884] APPELLATE CIVIL.

Before Mr. Justice Pearson, Mr. Justice Spankie and Mr. Justice Straight.

LACHMAN PRASAD (*Defendant*) *v.* BAHADUR SINGH AND OTHERS (*Plaintiffs*).* [7th May, 1880.]

Pre-emption—Cause of action—Conditional sale—Second appeal—Act X of 1877 (Civil Procedure Code), ss. 542, 584, 587.

Per PEARSON, J. and STRAIGHT, J., (SPANKIE, J., dissenting)—That in disposing of a second appeal the High Court is competent, under s. 542 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.

Also *per* PEARSON, J., and STRAIGHT, J. (SPANKIE, J., dissenting)—That the cause of action of a person claiming the right of pre-emption in the case of a conditional sale arises when the conditional sale takes place and not when it becomes absolute; and therefore, where a conditional sale took place in 1867, and after it had become absolute a person sued to enforce his right of pre-emption in respect of the property sold, basing his claim upon a special agreement made in the interval between the date of the conditional sale and the date that it became absolute, and alleging that his cause of action arose on the latter date, that the

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* Second Appeal, No. 716 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 4th April, 1879, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 20th March, 1878.

suit was not maintainable, the plaintiff having no right of pre-emption at the time of the conditional sale.

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[R., 3 A. 610 (619) (F.B.); 14 C. 761 (767); 1 L.B.R. 184 (185); U.B.R. Civil (1892—1896) 265 (266).]

ONE Umeda Singh on the 3rd May, 1867, executed a deed of conditional sale in respect of a two-anna share in mauza Tikarbhan in favour of Lachman Prasad, the defendant in this suit, who was not a co-sharer of the village, but a stranger. Application was made under Regulation XVII of 1806 for foreclosure, and on the 12th August, 1875, the year of grace having previously expired on the 13th February, 1875, the conditional sale was declared absolute. Lachman Prasad subsequently preferred a suit against Umeda Singh for the possession of the property and obtained a decree in execution of which on the 26th September, 1875, possession of the property was delivered to him. On the 11th December, 1875, one Jagraj Singh, a share-holder in mauza Tikarbhan, instituted the present suit against Lachman Prasad to establish his right of pre-emption in respect of the property, founding such right upon a special agreement recorded in the administra-[885]tion-paper of mauza Tikarbhan which was dated the 6th February, 1873. The terms of that document relating to the right of pre-emption were that the custom in the neighbourhood was that when any sharer sells his share, first his co-sharers, next his sharers in the patti, afterwards his sharer in the thoke, then a stranger, may get it, and that the proprietors of mauza Tikarbhan also approve of the aforesaid custom. While the suit was pending Jagraj Singh died and his sons were made plaintiffs in his stead. The Court of first instance dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree. On second appeal by the defendant to the High Court the learned Judges of the Division Bench (PEARSON, J., and SPANKIE, J.) before which such appeal came differed in opinion on the point whether the question whether the plaintiffs had any cause of action or not could be considered on second appeal, such question not having been raised by the defendant in the Courts below or in his memorandum of second appeal, but having been raised at the hearing of such appeal; and on the point whether the plaintiffs had any cause of action or not.

The Senior Government Pleader (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for the respondents.

The material portions of the judgments of the Judges of the Division Bench were as follows:

PEARSON, J.—But the material point for determination in my opinion is whether a valid cause and right of action accrued to Jagraj Singh on the 13th February, 1875, and that question I am free and competent to consider under s. 542 of the Procedure Code. I observe that the sale of Umeda Singh's share to the defendant did not take place on that date. His share had been sold conditionally, it is true, so long before as the 3rd of May, 1867. What happened on the 13th February, 1875, was merely that the sale became absolute. No fresh transfer was made, but the character of the transferee's possession was modified by the operation of the terms on which the original transfer had been made. The transaction commenced on the earlier and came to an end on the latter date. No new transaction was effected on the latter. The clause[886]in the *wajib-ul-arz* dated 6th February, 1873, must, I conceive, be held to refer to future

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not to past transactions. Umeda Singh did not sell his share after the date of the *wajib-ul-arz*, but only failed to redeem it from mortgage. He was not when the year of grace was expiring in a position to offer the property to Jagraj Singh. He could not have empowered Jagraj Singh to redeem it as his substitute. At the time of conditional sale it is not shown that any right of pre-emption was possessed by the proprietors of mauza Tikarbhan. I conclude, therefore, that the present suit is unmaintainable, and I would decree the appeal without costs, reversing the lower appellate Court's decree and restoring that of the Court of first instance.

SPANKIE, J.—I regret that I cannot agree with Mr. Justice Pearson in the latter part of his judgment. The objection taken by my honorable colleague is not one taken by appellant in the Court below, nor indeed in this Court. I admit that under s. 542 the Court is not confined to the grounds set forth in the memorandum of appeal. But the chapter in which the section is found refers to appeals from original decrees. I am aware that s. 587 of Act X of 1877 provides that the provisions of Chapter XII should apply as far as may be to appeals from appellate decrees. But the words "as far as may be" are of importance, and they should be considered with reference to s. 584, cls. (*a*), (*b*) and (*c*). On no other grounds than those allowed by the section does a second appeal lie. The objection on which my honorable colleague relies was not, as we have seen, raised below, and I doubt whether we can now set aside the Judge's decision solely upon the objection taken by my colleague. I certainly think it was for the appellant to urge that there was no valid cause and right of action on the grounds taken by my honorable colleague, and it was not for the Court to make the objection in second appeal. But, however this may be, I go further, and would say that there was no sale without power of redemption until the foreclosure had been completed, and defendant had obtained a decree for possession as owner. Until these conditions had been fulfilled the transaction was one of mortgage and a power of redemption remained. After these conditions had been fulfilled and rendered valid by decree of Court, the transaction once partaking of **[887]** a double character became a single one, and an absolute sale and possession was given under the sale-deed. On this the plaintiff's cause of action arose, and under the terms of the administration-paper, he was at liberty to bring or continue this suit.

I would remand the appeal to enable the Judge to determine the amount of the sale-consideration on payment of which the plaintiffs would be entitled to obtain the property in suit and to fix a period within which that amount should be paid. When the lower appellate Court returns the finding on this point, one week may be allowed for objection, and on its expiration I would dispose of the appeal.

The case, in consequence of the difference of opinion between Pearson, J., and Spankie, J., was referred, under s. 575, Act X of 1877, to Straight, J., who delivered the following judgment:

JUDGMENT.

STRAIGHT, J.—This appeal has been referred to me by order of the learned Chief Justice under s 575 of the Civil Procedure Code, in consequence of a difference of opinion on points of law between Pearson, J., and Spankie, J., composing the Division Bench before whom the case originally came.

The two questions properly arising out of this reference appear to be as follows:—(i) Was it competent for Pearson, J., to dispose of the appeal

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on a point of law not taken in the Courts below nor raised by the appellant's pleas ? (ii) If it was competent for him so to do, has he held rightly in decreeing the appeal, on the ground that no cause of action ever accrued to the plaintiffs-respondents, upon which they were entitled to maintain a suit for pre-emption?

Upon the first of these two points I think it was competent for Pearson, J., to entertain the objection that the suit could not be sustained, in the absence of any cause of action having arisen to the plaintiffs, even though such objection had not been taken in the lower Courts, and was not urged in the grounds of appeal. It is argued for the appellant that both in his original statement of defence and in the second of his pleas to this Court he substantially, if not specifically, called the plaintiff's title to sue in question. But, whether this be so or not, I [888] think that the terms of s. 542 of the Civil Procedure Code, so far as they are applicable to second appeals, allow the appellate Court a discretion, of which Pearson, J., was in my opinion fully justified in availing himself. The point upon which his judgment is based is purely one of law, and it arises directly upon the facts which are admitted and about which there can be no contradiction or controversy. Many cases might occur in which a careless and unreflecting use of s. 542 would cause hardship and injustice, but in the present instance the objection is simply a legal one, aiming directly at the status of the plaintiff to come into Court at all. Such an objection it seems impossible for the Court to avoid taking cognizance of in special appeal, even though it be raised for the first time at the hearing, any more than it could disregard a new point as to limitation or want of jurisdiction.

The second question for my consideration is not without difficulty, though the equities are clearly in favour of the view taken by Pearson, J. The mortgage or conditional sale-deed of the 3rd May, 1867, executed by Umeda Singh to the defendant-appellant, Lachman Prasad, for Rs. 700, charges his two-anna share in mauza Tikarbhan for three years on condition that the principal sum and interest shall be paid "within the said term, on the last day of the said term : if I fail to do so and do not get the mortgaged property freed from the mortgage, this mortgage-deed shall be considered as a conditional sale-deed and the mortgage-money a consideration therefor, and the mortgagee shall take proprietary possession of the property." From this it will be seen that the Rs. 700 with interest was to be repaid on or before the 3rd May, 1870, and then, if the mortgagor made default, the mortgagee was competent at once to take foreclosure proceedings to convert the conditional sale into an absolute one. No doubt Umeda Singh remained in possession until he was ousted by Lachman Prasad under process of law, and till the final order in the foreclosure proceedings was passed he still had his equity of redemption, but all this same time Lachman Prasad had his equitable rights and interests over the property pledged with him as security, and after the three years had expired and default had been made by the borrower, the only alternative open to Umeda Singh [889] was to pay the money within one year from the date of receiving notice of foreclosure, otherwise Lachman Prasad's proprietary title would by efflux of time become completely established. At the time Umeda Singh, signed the *wajib-ul-arz* he could not put the land, in which Lachman Prasad was jointly interested with him under disabilities and conditions, so to speak, of which the mortgagee had neither notice nor knowledge, nor could he make any contract which could have the retrospective effect of rendering an agreement

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he had already entered into incapable of fulfilment, in that other persons were to have a priority of right to purchase over the head of his conditional vendee. Whether the plaintiffs lay their cause of action as having arisen on the 13th February, 1875, when the foreclosure proceedings became final, or on the 26th September, 1875, when the defendant-appellant obtained possession, can make no difference. Umeda Singh had "no share" to offer for sale, pursuant to the terms of the *wajib-ul-arz*, and he was not in a position to fulfil its conditions, for all that remained to him till the 13th February, 1875, was his equity of redemption, which then became irretrievably lost. There was in effect no sale on that date in respect of which the plaintiffs could set up a right of pre-emption; all that took place was that the conditional vendee by operation of law became an absolute proprietor.

I am, therefore, of opinion that the view of Pearson, J., is correct upon both points referred to me, and I concur in his order that the appeal should be decreed and the decision of the first Court restored without costs.

Appeal allowed.

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2 A. 889.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

MEHDI HUSAIN (*Plaintiff*) *v.* MADAR BAKSH AND OTHERS (*Defendants*).* [7th May, 1880.]

Error or irregularity—Court-fees—Appeal—Act X of 1877 (Civil Procedure Code), s. 578.

The refusal of a plaintiff-respondent to make good a deficiency in Court-fees in respect of his plaint when called upon to do so by the appellate [890] Court is not a ground upon which the appellate Court should reverse the decree of the Court of first instance and dismiss the suit.

THE plaintiff in this suit obtained a decree in the Court of first instance. On appeal by the defendants against this decree the lower appellate Court set it aside and dismissed the suit on the ground that the plaintiff had not sufficiently stamped his plaint, and when called upon to stamp it sufficiently refused to do so. The decision of the lower appellate Court was in the following terms:—"Full fees have not been paid in this suit, and the appeal is decreed and the suit is dismissed in consequence of the plaintiff-respondent's refusal to make good the value of the fees. The suit is for a declaratory decree and consequential relief, and falls under s. 7, cl. iv, letter *c*, Act VII of 1870 In this section it is declared that the amount of fee payable in such a case shall be computed according to the amount at which the consequential relief sought is valued. Now the value of the suit is stated in the petition of plaint to be Rs. 600, and in the table of rates of *ad valorem* fees leviable on institution of suits of the Act, Rs. 45 is given as the fee chargeable. The plaintiff has paid Rs. 35 only: this finding of the Court is explained to the plaintiff in Court through his vakil and payment of the balance being refused, this

* Second Appeal, No. 14 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 1st October, 1879, reversing a decree of Maulvi Kamaruddin Ahmad, Munsif of Azamgarh, dated the 23rd June, 1879.

Court cannot but throw his case out. The appeal is decreed with costs and interest. The lower Court's decision is reversed, the suit being dismissed."

The plaintiff appealed to the High Court.

Shah *Asad Ali*, for the appellant.

Pandit *Ajudhia Nath* and Lala *Lalta Prasad*, for the respondents.

JUDGMENT.

The judgment of the Court (STUART, C.J., and OLDFIELD, J.) was as follows:

In this case the Munsif decreed the claim, but his judgment was reversed by the Judge, not on the merits, but because the plaintiff had paid a Court-fee too small for the suit, Rs. 35 instead of Rs. 45. In this view he may or may not be right, but clearly the objection is not one affecting the merits of [891] the case, and therefore as provided by s. 578, Act X of 1877, he ought not to have made the order he did reversing the decision of the Munsif. We must, therefore, set aside the Judge's order and direct him to try the appeal that was taken to his Court on the merits. Costs to abide the result.

Cause remanded.

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2 A. 891.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

NASIR HUSAIN (*Defendant*) *v.* MATA PRASAD AND ANOTHER (*Plaintiffs*).* [13th May, 1880.]

Voluntary alienation—Good Faith—Fraud—Consideration.

A decree-holder instituted a suit against his judgment-debtor and the latter's son for a declaration that a gift by the judgment-debtor to his son of certain property was fraudulent, and that such property was liable to be taken in execution of the decree. *Held* that, such gift having been made by the donor out of natural love and affection for the donee and in order to secure a provision for him and his descendants, and therefore for good consideration, and having operated, and the donor having reserved to himself sufficient property to satisfy the decree, the mere fact that the donor reserved to himself no property within the jurisdiction of the Court which made the decree was not a ground for holding that such gift was fraudulent and not made in good faith, and for setting it aside and allowing the decree-holder to proceed against the property transferred by it.

The law relating to voluntary alienations explained.

[R., 10 B. 395 (397) ; U.B.R. Civil (1892—1896) 315 (317).]

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court (SPANKIE, J., and OLDFIELD, J.) remanding the case.

The Senior Government Pleader (Lala *Juala Prasad*) and Shah *Asad Ali*, for the appellant.

Pandit *Nand Lal* and Babu *Jogindro Nath Chaudhri*, for the respondents.

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* Second Appeal, No. 168 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd December, 1878, reversing a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 24th December, 1877.

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2 A. 891.

ORDER OF REMAND.

The High Court's order of remand was as follows:—

Oldfield, J. (Spankie, J., concurring).—It appears that Zulfikar Husain executed a deed of gift dated 14th December, 1872, by [892] which he bestowed a large portion of his property on his son Nasir Husain. The plaintiff held at the time of gift a decree against him dated 21st November, 1867, and the debt which was unsecured amounted at the time of institution of the suit to Rs. 4,838-15-0; and he seeks in this suit to have it declared that the deed of gift was fraudulent, that certain house-property and a garden, part of the property conveyed by it, is the property of Zulfikar Husain and is liable to be sold in satisfaction of his decree. Nasir Husain, appellant, before us, pleaded that the deed was *bona fide* and valid, and that his father still possesses ample property sufficient to satisfy the debt, which he reserved from the operation of the gift; that the suit is barred by limitation; and that the decree sought to be satisfied is also barred by limitation. The first Court decided that there was no valid objection on the ground of limitation taken, and that the gift was valid, being on good consideration and *bona fide*, and the executant had at the time reserved to himself shares in twenty-five villages with an income of Rs. 200 a month. The Judge has reversed this decree; he remarks that Zulfikar Husain "transferred by deed of gift the bulk of his property lying in many districts including Cawnpore to his son for no consideration, but merely as it is orally alleged, because of his own reckless expenditure in charitable acts, charging his son with the redemption of the mortgages existing on a considerable portion of the said property, and reserving to himself for maintenance the income of some twenty-five villages, more or less, in the district of Sarun. The debts secured by mortgages are mentioned in the deed of gift but unsecured debts are not alluded to, nor is the house-property in Cawnpore which appellant now seeks to attach and sell in satisfaction of his decree covered by any mortgage, nor is there mention made in the deed of any reservation of property by the donor for his own purposes. If the gift be looked on as a *bona fide* valid alienation, the creditor who has not been prudent enough to secure his debt by collateral security must, regardless of the distance or expense attending the effort, proceed to Sarun in Bengal to satisfy his decree from such property as his debtor may possess in that district; he may or may not find it already incumbered in a manner he did not expect. There is no authentic indication on the record of any property being reserved by the judgment-debtor to himself. It is true that respondents offer to prove it but such proceeding is unnecessary: the law protects judgment-creditors as well as the [893] debtors from the consequence of a fraudulent act or from that which although not exactly a fraud cannot be held to be done in good faith towards all creditors. Ordinarily the law would not presume bad faith if a judgment-debtor, when alienating a portion of his property, leaves the means to his creditors of recovering their dues from his other assets. A creditor has the power to attach his debtor's property both before and after decree, and on failure to do so he has no lien on any particular portion of the property for the discharge of his claim more than the rest; but at the same time where, as in the present case, the unincumbered property is alleged to be some hundred miles beyond the jurisdiction of the Court executing the decree, and the decree could have been satisfied from unincumbered property lying within the jurisdiction of the Court, it is neither fair nor equitable to the creditor to require

him to do that which his debtor acting in good faith should have done for him, or by accepting as valid the post-decretal transfer of the property to subject him to the possibility of finding himself shut out from relief by other lien-holders' preferential claims on the residue of the property;" and the Judge concludes by not finding the alienation to be made in good faith. The Judge then seems to find that there was no good consideration for the gift and that it was not *bona fide*. But his judgment shows he has arrived at these conclusions through an inaccurate view of the law on the subject of voluntary conveyances. He holds that the conveyance, if made from a motive to provide for the son and to protect him from the consequence of the father's habit of careless expenditure in charitable purposes, cannot be held to be on good consideration, and in finding that it was fraudulent, he has rejected as quite immaterial the explanation that at the time of the gift Zulfikar Husain reserved to himself ample property to satisfy existing creditors, and has clearly been guided in his decision by the consideration that it was not only the duty of the debtor to reserve sufficient property to meet his creditors' demands, but to reserve property within the jurisdiction in which his creditors might reside or in which they might hold decrees against him; and the Judge appears even to think that a creditor who holds a decree at the time his debtor makes a voluntary conveyance of his property can claim to have it set aside, if it does not reserve property to **[894]** meet his decree within the jurisdiction of the Court that gave the decree.

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Voluntary conveyances of property liable to be taken in execution for payment of debts must be shown to be made on good consideration and to be *bona fide*, in order that they may be protected against the claims of creditors who hold claims at the time the conveyances were made; and there will be a presumption that voluntary conveyances are not *bona fide*, in respect of debts that existed at the time, but this presumption will be rebutted when the circumstances of the indebtment and the conveyances repel fraud. The law may be taken to be as given in Story's Equity Jurisprudence, 11th ed., vol. i, s. 365,—" Mere indebtment would not *per se* establish that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors. In the latest English case, touching the subject, it was unequivocally held that a voluntary deed, made in consideration of love and affection, is not necessarily void as against the creditors of the grantor, upon the common law, or the Statute of Elizabeth, but that it must be shown from the actual circumstances, that the deed was fraudulent, and necessarily tended to delay or defeat creditors."

In the case before us the deed gives the reasons for the conveyance as follows: "I have no other male child, and through him I expect to perpetuate my name and lineage, and also because he has ever been very dear to me, and since his attaining discretion up to this day has been devoted to my service and to please me and never acted contrary to my will, I put the donee in full proprietary possession, &c.;" and all rights of creditors secured by the mortgages of the said property are specially reserved by the deed.

If it be as stated that Zulfikar Husain, knowing himself to be a man of expensive habits, and out of affection for his son and in order to secure a provision for him and his descendants, made the gift in question, it

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cannot be said to have been made otherwise than on good consideration, and if the gift was made *bona fide* [895] and had operation, there is no reason why it should not be valid; and it is clearly a most material circumstance for judging of the *bona fide* character of the conveyance to determine what property Zulfikar Husain reserved to himself, and whether it was sufficient to satisfy all debts existing at the time of the conveyance for which no other provision had been made, and the Judge has attached too much importance to the fact that no property was reserved within the jurisdiction of the Court that gave plaintiff's decree, since there could be no difficulty in reaching other property, the law providing for such cases.

I would remand the case in order that the Judge should re-try the issue of the *bona fide* character of the conveyance, after more fully ascertaining the circumstances of the conveyance and of the indebtment of Zulfikar Husain at the time he made it, and allow ten days for objections to the finding after its submission.

On the return of the lower appellate Court's finding the High Court (PEARSON, J., and OLDFIELD, J.,) delivered the following judgment disposing of the appeal:

JUDGMENT.

OLDFIELD, J., (PEARSON, J., concurring).—We have now before us the Judge's finding on the issue remitted, and there can be no question that the deed did not operate by conveyance of the property or that it was not made on a perfectly good consideration, and there is nothing to show that, when the deed of gift was executed, the defendant had not reserved to himself ample property sufficient to meet all existing claims of creditors; indeed, it has been found that he is now in possession of seventeen villages and has property abundantly sufficient to satisfy the present claim.

Under such circumstances it is impossible to accept the Judge's finding that the gift was not *bona fide*, but that it was in fraud of creditors, or to permit plaintiff to have it set aside and to allow him to proceed against the property it conveyed for the satisfaction of his debt. The Judge's reason for still holding the gift to be not *bona fide* is the same which we held to be irrelevant in our order of remand, *viz.*, that by the gift of the property it refers to, the plaintiff has been deprived of the power of proceeding against property in his [896] own neighbourhood for satisfaction of the debt. This consideration is too insignificant to stamp the gift with fraud. We decree the appeal and reverse the decree of the lower appellate Court and restore that of the first Court and dismiss the suit with all costs.

Appeal allowed.

2 A. 896.

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2 A. 896.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

RAM BARAN RAM (*Plaintiff*) v. SALIG RAM SINGH (*Defendant.*)*
[13th May, 1880.]

Land-holder and Tenant—Trees.

Held that trees accede to the soil and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses during the term of his tenancy, his privilege, where he has it, of removing the trees, he can not do so afterwards; he would then be deemed a trespasser.

Held, also that, where a tenant has been ejected in the execution of the decree of a Revenue Court for arrears of rent from the land forming his holding, his tenancy then terminates, and with it all right in the trees standing on such land or power of dealing with them. A person, therefore, who purchases the rights and interests of a tenant after his ejectment in the execution of such a decree cannot maintain a suit for the possession of the tree standing on the tenant's holding.

[F., 2 O.C. 281 (283); R., 8 A. 467 (472); 10 A. 159 (161); 22 C. 742 (750); 1. O.C. 231 (248).]

THE plaintiff in this suit claimed the possession of certain trees as having belonged to the defendant Harakh Rai, whose rights and interests had been purchased by the plaintiff at an execution sale. Harakh Rai had been the tenant with a right of occupancy of the land on which such trees were standing, but had been ejected previously to plaintiff's auction-purchase of such trees, in the execution of a decree for arrears of rent obtained against him by the defendant Salig Ram Singh, the landholder. The Court of first instance gave the plaintiff a decree on the ground that a tenant did not lose his right to the trees standing on his holding, by reason that he had been ejected from his holding in the execution of a decree for arrears of rent. On appeal by the defendant Salig Ram Singh, the lower appellate Court held that Harakh Rai had lost his right to the trees by reason of his ejectment from his holding, and dismissed the plaintiff's suit.

[897] The plaintiff appealed to the High Court.

Munshi *Hanuman Prasad* and Lala *Lalta Prasad*, for the appellant.

Munshi *Sukh Ram*, for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

OLDFIELD, J.—The law may be stated to be that trees accede to the soil and pass to the landlord with the land, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, to remove the trees, he cannot do so afterwards; he would then be deemed a trespasser.

In this case the tenant had been ejected by his landlord in execution of a Revenue Court decree for arrears of rent from the land on which the trees stand, forming part of his tenant-holding; his tenancy then terminated and with it all right in the trees or power of dealing with

* Second Appeal, No. 45 of 1880, from a decree of Maulvi Mahommad Bakhsh, Additional Subordinate Judge of Ghazipur, dated the 26th September 1879, reversing a decree of Munshi Mohan Lal, Munsif of Balia, dated the 7th June, 1879.

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them. The plaintiff bought the tenant's rights and interests after his eviction and cannot maintain this suit for possession of the trees.

We cannot allow the contention of the plaintiff's pleader that a tenant in this country has any right in trees standing on the land of his holding as something distinct from and independent of the tenant-right by which he holds the land, so that eviction from the land will not affect his right in the trees. It is difficult to see how he could after eviction assert any such right without being deemed a trespasser. No such right to trees is reserved by the Rent Act to an ejected tenant, the only right reserved are by s. 42*a*, to the growing crops or other ungathered products of the earth belonging to the tenant, and growing on the land at the time of his ejectment, and the right to use the land for the purpose of tending and gathering in such crops or other products paying adequate rent therefor. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 898.

[898] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

GANRAJ DUBEY (*Defendant*) *v.* SHEOZORE SINGH (*Plaintiff*).*
[13th May, 1880.]

Hindu law—Joint undivided family property—Alienation—Assent of co-parceners—Stranger.

The member of a joint Hindu family who alienates his rights and interest in the family property to a stranger in blood thereby incapacitates himself from objecting to a similar alienation by another member of such family of his rights and interests in such property on the ground that such alienation was made without his consent, and such stranger is not competent to make such objection. *Ballabh Das* v. *Sunder Das* (1) followed.

[R., A.W.N. (1908) 200.]

In September, 1878, one Kishen having died, his widow Makhtola, as mother and guardian of his minor sons, gave one Sheozore Singh a usufructuary mortgage of Kishen's landed estate, consisting of a one-third share of certain lands, and delivered possession to him. In November 1878, Kishen brother, Kalahal, mortgaged his own one-third share of such lands and also Kishen's one-third share to one Ganraj, who dispossessed Sheozore Singh of Kishen's share. Sheozore Singh consequently brought the present suit against Makhtola, in her own name and as guardian of Kishen's minor sons, and against Kalahal and Ganraj, for possession of Kishen's share in virtue of its mortgage to him by Makhtola in September, 1878. The defendant Ganraj contended that the mortgage to the plaintiff was invalid, as the defendant Makhtola was not the lawful wife of Kishen. The defendant Kalahal contended that he and his brother Kishen and a third brother owned and held the land jointly in equal one-third shares. The Court of first instance held that the defendant Makhtola was the lawful wife of Kishen, that she and the minor sons of

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* Second Appeal, No. 43 of 1880, from a decree of Maulvi Muhammad Bukhsh, Additional Subordinate Judge of Ghazipur, dated the 23rd September, 1879, affirming a decree of Chaudhri Jagan Nath, Munsif of Saidpur, dated the 30th June, 1879.

(1) 1 A. 429.

Kishen were entitled to his estate, and that the mortgage to the plaintiff was good and valid, and gave the plaintiff a decree, which the lower appellate Court, on appeal by the defendant Ganraj, affirmed. Neither of the lower Courts determined whether Kishen's estate was separate and divided property or not.

[899] On appeal to the High Court the defendant Ganraj contended *inter alia*, that the alienation of Kishen's share of the joint family property to the plaintiff without the consent of the defendant Kalahal, a co-sharer of that property, was invalid.

The Senior Government Pleader (Lala *Juala Prasad*), for the appellant.

Pandit *Ajudhiya Nath* and Babu *Jogindro Nath Chaudhri*, for the respondent.

JUDGMENT.

The portion of the judgment of the Court (PEARSON, J., and STRAIGHT, J.,) marterial to the purposes of the report was as follows :—

PEARSON, J.—The plea which constitutes the second ground of the appeal was not taken in the Court of first instance. There it is true Kalahal pleaded that Kishen's estate was not a separate one, but not that the mortgage made by his widow and sons was invalid because it had been made without his consent; and Ganraj pleaded that it was invalid because she was not a lawful wife and his children were illegitimate. The plea now set up is here for the first time set up, not by Kalahal, who alone might under other circumstances, *i.e.*, if he had not by his own act incapacitated himself, have been competent to urge it, but by Ganraj, a stranger to the family, in whose mouth it does not lie,—*Ballabh Das* v. *Sundar Das* (1). The second ground of appeal is consequently disallowed. The appeal is dismissed with costs.

Appeal dismissed.

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2 A. 899.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

CHANDRA SEN (*Defendant*) v. GANGA RAM AND ANOTHER (*Plaintiffs*).* [21st May, 1880.]

Hindu Law—Joint Hindu family property—Alienation by Father—Sons' rights.

G, a member of a joint undivided Hindu family consisting of himself and his sons, having wrongfully converted to his own use the property of another person, such person sued him for damages for such conversion, and obtained a **[900]** decree in the execution of which *G's* rights and interests in the family property were put up for sale and purchased by *C*, who in execution of such decree took possession of such property. *G's* sons thereupon sued *C* to recover their shares according to Hindu law of such property. *Held*, *per* OLDFIELD, J., that, although the father's debt was not one which the sons were in duty bound to pay, it might be that, had the family estate passed out of the family under the execution-sale, the sons could not have recovered it from *C*, who was an auction-purchaser and a stranger to the suit against the father. Inasmuch as, however the claim in that suit was not for a joint family debt, but a personal claim

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* Second Appeal, No. 1176, of 1879, from a decree of W. Tyrrell, Esq., Judge of Bareily, dated the 30th July, 1879, affirming a decree of Pandit Indar Narain, Munsif of Bareily, dated the 26th May, 1879.

(1) 1 A. 429.

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against the father, who was alone represented in that suit, and the decree in that suit was against him personally, and it was only his rights and interests that were put up for sale and purchased by *C*, the sons were entitled to recover from *C* their shares of the family property. *Suraj Bunsi Koer* v. *Sheoprasad Singh* (1) distinguished.

Per STRAIGHT, J.—That the sons were entitled to recover their shares of the family property, the decree being purely a personal decree against the father, and his rights and interests only in such property having been put for sale and purchased by *C*.

THIS was a suit instituted on behalf of the two plaintiffs, who were minors, by their uncle as their next friend, for possession of a two-ninths share of a certain dwelling house. This house was ancestral property which had descended to the plaintiff's father Gopal Das, and his two brothers in equal one-third shares. On the 31st July 1878, the rights and interests of Gopal Das in the house were put up for sale in the execution of a decree for money, which one Ram Kinkar had obtained against him in a suit for damages for wrongfully converting to his own certain jewels belonging to Ram Kinkar. Such rights and interests were purchased by the defendant in this suit. The defendant having taken possession of one-third of the house, the present suit was brought against him by the plaintiffs for possession of their shares of such one-third. The defendant contended that the suit was not maintainable, inasmuch as the family property of the plaintiffs and their father had been put up for sale in the satisfaction of a debt incurred by their father for their support, and the defendant had purchased the property in good faith. The contention that the debt had been incurred for the support of the plaintiffs was based upon the allegation that Gopal Das had converted the property of Ram Kinkar to his own use in order to maintain himself and his children during a time of famine. The Court of first instance disallowed this contention and gave the plaintiffs a **[901]** decree, which, on appeal by the defendant, the lower appellate Court affirmed, disallowing the same contention.

On appeal to the High Court the defendant contended that the property had passed to him and could not be recovered, as he was a stranger to the proceedings against Gopal Das and had purchased in good faith.

Lala *Lalta Prasad* and Mir *Zahur Husain*, for the appellant.

Munshi *Hanuman Prasad*, for the respondents.

JUDGMENTS.

The following judgments were delivered by the Court:

OLDFIELD, J.—The plaintiffs are two minor sons of one Gopal: the latter misappropriated some jewels which were pledged to him by one Ram Kinkar, who brought a suit against him for damages and obtained a decree, and in its execution caused his judgment-debtor's rights and interests in a joint ancestral house to be sold and appellant became the purchaser. Plaintiffs sue to recover their shares of the house. Both Courts have decreed the claim, and we consider that the appeal fails.

The law is that, when joint ancestral property has passed out of the joint family under a sale in execution for a father's debts, his sons by reason of their duty to pay his debts cannot recover the property, unless they show that the debts were contracted for immoral purposes and

(1) 5 C. 148.

that the purchaser had notice that they were so contracted and a purchaser at an execution-sale being a stranger to the suit, if he has not notice that the debts were contracted for immoral purposes, is not bound to make inquiries beyond what appears on the face of the proceedings—*Suraj Bunsi Koer* v. *Sheo Prasad Singh* (1).

In the case before us the debt is not one which the sons were in duty bound to pay, but it may be that, had the property passed out of the family under the sale in execution of the decree, they could not recover it from the appellant, who is an auction-purchaser and a stranger to the suit; but an examination of the suit and decree and execution-proceedings shows that no more than the right, title, and interest of the judgment-debtor in the property [902] passed under the execution sale. The claim was not for a joint family debt, but a personal claim against Gopal, who was alone represented in the suit, and the decree was against him personally for a money claim, and it was only his right, title, and interest that was put up for sale and bought by the appellant. I would dismiss the appeal with costs.

STRAIGHT, J.—I concur in the judgment of my honourable colleague entirely on the ground that the decree was purely a personal one against Gopal, and that all that was put up and brought to sale was his right, title, and interest. The appeal should be dismissed with costs.

Appeal dismissed.

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2 A. 902.

APPELLATE CIVIL.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

CHIMMAN SINGH (*Plaintiff*) *v.* SUBRAN KUAR AND OTHERS (*Defendants*).* [26th May, 1880.]

Act XL of 1858, s. 18—*Mortgage by certificate-holder without sanction—Act IX of* 1872 (*Contract Act*), s. 23.

A mortgage by a person holding a certificate of administration in respect of the estate of a minor under Act, XL of 1858, of immovable property belonging to the minor, without the sanction of the Civil Court previously obtained, is void, with reference to s. 18 of that Act and s. 23 of the Indian Contract Act, even though the mortgage-money was advanced to liquidate ancestral debts and to save ancestral property from sale in the execution of a decree.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Lala *Lalta Prasad* and Munshi *Kashi Prasad*, for the appellant.

Mr. *Niblett* and Babu *Beni Prasad*, for the respondents.

The High Court (STUART, C. J., and OLDFIELD, J.) delivered the following

JUDGMENT.

The widows of Thamman Singh and guardians of his son the plaintiff, and of another son, Sirdar Singh, since deceased, executed on 19th July 1870, three deeds of mortgage of property left by Thamman Singh in favour

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* First Appeal, No. 18 of 1879, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 13th December, 1878.

(1) 5 C. 148.

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of the defendants or persons now represented by defendants. The sons of Thamman Singh were [903] minors, and the widows had obtained a certificate under Act XL of 1858 in respect of the minors' estates. The plaintiff has brought this suit on attaining majority to set aside these deeds on the ground of their illegality and to recover possession of property conveyed by two of them. The deeds are (i) mortgage of 10 biswas in Dharanpur, (ii) mortgage of 10 biswas in Beharipur, (iii) mortgage of 35 biswas 4 biswansis of resumed muafi land in Dharanpur; and a ground taken by the plaintiff in the Court below was that the widows had no power to make the mortgages without the sanction of the Civil Court. The defence is that the money was advanced by defendants on the mortgages to satisfy ancestral debts and to save from sale in execution of decree the ancestral property which had been attached and put up for sale. The Court below has held that the ground urged by the plaintiff was not one on which the deeds could be set aside, and has found this defence to be good in respect of the first and second deeds, but not in respect of the third, and the Court decreed the claim only in respect of the third deed. There are separate appeals preferred by both parties.

The plaintiff has again urged in appeal that the deeds are invalid with reference to the provisions of Act XL of 1858, and this plea is good and disposes of both appeals. The deeds of mortgage were executed by persons holding a certificate under Act, XL of 1858 without the sanction of the Civil Court previously obtained, and the contracts so made are void with reference to s. 23, Indian Contract Act, since their object is of such a nature that if permitted it would defeat the provisions of s. 18, Act XL of 1858, which enacts that no person taking a certificate under the Act shall have power to sell, mortgage, &c., without the order of the Civil Court previously obtained. The following cases in point may be referred to:—S.A. No. 180 of 1870, decided the 25th March, 1870 (1); S.A. No. 1078, in 1878, decided the 17th April, 1879 (1); *Surut Chander Chatterjee* v. *Ashootosh Chatterjee* (2); *Dabee Dut Shahoo* v. *Subodra Bibi* (3). The appeal on the part of the plaintiff is decreed with costs, and that on the part of defendants is dismissed with costs.

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2 A. 904.

[904] APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

KARMAN BIBI AND OTHERS (*Petitioners*) *v.* MISRI LAL (*Plaintiff*).*
[27th May, 1880.]

Addition of Parties—Appeal—Act X of 1877 (*Civil Procedure Code*), ss. 32, 588—*Act XII of* 1879, *s.* 90 (2).

An order refusing an application, under s. 32 of Act X of 1877, by a person to be added as a defendant in a suit is not appealable.

[F., 21 C. 539 (541); 12 C.P.L.R. 41 (52).]

ONE Karman Bibi and certain other persons applied, under s. 32 of Act X of 1877, to be joined as defendants in a suit brought by one

* First Appeal, No. 43 of 1880, from an order of Rai Phagwan Prasad, Subordinate Judge of Azamgarh, dated the 6th March 1880.

(1) Unreported. (2) 24 W.R. 46. (3) 25 W.R. 449.

Misri Lal which was pending in the Court of the Subordinate Judge of Azamgarh. The Subordinate Judge refused this application, holding that the rights and interests of the applicants could not be dealt with in the suit, and that if they were made defendants, there might be a misjoinder of parties, and the plaintiff in the suit would be necessarily burdened with costs.

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Karman Bibi and the other applicants appealed against this order to the High Court.

Mir *Akbar Husain*, for the applicants.

Lala *Lalta Prasad*, for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—Under s. 588, Act X of 1877, as amended by Act XII of 1879, orders under s. 32 striking out or adding the name of any person as plaintiff or defendant are appealable; but the order which is the subject of the present appeal is not an order of the kind above mentioned. It is an order refusing to make the appellants defendants in the suit; and there is no provision in the law for an appeal from such an order. The appeal is therefore disallowed with costs.

Appeal dismissed.

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2 A. 905.

[905] APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Straight.

HARI SINGH (*Defendant*) v. BALDEO SINGH AND ANOTHER (*Plaintiffs*).*
[27th May, 1880.]

Suit of the nature cognizable in a Small Cause Court—Haq-i-chaharum—*Second Appeal.*

A suit by a zamindar for one-fourth of the price of trees cut by tenants is, when based upon contract, one of the nature cognizable in a Court of Small Causes, and consequently, where the amount claimed is under five hundred rupees, no second appeal lies in such a suit. The principle laid down in *Nanku* v. *The Board of Revenue* (1), followed.

THE plaintiffs in this suit claimed from the defendant Rs. 9-4-0, being one-fourth of Rs. 37, the price of certain trees cut down and sold by the defendant. The plaintiffs were the zamindars of the land on which the trees were situated and claimed as such, the defendant being the occupancy-tenant of such land. The plaintiffs based their claim on a "*razinama*" dated the 10th August, 1871, and village administration-paper in which the substance of this instrument had been recorded. This "*razinama*" was executed by the defendant and other tenants, who agreed therein, that when any tenant cut down and sold any trees situated on his holding, the zamindars should be allowed one-fourth of the sale price. The village administration-paper contained a declaration to the effect that the zamindars were entitled to one-fourth of the price of any trees cut down and sold by the tenants. The Court of first instance dismissed the suit. On appeal by the plaintiffs the lower appellate Court gave them a decree.

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* Second Appeal, No. 126 of 1880, from a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 29th September, reversing a decree of Shah Ahmad-ullah, Munsif of the Suburbs of Bareilly, dated the 18th July, 1879.

(1) 1 A. 444.

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The defendant appealed to the High Court. On behalf of the respondents it was contended that the suit was one of the nature cognizable in a Court of Small Causes, and consequently no second appeal in the suit would lie.

Munshi *Hanuman Prasad*, for the appellant.

Babu *Oprokash Chandar Mukarji*, for the respondents.

JUDGMENT.

[906] The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—The lower appellate Court has found that the *razinama* was duly and properly executed; in other words, that the defendant agreed in writing to allow the plaintiffs "*haq-i-chaharum*." The suit was therefore money due upon a contract and of a nature of cognizable by a Small Cause Court. Accordingly no second appeal lay to this Court, and the preliminary objection taken by the respondents' pleader must prevail. Our attention was called at the hearing to the case of *Nanku* v. *The Board of Revenue* (1), but the view we are now taking is in no way inconsistent with, on the contrary is entirely in accordance to, the principle laid down in that case by the Court at large. The appeal is not entertainable and must be dismissed with costs.

Appeal dismissed.

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2 A. 906.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

CHANDIKA SINGH AND ANOTHER (*Defendants*) *v.* POHKAR SINGH (*Plaintiff*).* [31st May, 1880.]

Joint Mortgage—Foreclosure.

Where a mortgage of an estate is a joint one and there is no specification in it that any individual share or portion of a share of such estate is charged with the repayment of any defined proportion of the mortgage-money, but the whole estate is made responsible for the mortgage-money, it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be calculated as his reasonable share of the joint debt and to release his share from further liability. Where, therefore, in the case of such a mortgage, the mortgagee, in taking foreclosure proceedings, exempted the person and share of the mortgagor so payinga nd proceeded only against the other mortgagors, and, the mortgage having been foreclosed, sued the other mortgagors for the possession of their shares of such estate. *Held* that, the foreclosure proceedings being irregular, the suit was not maintainable.

[Diss., 28 A.. 174 (179) (F.B.) = 2 A.L.J. 630 = A.W.N. (1905). 244; R., 3 C.P.L.R. 3 (5); 3 O.C. 8 (11) (F.B.); D., 5 A. 257 (258) = A.W.N. (1883) 10; 15 B. 186 (189).]

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

[907] Babu *Jogindra Nath Chaudhri* and Maulvi *Obeid-ul-Rahman*, for the appellants.

Munshi *Hanuman Prasad*, for the respondent.

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* Second Appeal, No. 179 of 1880, from a decree of Pandit Jagat Narain, Subordinate Judge of Cawnpore, dated the 13th December 1879, affirming a decree of Maulvi Sakhawat Ali, Munsif of Akbarpur, dated the 16th September, 1878.

(1) 1 A. 444.

JUDGMENT.

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APPELLATE CIVIL.

2 A. 906.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—This is a suit for possession of a one pie share of mauza Rai, pargana Ghatanpur, upon the basis of a mortgage dated the 2nd July, 1869, and a foreclosure proceeding of the 23rd May, 1878. Both the lower Courts decreed the claim and the defendants now appeal. The short facts are that the appellants with one Shankar Singh executed a conditional sale-deed to the plaintiff-respondent on the 2nd July, 1869, for a period of four years, of their one and one-half pie share of mauza Rai for an advance of Rs. 125. Some time afterwards Shankar Singh paid Rs. 62 principal and interest to date, as representing one-third of the mortgage amount due, and the mortgagee-respondent accepted it as such and endorsed the receipt on the deed. The appellants failed to pay the balance then remaining and foreclosure proceedings were taken against them alone, Shankar Singh and his half-pie share being exempted. The usual notice was given, and when the required twelve months' grace had elapsed, the proceeding was recorded on the 23rd May, 1878, upon which the present suit was instituted. The appellants contend that as the mortgage was joint and the share of Shankar Singh was equally liable with their own for the joint debt, that the foreclosure proceedings were irregular in that he was not made a party, and that the present suit is not maintainable.

We are of opinion that this plea must prevail. The mortgage was clearly a joint one, and there is no specification in it that any individual share or portion of a share is identified to and charged with the repayment of any defined proportion of the money advanced. The liability of the mortgagors was mutual and indivisible in that their property, as a whole, was made responsible for the debt. We therefore do not think it was competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be [908] calculated as his reasonable share of the joint indebtedness and to release his share from further liability. Such payment could only properly be treated as made for the whole of the mortgagors and ought to have been carried to the credit of all of them in reduction of the principal sum jointly due. Consequently the plaintiff-respondent was not justified in exempting the half-pie share of Shankar Singh from the foreclosure proceedings and in directing his claim against the property of the appellants alone. The present suit cannot under the circumstances, be entertained. The appeal is decreed with costs.

Appeal allowed.

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2 A. 908.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Straight.

AKBARI BEGUM AND OTHERS (*Defendants*). v. WILAYAT ALI (*Plaintiff*).* [31st May, 1880.]

Remand—Objection to finding—Appellate Court, powers of—Act X of 1877 (*Civil Procedure Code*), ss. 566, 567, 578—*Error or Irregularity.*

Held, that an appellate Court is not bound to accept a finding returned to it by a Court of first instance under s. 566 of Act X of 1877 merely because no

* Second Appeal, No. 169 of 1880, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Saharanpur, dated the 18th November, 1879, reversing a decree of Munshi Baij Nath, Munsif of Muzaffarnagar, dated the 12th March, 1879.

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objections to such finding are preferred, but is competent to examine the evidence on which such finding is founded and to satisfy itself that it is correct and fit to be accepted. *Noorun* v. *Khoda Baksh* (1) dissented from; *Ratan Singh* v. *Wazir* (2) followed.

Held also that, assuming that an appellate Court, in deciding a case in a manner inconsistent with, and opposed to, the finding returned to it by the Court of first instance under that section, in the absence of objections, acted irregularly, its decree could not be reversed or the case remanded on account of such irregularity, such irregularity not affecting the merits of the case or the jurisdiction of the Court.

[F., 6 A. 383 (384) = A.W.N. (1884), 127; 6 A. 391 (392) = A.W.N. (1884), 129.]

THIS suit, in which the plaintiff claimed a right of way over land belonging to the defendants, was dismissed by the Court of first instance on the 12th March, 1879. On appeal by the plaintiff the lower appellate Court, on the 29th August, 1879, remanded the case to the Court of first instance for the trial of certain issues, under the provisions of s. 566 of Act X of 1877, fixing a period of one week for objections to the finding of the Court of first instance. The [909] finding of the Court of first instance was adverse to the plaintiff's claim, but the plaintiff did not prefer any memorandum of objections to such finding. The lower appellate Court in due course proceeded to determine the plaintiff's appeal, and, refusing to accept the finding of the Court of first instance, recorded a finding to the contrary and reversed the decree of the Court of first instance, and gave the plaintiff a decree.

The defendants appealed to the High Court. It was contended on their behalf that the lower appellate Court was not competent to decide the suit contrary to the finding of the Court of first instance, the plaintiff having taken no written objections to such finding.

Mr. *Hill*, Shah *Asad Ali*, and Shaikh *Maula Bakhsh*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

JUDGMENT.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) so far as it related to this contention, was as follows:

PEARSON, J.—The main contention of the learned counsel for the appellants was outside the grounds of the appeal. He contended that the lower appellate Court was bound to accept the finding returned to it by the Court of first instance under s. 566, Act X of 1877, because no objections thereto were presented in the form of a memorandum within the time allowed, and was not free or competent to decide the case in a manner inconsistent with and opposed to such finding. In support of his contention he referred us to a decision of a Bench of this Court (Morgan, C. J., and Pearson, J.), dated 29th June, 1866 (1). In the case then decided it was pleaded in appeal that, "no objection having been raised on the part of the respondent against the Munsif's decision, under s. 354, it was improper to award a decree for fourteen bighas and six biswansis of the resumed muafi land"; and the plea was allowed, and that portion of the Munsif's judgment which had not been objected to was restored. But the question as to the meaning and intention of the terms of s. 354, Act VIII of 1859 and s. 567, Act X of 1877, has since 1866 been not unfrequently considered, and the ruling of 1866 has not been followed. A Full Bench decision—*Ratan Singh* [910] v. *Wazir* (2)—held that, when a memorandum of objections

(1) H. C. R. N.W.P. 1866, p. 50. (2) 1 A. 165.

had not been presented by a party, he might with the permission of the Court urge them orally at the hearing. In the case now before us it may be that the Subordinate Judge allowed objections to the Munsif's finding on remand to be taken orally. But even if no objection to it was preferred in writing or orally, we are not of opinion that the lower appellate Court's duty was to accept it blindly, without examining the evidence on which it was founded and satisfying itself that it was correct and fit to be accepted.

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No doubt an appellate Court would hesitate to set aside such a finding in the absence of objections, and would deem it proper to record its reasons at length for coming to a contrary conclusion. In the present case the Subordinate Judge has fully stated the grounds on which he differs from the Munsif, and makes it clear that he has given a close and intelligent attention to the points in issue and the evidence relating to them. It is impossible to hold that his action has contravened the terms of s. 567 of the Code, which merely direct that "after the expiration of the period fixed for presenting such memorandum, the appellate Court shall proceed to determine the appeal." But even had we been of opinion that the lower appellate Court's action in the matter was irregular, we should be precluded from reversing its decree or remanding the case on account of the irregularity which is not of a nature affecting the merits of the case or the jurisdiction of the Court.

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2 A. 910.

CRIMINAL JURISDICTION.

Before Mr. Justice Oldfield.

EMPRESS OF INDIA v. ILAHI BAKHSH. [31st May, 1880].

Inquiry into case triable by Court of Session—Commitment.

Held, where a Magistrate had tried a case exclusively triable by a Court of Session, and the conviction of the accused person and the sentence passed upon him at such trial were for that reason annulled by the Court of Session, but the proceedings held at such trial were not annulled that such Magistrate might commit the accused person to the Court of Session on the evidence given before him at such trial.

[D., 36 M. 321=13 Cr. L.J. 778=17 Ind. Cas. 410=23 M.L.J. 368=13 M. L.T. 116=(1912) M.W.N. 1243.]

[911] THIS was a reference to the High Court by Mr. C. J. Daniell, Sessions Judge of Moradabad, under s. 296 of Act X of 1872. One Ilahi Baksh preferred a complaint to Mr. J. J. D. LaTouche, Magistrate of the first class, charging a certain person with robbery. That officer, being of opinion that such charge was false and made with intent to injure such person, proceeded to try Ilahi Bakhsh for the offence of making a false charge of an offence punishable with imprisonment for seven years, an offence punishable under s. 211 of the Indian Penal Code, and on the 28th January, 1880, convicting him of such offence, sentenced him to one year's rigorous imprisonment. On appeal by Ilahi Bakhsh, the Court of Session annulled the conviction and sentence on the grounds that the Magistrate was not competent to try an offence committed against his own office or person, and that Ilahi Bakhsh was charged with committing an offence exclusively triable by the Court of Session. The

1880 MAY 31. — CRIMINAL JURISDICTION. — 2 A. 910.

Magistrate thereupon without further inquiry committed Ilahi Bakhsh for trial to the Court of Session, stating in his committing order that the grounds of committal were set forth in his decision of the 28th January, 1880. Mr. C. J. Daniell, the Sessions Judge, was of opinion that the commitment was illegal and should be quashed. His reasons for so thinking appear from the following extract from his letter referring the case to the High Court: "The decision alluded to is that given in the trial concluded on the 28th January, which trial the Sessions Judge had on 3rd April quashed, as being irregular and held by a Magistrate who was not competent to hold it. If it were otherwise regular, this order of the Sessions Judge would deprive the evidence taken in the trial of Ilahi Bakhsh held in January of any value, but it appears to me to be opposed to the provisions of Chapter XV of the Criminal Procedure Code, that a Magistrate should commit an accused person on evidence which has not been taken for the purposes of the commitment, but for the purpose of holding a trial, more specially as that trial was itself illegal. It appears to me that none of the provisions of Chapter XV have been observed in the inquiry into this case, and I do not consider myself at liberty to go on with a trial thus commenced or pass a sentence either of acquittal or conviction. Any sentence passed would be of doubtful legality."

ORDER.

[912] The following order was made by the High Court:

OLDFIELD, J.—The commitment is not vitiated because the Joint Magistrate did not commence a fresh inquiry and take evidence *de novo*. The inquiry and the evidence at the trial are sufficient for the purposes of commitment. The proceedings held at the trial were not set aside by the Judge, whose order only set aside the conviction and sentence of the accused, and though those proceedings could not form the basis of a conviction by the Magistrate, there is no reason why a commitment by the same Magistrate should not be based on them. In the analogous case when in the course of a trial the Magistrate finds that he must commit the accused to the Sessions Court, s. 221 of the Criminal Procedure Code directs that he "shall stop further proceedings under this Chapter (*i. e.*, Chapter XVII, for trial of warrant cases) and shall commit the prisoner under the provisions hereinbefore contained," that is, under the provisions contained in Chapter XV. This direction does not mean that the Magistrate is to commence the inquiry and take the evidence *de novo*, since his procedure under Chapter XVII in the matter of examination of the complainant and witnesses has been conducted under ss. 190 to 194 of Chapter XV (see s. 214), but only that the further procedure necessary for commitment shall be taken as directed in Chapter XV. Moreover trial is not vitiated by mere irregularity in the proceedings up to trial. The Judge should proceed with the trial.

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declared in s. 4 of Act X of 1859 (corresponding with s. 6 of Act XVIII of 1873), if he proves that, for a period of twenty years next before the commencement of the suit to enhance his rent, he has paid the same proportion of the produce of his holding. HANUMAN PARSHAD v. KAULESAR PANDEY, 1 A. 301 ... 205

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Ss. 19, 23, 34—*Suit for infringement of patent—"Public or actual" user—Measure of damages—Particulars.—Held*, by the Court, in a suit, under Act XV of 1859, for the infringement of a patent, where the plaintiff had been in the habit of licensing the use of his invention, that the loss of the amount paid for such license was the measure of damages.

Per SPANKIE, J.—The meaning of the words "publicly or actually used" in s. 23 of Act XV of 1859 discussed.

Held per SPANKIE, J.—That, where the defendant did not allege in his written statement that the invention was publicly used at certain places prior to the date of the petition for leave to file the specification, but was allowed to give evidence that the invention was so used at such places, the plaintiff was not bound before trial to have called upon the defendant to supply the particulars as to such places, and such evidence was not admissible. SHEEN v. JOHNSON, 2 A. 368 ... 798

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(1) *Debts—Certificate to collect debts—Alienation of the estate of a deceased person for the payment of his debts—Succession.*—Where a person to whom a certificate had been granted under Act XXVII of 1860, to collect the debts due to the estate of a deceased Hindu, but who had no share or interest in such estate, contracted a debt for the purpose of paying debts due from such estate, and charged such estate with the payment of such debt, *held* that the creditor could not by virtue of the acts of such person claim to recover the moneys advanced by him to such person from the heirs and estate of the deceased, even though such moneys had been applied to the liquidation of debts of the deceased. MUNIA v. BALAK RAM, 2 A. 513 ... 899

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(3) *Ss.* 5, 6—*Certificate for collection of debts—Security—Appeal.*—No appeal impugning the order of a District Court requiring security from the person to whom it has granted a certificate, under Act XXVII of 1860, lies under that Act to the High Court. *Semble*, that, in proceedings under Act XXVII of 1860, a review of judgment is admissible. *In the matter of the petition of* RUKMIN, 1 A. 287 ... 195

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offences, which were in force before the passing of Act XVII of 1862, repealed in respect of offences committed before the 1st January 1862, prior to the passing of Act I of 1868. *Held* accordingly, where a person committed murder in the year 1855, that such person was punishable under the Regulations.

Held, also, that, inasmuch as such right as the right of reference given by s. 3 of Reg. IV of 1797 accrues on conviction, and therefore in the present case had not accrued before Act XVII of 1862 was repealed, it is doubtful whether a person convicted of murder committed before the 1st January, 1862, has such right. EMPRESS OF INDIA v. MULUA, 1 A. 599=2 Ind. Jur. 723 ... 416

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Ss. 8 and 9—See RES JUDICATA, 2 A. 294.

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Ss. 2, 3—*Act* XLV *of* 1860, *ss.* 378, 411—*Punishment—Whipping—Theft—Dishonestly receiving stolen property—Act X of* 1872, *ss.* 504, 505—*Security for good behaviour.*—*P* was convicted by a Magistrate of the first class of dishonestly receiving stolen property. He confessed on his trial that he had twice previously been convicted of theft. He was sentenced to be whipped, to be rigorously imprisoned, and, on the expiration of the term of imprisonment, to furnish security for good behaviour. *Held* that the offence of theft not being the same offence as that of dishonestly receiving stolen property, the punishment of whipping was illegal.

Held also, with some hesitation, that there was evidence as to general character adduced before the Magistrate which justified him in dealing with *P* under s. 505 of Act X of 1872.

Held also that the order requiring security should not have formed part of the sentence for the offence of which *P* was convicted. A proceeding should have been drawn out representing that the Magistrate was satisfied, from the evidence as to general character adduced before him in the case, that *P* was by repute an offender within the terms of s. 505 of Act X of 1872, and therefore security would be required from him, and an order should have been recorded to the effect that, on the expiry of imprisonment, *P* should be brought up for the purpose of being bound. EMPRESS OF INDIA v. PARTAB, 1 A. 666 ... 465

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(1) S. 6—See CONTRACT ACT (IX OF 1872), 2 A. 671.

(2) Ss. 20, 51—See SMALL CAUSE COURT, 1 A. 621.

(3) *Ss.* 45, 51—*Principal and Surety—Clerk of the Small Cause Court—Bond for performance of duties of office—Liability of surety—Small Cause Court Judge—Principal Sudder Amin (Subordinate Judge)—Jurisdiction.*—*Held* that, in permanently investing under s. 51 of Act XI of 1865 the Judges of the Courts of Small Causes at Agra, Allahabad, and Benares with the powers of a Principal Sudder Amin (Subordinate Judge), the Local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name from time to time with the powers of a Principal Sudder Amin may have been the mode of procedure contemplated by the Legislature as the one likely to be ordinarily adopted.

The defendant and J. W. C., Clerk of the Small Cause Court at Allahabad, entered into a bond to the Judge of the Small Cause Court, as well as to his successors in office, in a certain sum as security for the true and faithful performance by J. W. C. of his duties as Clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. *Held*, in a suit against the defendant as surety, that he was liable for misappropriation by J. W. C. of moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, and that, had the Small Cause Court Judge not been invested at the time of the execution of the bond with the powers of a Subordinate Judge, the defendant's liability in respect of such moneys would not have been thereby affected. CROSTHWAITE v. HAMILTON, 1 A. 87 ... 59

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(1) *Suspension of a pleader for misconduct—Special leave to appeal.*—The High Court, acting regularly within its jurisdiction, suspended a pleader from practice for misconduct. The Judicial Committee, not being prepared to say from the materials before it, that the High Court's conclusion on a pure question of fact was wrong, refused to grant special leave to appeal. It would not have followed, even if more doubt had been entertained on such a question, that an appeal would have been granted against Judges so acting. *In the matter of* F. W. QUARRY, 2 A. 511 (P.C.)=7 I.A. 6=4 Sar P.C.J. 99 ... 897

(2) S. 37—See PRE-EMPTION, 1 A. 709.

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(1) Ss. 3, 6—See ACT XVII OF 1862 (REPEALING ENACTMENTS RELATING TO CRIMINAL LAW), 1 A. 599.

(2) S. 5—See CRIM. PRO. CODE (ACT X OF 1872), 1 A. 461.

(3) S. 6—See CIV. PRO. CODE (ACT X OF 1877), 2 A. 74, 785.

(4) S. 6—See REGISTRATION ACT (III OF 1877), 2 A. 851.

(5) S. 6—*Act* X *of* 1877—*Execution of Decree—Appeal—Act* VIII *of* 1859—*Repeal—Pending Proceedings.*—The holder of a decree for money applied for the attachment in the execution of the decree of certain moneys deposited in Court to the credit of the judgment-debtor. On the 4th June 1877 the Court of first instance refused the attachment on the ground that the decree directed the sale of certain immoveable property for its satisfaction and awarded no other relief. The order of the Court of first instance was affirmed by the lower appellate Court on the 4th August 1877. Act X of 1877, repealing Act VIII of 1859, and Act XXIII of 1861, came into force on the 1st October 1877. On the 13th November 1877, the decree-holder applied to the High Court for the admission of a second appeal from the order of the lower appellate Court on the ground that the decree had been misconstrued.

Held that an appeal was admissible under the repealed Act VIII of 1859, under the provisions of s. 6 of Act I of 1868.

Held also that the order of the lower appellate Court was also appealable under Act X of 1877. THAKUR PRASAD v. AHSAN ALI, 1 A. 668 ... 466

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Ss. 3, 45, 54—*Entering a* Havalat *with intent to convey food to Prisoner—Rules made by Local Government for the management and discipline of Prisons—House-trespass—Offence in relation to prison—Act* XLV *of* 1860, *s.* 442—*Previous Acquittal—Act* X *of* 1872, *ss.* 454, 460.—*Per* SPANKIE, J., OLDFIELD, J., (STUART, C.J., doubting) that a *havalat* (lock-up) is a prison within the meaning of the Prisons Act.

Per STUART, C.J., that food is not an "article" within the meaning of s. 45 of that Act.

Per STUART, C.J., and OLDFIELD, J., that the conveyance of food into a *havalat*, not being expressly prohibited by the rules made by the Local Government under s. 54 of that Act for the management and discipline of prisons, is not "contrary to the regulations of the prisons" within the meaning of s. 45 of that Act, and is therefore not an offence punishable under that section.

Held, therefore, *per* STUART, C.J., and OLDFIELD, J., that, where a person entered into a *havalat* with intent to convey or attempt to convey food to an under-trial prisoner, such act on his part did not amount to house-trespass within the meaning of s. 442 af the Indian Penal Code, and it was not an act punishable under s. 45 of the Prisons Act.

Per SPANKIE, J., *contra.*

Per STUART, C.J., that the fact that such person had been tried for house-trespass and acquitted was no bar to his being tried subsequently for an offence under s. 45 of the Prisons Act. EMPRESS OF INDIA v. LALAI, 2 A. 301 ... 750

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(3) S. 24—See EVIDENCE ACT (I OF 1872), 1 A. 53; 2 A. 625.

(4) S. 24—See MUHAMMADAN LAW (DOWER), 1 A. 483.

(5) S. 24—See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 533.

(6) S. 24—See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 283, 564.

Act X of 1871 (Excise).

(1) *Ss.* 12, 62, *chap.* VI—*Illicit sale of liquor—License.*—*D* was the holder of a license for the sale of spirituous and fermented liquors by retail for a period terminating on the 31st December 1877. On the 10th January 1878, his license not having been renewed by the Collector, *D* sold certain spirits by retail. On these facts he was convicted of the illicit sale of liquor. Subsequently to his conviction his license was renewed. *Held* that, under such circumstances, his conviction was good. EMPRESS OF INDIA v. DHARAM DAS, 1 A. 635 ... 443

(2) *Ss.* 32, 57, 62—*Illicit sale—License.*—*A* held a license for the sale of spirituous and fermented liquors by retail for a period of three months terminating on the 31st December 1877. Prior to the 8th January 1878 no notice was given by *A* of her intention not to renew the license, nor had the license been recalled by the Collector. Between the 1st January 1878 and the 8th January 1878, both days inclusive, *A's* servants sold spirituous and fermented liquors by retail. On these facts *A's* servants were convicted, under s. 62 of Act X of 1871, of the illicit sale of liquor. *Held*, following the opinion expressed in *Empress* v. *Seymour*, that the convictions were bad, as *A's* license, under the provisions of s. 32 of that Act, remained in force until she gave notice of her intention not to renew it or it was recalled by the Collector.

A should have been prosecuted under s. 57 of the Excise Act for not paying her monthly fee in advance. EMPRESS OF INDIA v. MAHINDRA LAL, 1 A. 638 ... 445

(3) *Ss.* 57, 62, *ch.* VI—*Illicit sale of liquor—License.*—On the 30th October 1877 *N* was granted a license for the sale of spirituous and fermented liquors by retail terminating on the 31st December 1877. On the 11th January 1878 such license was renewed by the Collector for a period terminating on the 31st March 1878. On the 14th January 1878 *N's* servant was convicted, under s. 62 of Act X of 1871, of the illicit sale of liquors between the 1st January 1878 and 10th January 1878, both days inclusive. *Held* that the renewal of *N's* license was a condonation of the offence and the conviction was bad.

Semble that, inasmuch as *N* had given no notice of his intention not to renew the license, nor had the Collector recalled it, the license remained in force, and the conviction was consequently bad, under s. 32 of Act X of 1871. EMPRESS OF INDIA v. SEYMOUR, 1 A. 630 ... 439

Act XI of 1871 (Foreign Jurisdiction and Extradition).

Ss. 3, 9—*Liability of Native Indian British Subject for offence committed in Cyprus—"Native State"—Act* V *of* 1869, *arts.* 170, 171—*Reference—Confirmation of sentence of death. Act* X *of* 1872, *ss.* 288, 297—*Division Court—Full Court.*—*Held* (STUART, C.J., dissenting) that a Native Indian subject of Her Majesty, being a soldier in Her Majesty's Indian Army, who committed a murder in Cyprus, while on service in such army, and who was accused of such offence at Agra, might, under s. 9 of Act XI of 1872, be dealt with in respect of such offence by the Criminal Courts at Agra, Cyprus being a "Native State," in reference to Native Indian subjects of Her Majesty, within the meaning of that Act.

Per STUART, C. J.—The power of the Governor-General of India in Council to make laws for the trial and punishment in British India of offences committed by British Indian subjects in British territories other than British India discussed.

A Division Court of the High Court ordered the Magistrate who had refused to inquire into a charge of murder on the ground that he had no jurisdiction to inquire into such charge, considering that the Magistrate had jurisdiction to make such inquiry. The Magistrate inquired into the charge and committed the accused person for trial. The Court of Session convicted the accused person on the charge and sentenced him to death,

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The proceedings of the Court of Session having been referred to the High Court for confirmation of the sentence, the case came before the Full Court.

Held per STUART, C. J., SPANKIE, J., and OLDFIELD, J., that in determining whether such sentence should be confirmed, the full Court was not precluded by the order of the Division Court from considering whether the accused person had been convicted by a Court of competent jurisdiction. EMPRESS OF INDIA v. SARMUKH SINGH, 2 A. 218 ... 693

Act VIII of 1873 (Northern India Canal).

S. 70—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 1 A. 461.

Act X of 1873 (Oaths).

Ss. 8, 10, 13—See APPEAL (SPECIAL APPEAL), 1 A. 535.

Act XV of 1873 (N.W.P. and Oudh Municipalities Act).

(1) *Ss.* 27, 32, 38—*Public Thoroughfare—Easement—Special damage—Right of Action—Municipal Committee, powers of.*—While certain land formed part of a certain public thoroughfare *F* had immediate access to such thoroughfare and the use of a certain drain. The Municipal Committee sold such land to *M* and constructed a new thoroughfare. M used and occupied such land so as to obstruct *F's* access to the new thoroughfare and his use of the drain. *F* therefore sued him to establish a right of access to the new thoroughfare over such land and a right to the use of such drain. *Held* that, having suffered special damage from *M's* acts, *F* had a right of action against him, and that such right of action was not affected by the circumstance that *M* had acquired his title to the land from the Municipal Committee, inasmuch as the Municipal Committee could not have dealt with the old thoroughfare to the special injury of *F*, and had it closed the same would have been bound to provide adequately for his access to the new thoroughfare and for his drainage. FAZAL HAQ v. MAHA CHAND, 1 A. 557=2 Ind. Jur. 790 ... 386

(2) *Ss.* 28, 43—*Local Government—Notice of Suit—Special Appeal.*—Where, in a suit against a Municipal Committee, the Magistrate of the District was impleaded as representing the Local Government, the Court refused to allow the plea that the Local Government had not been made a party to the suit in accordance with the provisions of s. 28 of Act XV of 1873.

The notice previous to suing a Municipal Committee for a thing done by them under that Act required by s. 43 of the Act is only necessary where compensation is claimed for the thing done.

The plea that no notice was given as required by s. 43 cannot be taken for the first time in special appeal.

Quære.—Whether a plea that the Local Government has not been made a party to a suit against a Municipal Committee in accordance with s. 28 can be taken for the first time in special appeal. THE MUNICIPAL COMMITTEE OF MORADABAD v. CHATRI SING, 1 A. 269 ... 182

(3) *Ss.* 40, 43—*Suit against Secretary to Municipal Committee—Substitution of president as defendant—Act* XV *of* 1877, s. 22.—Where, after notice required by s. 43 of Act XV of 1873 had been left at the office of a Municipal Committee, such Committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary, instead of the name of their President, as required by s. 40 of Act XV of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary, *held* that by reason of such substitution such suit could not be deemed to have been instituted against such Committee when such substitution was made, s. 22 of Act XV of 1877 applying to the case of a person personally made a party to a suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made.

Semble.—S. 43 of Act XV of 1873 contemplates suits in which relief of a pecuniary character is claimed for some act done under that Act by a Committee, or any of their officers, or any other person acting under their direction, and for which damages can be recovered from them personally, and not a suit against a Committee for a declaration of the plaintiff's right to reconstruct a building which has been demolished by the order of such committee and for compensation for such demolishment. MANNI KASAUNDHAN v. CROOKE, 2 A. 296 ... 202

Act XVIII of 1873 (N.W.P. Rent). PAGE

(1) *Act* IX *of* 1871, *s.* 15—*Act* XVIII *of* 1873—*Limitation.—Semble*, that the provisions of s. 15, Act IX of 1871, are not applicable to suits or applications under Act XVIII of 1873. TIMAL KUARI v. ABLAKH RAI, 1 A. 254 171

(2) See ARBITRATION, 2 A. 119.

(3) *Ss.* 3, 31, 209—*Land in mahal held by the lambardar as "khud-kasht" at a nominal rental—Liability of lambardar to co-sharer for profits*—The land in a certain mahal was recorded as held by *M*, the lambardar, as "*khud-kasht*" at a certain nominal rental. For two years in succession *M* sublet such land in part or in whole for a less amount than such nominal rental; the third year such land lay fallow. Certain persons sued as co-sharers in the mahal to recover from *M* their share of the profits on account of such years. *M* set up as a defence to the suit that there were no profits, on the contrary, a small loss. The lower Courts held *M* answerable for the rental recorded.

Held that it was doubtful whether the provisions of s. 209 of Act XVIII of 1873 were applicable in the present case, and that even if such provisions were applicable, the lower Courts having neither found that more was realized from the land than had been accounted for by *M*, nor that the failure to realize more was owing to gross negligence or misconduct on his part, the decree of the lower Courts could not be sustained. MANGAL KHAN v. MUMTAZ ALI, 2 A. 239 ... 707

(4) Ss 5, 6—See ACT X OF 1859 (BENGAL RENT), 1 A. 301.

(5) *S.* 7—*Ex proprietary tenant—Sir land—Mortgage of proprietary rights in a mahal*—Where a person mortgaged his proprietary rights in a mahal, which rights consisted of certain lands occupied by him, covenanting to give the mortgagee possession for the purpose of cultivation and the payment of Government revenue, and being at liberty to redeem the lands at any time at the end of the month Jaith, such person could not resist a claim on the part of the mortgagee for possession of the lands on the ground that he had a right of occupancy in the lands under s. 7 of Act XVIII of 1873, such section not being applicable and contemplating something more than a mere temporary transfer of proprietary rights. BHAGWAN SINGH v. MURLI SINGH, 1 A. 459=2 Ind Jur. 283 ... 315

(6) Ss. 7, 9—See OCCUPANCY RIGHT, 2 A. 735.

(7) Ss 7, 14—See SIR LAND. 1 A. 659.

(8) Ss. 7, 95 - See JURISDICTION (OF CIVIL COURT), 1 A. 448.

(9) *Ss.* 8, 9, 171—*Right of occupancy when transferable—Sale in execution.—Held* (by a majority of the Full Bench) that the right of an occupancy tenant is transferable by sale in execution of decree, but only as between persons who have become by inheritance co-sharers in such right.

Per STUART, C.J.—That such right is transferable by sale in execution of decree without any restriction. ABLAKH RAI v. UDIT NARAIN RAI, 1 A. 353=1 Ind. Jur. 705 ... 241

(10) *S.* 9—*Landholder—Right of occupancy tenant—Transfer of right of occupancy in execution of decree.*—S 9 of Act XVIII of 1873 does not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. UMRAO BEGAM v. THE LAND MORTGAGE BANK OF INDIA, 1 A. 547 ... 378

(11) *S.* 9—*Tenant at a fixed rate—Ex proprietary tenant—Occupancy tenant—Inheritance to rights of occupancy.—Held* that the proviso to the last clause of s 9 of Act XVIII of 1873 refers only to the holdings of ex-proprietary tenants and occupancy tenants and not to tenants at fixed rates. BHAGWANTI v. RUDR MAN TEWARI, 2 A. 145 ... 643

(12) *Ss.* 9, 171—*Land-holder—Right of occupancy tenant—Transfer of Right of Occupancy in Execution of decree*—*Held* (SPANKIE, J., dissenting), affirming the decision of a Division Bench of the High Court in this case that s. 9 of Act XVIII of 1873 does not prevent a land-holder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. UMRAO BEGAM v. THE LAND MORTGAGE BANK OF INDIA, 2 A. 451 ... 856

(13) Ss. 30, 95—See GRANT, 2 A. 545.

(14) Ss. 30, 95 (c)—See ASSIGNMENT, 2 A. 732.

(15) *Ss.* 31, 34, 35, 93, 206, 207—*Co-sharer—Lambardar—Suit for Profits—Jurisdiction—Civil Court—Revenue Court—Profits when due—Limitation—Act XIX of* 1873 (*North-Western Provinces Land Revenue Act*), *s.* 3, *cl.* 8.—*Held*, by the Division Bench, following the ruling of the majority

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of the Full Bench in *Ashraf-un-nissa* v. *Umrao Begam*, that a suit by a co-sharer in an undivided mahal against the heir of a deceased lambardar for his share of profits collected by the lambardar before his death is a suit cognisable not by a Civil Court but by a Court of Revenue.

Per STUART, C.J.—Observations on the application of ss. 206 and 207 of Act XVIII of 1873.

Held, by the majority of the Full Bench, that the share of a co-sharer in an undivided mahal of the profits of the mahal for any agricultural year are due to him from the lambardar as soon as, after the payment of Government revenue and village expenses, there is a divisible surplus in the hands of the lambardar, unless by agreement or custom a date is fixed for taking the accounts and dividing the profits, in which case any divisible surplus which may have accrued prior to that date is due on that date, and the divisible profits in respect of any arrears which may be collected after that date are due when they reach the hands of the lambardar or his agent.

Held, *per* STUART, C.J. and SPANKIE, J.—That where by agreement or custom there is no date fixed for dividing such profits, the share of a co-sharer becomes due on the last day of the agricultural year as fixed by Acts XVIII and XIX of 1873. BHIKHAN KHAN v. RATANKUAR, 1 A. 512 ... 353

(16) S. 39—See LANDLORD AND TENANT, 2 A. 428.

(17) *S. 93, cl. (a)—Bhaoli—Money equivalent—Rent—Revenue Court—Civil Court—Jurisdiction.—Held* (PEARSON, J., dissenting), that a suit for the money equivalent of arrears of rent payable in kind is a suit for arrears of rent within the meaning of s. 93 of Act XVIII of 1873, and therefore cognizable by a Revenue Court

Per PEARSON, J.—Such a suit, being a suit for damages for a breach of contract, is cognizable by a Civil Court. TAJ-UD-DIN KHAN v. RAM PARSHAD BHAGAT, 1 A. 217 ... 146

(18) S. 93, cl. (c)—See LEASE, 2 A. 437.

(19) *S. 93, cl. (h)—Suit for Profits—Interest.*—A Court of Revenue is competent, in a suit for profits, under s. 93, cl. (*h*) of Act XVIII of 1873, to award the interest claimed on such profits. TOTA RAM v. SHER SINGH, 1 A. 261=1 Ind. Jur. 171 ... 176

(20) *Ss. 93, 95—Jurisdiction.*—The plaintiffs in this suit claimed a declaration of their proprietary right in respect of certain lands and possession of the lands, alleging that the defendants were their tenants, and liable to pay rent for the lands. The defendants, while admitting the proprietary right of the plaintiffs, alleged that they paid the revenue assessed on the lands, that they paid no rent, and that the plaintiffs were not entitled to rent, and they styled themselves tenants at fixed rates. *Held* on appeal, that, as the defendants substantially denied the proprietary title of the plaintiffs and set up a title of their own, the claim of the plaintiffs for a declaration of their proprietary right and of their right to demand rent was a matter which the Civil Court must decide, leaving the plaintiffs to sue in the Revenue Court to eject the defendants, and to recover rent, if the position of the defendants as tenants were established. KANAHIA v. RAM KISHEN, 2 A. 429 ... 840

(21) *Ss. 93, 189, 191—Appeal to Judge—Proprietary Right—Rent—Revenue—Sub-proprietor—Settlement.*—Where the defendant pleaded in answer to plaintiff's suit for arrears of rent, that defendant no longer held as tenant but as sub-proprietor under settlement made direct with defendant by settlement officer, *held* that under s. 189 of Act XVIII of 1873 the suit involved a question of proprietary title and that an appeal lay to the Judge of the district, although the amount in suit was less than Rs. 100. BISHESHAR SINGH v. SUGUNDI, 1 A. 366=1 Ind. Jur. 777 ... 251

(22) *S. 95, cl. (m)—Lease of Zemindari rights—Wrongful Dispossession of Lessee by Lessor—Suit for Compensation—Civil Court—Revenue Court—Jurisdiction.*—*A* granted *B* a lease of his zamindari rights in certain villages for a term of years at a fixed annual rent. Two years before the term expired, in breach of the conditions of the lease, he dispossessed *B*, and thereafter made collections of rent from the agricultural tenants himself. *B* sued him in the Civil Court to recover the moneys so collected by him in those two years. *Held* (by a majority of the Full Bench) that the Courts of Revenue were open to *B*, and that, as he could obtain in such a Court the relief he sought in the suit by an application for compensation

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for wrongful dispossession, the Civil Courts could not, under cl. (*m*), s. 95 of Act XVIII of 1873, take cognisance of the suit.

Per STUART, C.J., and SPANKIE, J.—That as the matter was not one on which *B* could make an application to a Revenue Court of the nature mentioned in cl. (*m*), s. 95 of Act XVIII of 1873, the suit was properly instituted in the Civil Court. ABDUL AZIZ v. WALI KHAN, 1 A. 338=1 Ind. Jur. 633 ... 231

(23) S. 95, cls. (*m*) and (*n*)—See JURISDICTION (OF CIVIL COURT), 2 A. 707.

(24) *S. 95 (m) and (n)—Jurisdiction—Civil Court—Revenue Court.—T*, the occupancy tenant of certain lands, gave *K* a lease of his occupancy rights for a term of twenty years. In the execution of a decree for the ejectment of *T* from such lands obtained by the landholder against *T* in a suit to which *K* was no party, *K* was ejected from such lands. This decree was subsequently set aside, and *T* recovered the occupancy of such lands. *Held* in suit by *K* against *T* and the landholder, in which *K* claimed the occupancy of the lands and mesne profits for the period during his dispossession, in virtue of the lease, that the suit was cognizable in the Civil Courts, and not one on the subject matter of which an application of the nature mentioned in s. 95 of Act XVIII of 1873 could have been made, so as to give the Courts of Revenue exclusive jurisdiction in such matter. KALIAN DAS v. TIKA RAM, 2 A. 137 ... 637

(25) S. 95, cl. (*n*)—See RES JUDICATA, 2 A. 200.

(26) S. 106—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 264.

(27) S. 177—See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 277.

Act XIX of 1873 (N-W.P. Land Revenue).

(1) See ARBITRATION, 2 A. 119.

(2) S. 3, cl. 1—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 400.

(3) S. 3, cl. 8—See ACT XVIII OF 1873 (N-W.P. RENT), 1 A. 512.

(4) Ss. 43, 83, 241, *cl. (b)—Vendor and purchaser—Agreement—Jurisdiction of Civil Court—Cause of Action—Assessment of Revenue.*—The purchaser of a certain estate paying revenue to Government agreed with the vendors, shortly after the sale, that they should retain a certain portion of such estate free of rent, and that he would pay the revenue payable in respect of such portion. In 1853, in a suit by the vendors against the purchaser to enforce this agreement, the Sudder Court held that the revenue payable in respect of such portion of the estate was payable by the purchaser. In 1875, on a fresh settlement of the estate, the representative in title of the purchaser applied to the settlement officer to settle such portion of the estate with the representative in title of the vendors. The settlement officer refused this application, but it was subsequently allowed by the superior revenue authorities. The representative in title of the vendors then sued the representatives in title of the purchaser in the Civil Court, claiming "that he might in accordance with the agreement between the vendors and the purchaser, be exempted from paying revenue in respect of such portion, as against the defendants, without any injury to the Government: that the defendants might be ordered to pay as heretofore such revenue: and that the defendants might be ordered never to claim or demand from him any revenue they might be compelled to pay in respect of such portion."

Held, per SPANKIE, J., that assuming that the agreement between the vendors and the purchaser was enforceable, the act of the defendants in moving the settlement officer to settle such portion of the estate with the plaintiff gave the plaintiff a cause of action. Also that, the object of the plaintiff's suit being to obtain a declaration that, as between him and the defendants, the latter were bound to pay revenue in respect of such portion, the suit was not barred by cl. (*b*), s 241 of Act XIX of 1873. Also that, although the revenue authorities might regard the decision of the Sudder Court as binding on the parties then before the Court, for the currency of the then settlement, that decision, that settlement having expired, and s. 83 of Act XIX of 1873 having come into force, could not control the power of the revenue authorities to settle the land in question with the plaintiff who was its proprietor.

Held, per OLDFIELD, J., that, with reference to ss. 43 and 83 of Act XIX of 1873, the Civil Courts could not relieve the plaintiff of his liability to pay revenue.

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Held by the Court that, in the absence of proof that the agreement by the purchaser was intended to extend beyond the period of the settlement then current, and that it was binding upon his representatives in title, the plaintiff could not obtain the declaration which he sought. HIRA LAL v. GANESH PRASAD, 2 A. 415 ... 831

(5) *Ss.* 61, 65, 91, 257—Wajib-ul-arz—*Pre-emption—Record of rights.*—A *wajib-ul-arz* prepared and attested according to law is *prima facie* evidence of the existence of any custom of pre-emption which it records, such evidence being open to be rebutted by any one disputing such custom. When such a *wajib-ul-arz* records a right of pre-emption by contract between the shareholders, it is evidence of a contract binding on all the parties to it and their representatives, and there will be a presumption that all the shareholders assented to the making of the record and in consequence were consenting parties to the contract of which it is evidence, and it will be for those shareholders repudiating such contract to rebut such presumption. ISRI SINGH v. GANGA, 2 A. 876.

(6) *Ss.* 62, 91, 94. 241—*Record of-Rights—Jurisdiction of Civil and Revenue Courts.*—The Civil Courts are not competent to try suits to alter or amend a record-of-rights, or to give directions in respect of the same, but they are not debarred from entertaining and determining questions of right merely because such questions have been the subject of entries in the record-of-rights, and because such determination may show that such entries are wrong and need correction. Consequently, a claim in the Civil Court for a declaration of the right to make certain collections of rent and to defray therewith certain village expenses, though such right had been the subject of an entry in the record-of-rights adverse to the person claiming such right, was held to be maintainable. SUNDAR v. KHUMAN SINGH, 1 A. 613 ... 427

(7) S. 66—See REGULATION VII OF 1822 (BENGAL LAND REVENUE SETTLEMENT), 1 A. 373.

(8) *S.* 66—*Cess—Custom.*—A cess leviable in accordance with village custom which is not recorded under the general or special sanction of the Local Government cannot, under s. 66 of Act XIX of 1873, be enforced in a Civil Court.

A custom to be valid must be ancient must have been continued and acquiesced in, and must be reasonable and certain.

The fact that a cess leviable in accordance with the village custom has been recorded by a settlement officer is important evidence of the custom but not conclusive proof of it.

Held, on the evidence in this case, that the village custom set up was not established. LALA v. HIRA SINGH, 2 A. 49 ... 576

(9) Ss. 79, 241—See GRANT, 2 A. 545.

(10) Ss. 79, 241 (*h*)—See ASSIGNMENT, 2 A. 732.

(11) *Ss.* 113, 114—*Partition.*—Where in the course of carrying out an order for a partition and of assigning the lands to each co-sharer, certain co sharers claimed certain plots of land as belonging to them, in severalty and demanded that the same should be assigned to them, and the Collector decided that some of such plots were held in severalty and one was held in common, *held* that his decision was not passed under s. 113 of Act XIX of 1873, and was therefore not appealable under s. 114 of that Act. SHIBBAN LAL v. TILOKE CHAND, 2 A. 619 ... 971

(12) *Ss.* 113, 114—Res Judicata—*Determination of title or of proprietary right.*—In the case of an objection to a partition raising a question of title, it is only when the Collector or Assistant Collector records a proceeding declaring the rights of the parties, after an adjudication of the objection on its merits, that his order becomes an order under s. 113 of Act XIX of 1873, within the meaning of s. 114 of that Act.

Where, therefore, an Assistant Collector made on order disallowing an objection to a partition raising a question of title, on the ground that such question had been determined against the objector in suit for profits between the parties, *held* that such order was not a decision of a Court of Civil Judicature, within the meaning of s. 114 of Act XIX of 1873, but that it could be contested by a suit in the Civil Court. ASHGAR ALI SHAH v. JHANDA MAL, 2 A. 839 ... 1123

(13) S. 188—See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 277.

(14) Ss. 194, 195—See ACT XXXV OF 1858 (LUNACY, DISTRICT COURTS), 1 A. 476.

Act VI of 1874 (The Privy Council Appeals). PAGE

See HIGH COURT, 1 A. 726.

Act XII of 1879 (Registration and Limitation Amendment).

(1) S. 2—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 357.
(2) S. 7—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 838.
(3) S. 90 (2)—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 904.
(4) Ss. 90 (16), 102—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 785.
(5) S. 90 (27)—See APPEAL (GENERAL), 2 A. 616.

Actionable Claim.

See PROMISSORY NOTE, 1 A. 732.

Actual Possession.

See PRE-EMPTION, 1 A. 311.

Adultery.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 339.

Adverse Possession.

(1) See LANDLORD AND TENANT, 2 A. 517.
(2) LIMITATION ACT (IX OF 1871), 1 A. 655.

Agreement.

(1) *Act* IX *of* 1872, *ss.* 23, 25—*Agreement—Consideration.*—By a written instrument, duly registered, *T* agreed, in consideration of the recognition by his two brothers of his rights in the joint and undivided property of the three brothers, not to sell, transfer or mortgage his share except to them, and should he desire to dispose of it, to dispose of it to them for a certain sum. In breach of this agreement he gave a usufructuary mortgage of his share to *L*. *Held* in a suit by *L* to enforce the mortgage, that the agreement was valid and that the mortgage was bad against *T*'s brothers. LAKHMI CHAND v. TORI LAL, 1 A. 618 ... 431
(2) Affecting land—See ALLOWANCE, 2 A. 162.
(3) Not to appeal—See CONTRACT ACT (IX OF 1872), 1 A. 267.
(4) Uncertain—See CONTRACT ACT (IX OF 1872), 1 A. 275.
(5) Without consideration—See CONTRACT ACT (IX OF 1872), 1 A. 309.
(6) With penal clause—See STAMP ACT (I OF 1879), 2 A. 654.
(7) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 415.
(8) See RELEASE, 2 A. 554.

Ajmere Courts Regulation (I of 1877).

Ss. 17, 18, 21, 36, 37—*Reference to the High Court by the Chief Commissioner of Ajmere and Mairwara—Reference to Chief Commissioner by Commissioner of Ajmere—Appeal from Commissioner's decree made in accordance with Chief Commissioner's judgment.*—On an appeal from a decision in a civil suit of the Assistant Commissioner of Ajmere to the Commissioner of Ajmere, the latter, feeling doubtful on a question of the nature specified in s. 17 of the Ajmere Courts Regulation I of 1877, referred such question, under s. 36 of that Regulation, to the Chief Commissioner of Ajmere and Mairwara. The Chief Commissioner dealt with the case as prescribed in s. 37 of that Regulation, and returned it to the Commissioner, who dismissed the suit in accordance with the Chief Commissioner's judgment. The plaintiff preferred an appeal to the Chief Commissioner from the Commissioner's decision. The Chief Commissioner did not make any order on the memorandum of appeal admitting it, or directing that it should be registered, or that the respondent should be summoned, or that the appellant should appear on a certain day under s. 551 of Act X of 1877; but issued a notice to the appellant's counsel to appear on a certain day. The appellant's counsel appeared on the day, and the Chief Commissioner intimated that he was acting under s. 551 of Act X of 1877. The appellant's counsel then proceeded to address the Chief Commissioner, and was heard for some time, and then stopped, in consequence of the Chief Commissioner resolving to refer to the High Court the question whether the appeal from the Commissioner's decision lay to him or to Her Majesty in Council. The Chief Commissioner subsequently referred such question to the High Court.

Held by the Full Bench (SPANKIE, J., dissenting), on a reference by the Division Bench before which the Chief Commissioner's reference came,

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that such question arose " in the trial of an appeal " within the meaning of s. 21 of the Ajmere Courts Regulation I of 1877, and was properly referred to the High Court.

Held by the Division Bench (SPANKIE, J., and STRAIGHT, J.) that the appeal from the Commissioner's decision lay, in this particular case, not to the Chief Commissioner, but to Her Majesty in Council. THAKUR OF MASUDA v. THE WIDOWS OF THE THAKUR OF NANDWARA, 2 A. 819 (F.B.) ... 1109

Alienation.

(1) See ATTACHMENT, 1 A. 616.
(2) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 58.
(3) See HINDU LAW (ALIENATION), 2 A. 41, 141, 267, 635.
(4) See MORTGAGE (GENERAL), 1 A. 610.

Allowance.

Agreement affecting land—Transfer of the land—Covenant running with the land.—*S*, by an instrument in writing, duly registered, agreed, for valuable consideration, for himself, his heirs and successors, to pay his wife, *A*, a certain sum monthly out of the income of certain land, and not to alienate such land without stipulating for the payment of such allowance out of its income. He subsequently gave *L* a usufructuary mortgage of the land subject to the payment of the allowance. *L* gave *R* a sub-mortgage of the land, agreeing orally with *R* to continue the payment of the allowance himself. *Held*, in a suit by *A* against *L* and *R* for the arrears of the allowance, that *A* was not affected by any agreement between *L* and *R* as to the payment of the allowance, and *R* being in possession of the land was bound to pay the allowance. ABADI BEGAM v. ASA RAM, 2 A. 162 ... 654

Ancestral Property.

See HINDU LAW (ALIENATION), 2 A. 141.

Appeal.

1.—GENERAL.
2.—SECOND APPEAL.
3.—SPECIAL APPEAL.
4.—TO PRIVY COUNCIL.

———1.—General.

(1) *Act* XX *of* 1866, *ss.* 52, 53, 54, 55—*Execution of decree obtained on Bond specially Registered—Appeal—Held* (STUART, C.J., dissenting) that an appeal lies from an order passed in the execution of a decree obtained under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions of s. 52 of that Act. WILAYAT-UN-NISSA v. NAJIB UN-NISSA, 1 A. 583=2 Ind. Jur. 792 ... 404

(2) *Act* X *of* 1877, *s.* 54 (*b*)—*Appeal when presented—Memorandum of appeal insufficiently stamped—Limitation.*—For the purpose of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the memorandum of appeal is insufficiently stamped and is returned in order that the deficiency may be supplied, it is again presented.

When an appellate Court returns an insufficiently stamped memorandum of appeal, in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied. SHEO PARTAB NARAIN SINGH v. SHEO GHOLAM SINGH, 2 A. 875 ... 1148

(3) *Act* X *of* 1877, *ss.* 556, 558, 588—*Dismissal of appeal for appellant's default—Appeal—Act* XII *of* 1879, *s.* 90 (27).—Where an appeal is dismissed under s. 556 of Act X of 1877, for the appellant's default, the order dismissing it is not appealable. NAND RAM v. MUHAMMAD BAKHSH, 2 A. 616. 969

(4) Admission, after time—See LIMITATION ACT (IX OF 1871), 1 A. 34, 250.

(5) Against joint-decree by some of the defendants on ground common to all—See CONTRIBUTION, 1 A. 455.

(6) *Decree—Judgment.*—The plaintiffs in this suit claimed, as the heirs of *G*, possession from the defendants of certain lands which *G* had mortgaged to the defendants, alleging that the mortgage-debt had been satisfied from the usufruct. The defendants denied the title of the plaintiffs to redeem, asserting also that the mortgage-debt had not been satisfied. The Court of

Appeal—1—General—(*Concluded*). PAGE

first instance held that the plaintiffs were entitled to redeem, but dismissed the suit on the ground that the mortgage debt had not been satisfied.

Held, that the defendants were entitled to appeal, the case of *Pan Kooer* v. *Bhugwunt Kooer* not being applicable to this case. RAM GHOLAM v. SHEO TAHAL, 1 A. 266 ... 179

(7) *Limitation.*—*B* sued *M* and *T* for money due on a bond, and on the 27th April 1877, obtained a decree against *T*; the suit against *M* being dismissed. *T* applied for a review of judgment, and *B* also made a similar application. On the 25th May 1877, *T*'s application was granted, and, on the 16th July 1877, *B*'s was rejected. On the 29th June 1878, the Court re-heard the suit against *T* and dismissed it. *B* appealed, making *T* and *M* respondents, and impugning in his memorandum of appeal the decree of the 27th April 1877, as well as that of the 29th June 1878. The appellate Court, assuming that the appeal was one from the decree of the 27th April 1877, preferred beyond time, admitted it after time, and after hearing the case on its merits gave a decree against *M* and dismissed the suit as regards *T*. *Held* that the appellate Court erred in assuming that the appeal was from the decree of the 27th April 1877, and that it was at liberty to admit it beyond time, the appeal being from the decree of the 29th June 1878, that decree being the one which had brought *B* before that Court as an appellant, and that the appellate Court was not competent on an appeal from the decree of the 29th June 1878, to reconsider the merits of the case against *M*, the appeal from the decree of the 27th April 1877 being barred by limitation, and that decree and the decree of the 29th June 1878, being separate and distinct, and not appealable in one memorandum of appeal from the latter decree. MOTI BIBI v. BIKANU, 2 A. 772 ... 1076

(8) *Plaint—Act* VIII *of* 1859—*Act* X *of* 1877, *s.* 584—*Suit for Redemption of Usufructuary Mortgage—Jurisdiction.*—A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsif's Court. After the suit had been admitted and the parties called on to produce evidence, the Munsif ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper Court, on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond the jurisdiction of a Munsif. *Held* that, under Act VIII of 1859, the Munsif's order was appealable to the lower appellate Court, and under Act X of 1877, the lower appellate Court's order to the High Court.

Where the question in dispute in such a suit is not only whether the property has been redeemed out of the usufruct, but whether the property and the right to redeem belongs to the plaintiff and the value of the property exceeds Rs. 1,000, such suit is not cognizable by a Munsif. KALIAN DAS v. NAWAL SINGH, 1 A. 620 ... 432

(9) See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 1 A. 287.

(10) See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.

(11) See ACT XVIII OF 1873 (N.W. P. RENT), 1 A. 366.

(12) See APPELLATE COURT, 1 A. 545.

(13) See ARBITRATION, 2 A. 471.

(14) See CANCELLATION OF DOCUMENT, 2 A. 148.

(15) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 156, 181, 260, 363, 374, 377; 2 A. 67.

(16) See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 178.

(17) See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 687, 745, 748; 2 A. 74, 91, 352, 357, 396, 497, 567, 651, 752, 785, 889, 904.

(18) See COURT FEES ACT (VII OF 1870), 1 A. 360.

(19) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 680; 2 A. 53.

(20) See EVIDENCE, 1 A. 725.

(21) See LETTERS PATENT (1865), 1 A. 31.

(22) See LIMITATION, 2 A. 192.

(23) See PRE-EMPTION, 1 A. 563.

(24) See RELEASE, 2 A. 554.

———2.—**Second Appeal.**

(1) See ACT XV OF 1873 (N.W. P. AND OUDH MUNICIPALITES), 1 A. 269.

(2) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 884.

(3) See DECLARATORY DECREE, 2 A. 134.

(4) See HAQ-I-CHAHARAM, 2 A. 905.

Appeal—3.—Special Appeal. PAGE

(1) *Act* XXIII *of* 1861—*S.* 27—*Suit of the nature cognizable in a Small Cause Court Act XLIII of* 1860, *s.* 1.—*Held*, where a suit of the nature cognizable in a Court of Small Causes was instituted before Act XLIII of 1860 came into force, and an order was made on regular appeal in execution of the decree in such suit after the passing of Act XXIII of 1861, that the provisions of s. 27 of Act XXIII of 1861 applied, and accordingly no special appeal would lie from such order. BHICHUK SINGH v. NAGESHAR NATH, 2 A. 112 ... 621

(2) *Act* X *of* 1873, *ss.* 8, 10, 13—*Reference to Arbitration—Form of Oath—Power of Arbitrator to administer oath other than in prescribed form—Validity of award based upon evidence taken on oath illegally administered—Act XLV of* 1860, *s.* 20—*Act* I *of* 1872, *s.* 3—*Special appeal—Objection.*—The matters in dispute in a suit were, by the desire of the parties to the suit, referred to arbitration. During the investigation of these matters by the arbitrators the plaintiff offered to be bound by the oath of the defendant administered on the Koran. The defendant agreed to take such oath, and such oath was accordingly administered to him by the arbitrators, and his evidence taken, and an award made based on the evidence so taken. On special appeal to the High Court by the plaintiff, he objected for the first time, the objection not having been taken in his memorandum of special appeal, that the arbitrators were not legally competent to administer such oath, and the evidence so taken could not form a valid basis of an award, and the award was therefore void.

Held per PEARSON, J., SPANKIE, J., dissenting, with reference to the legal competency of the arbitrators to administer the oath, that the objection was good, and that the arbitrators had no power to administer the oath.

Per PEARSON, J., SPANKIE, J., doubting, that as the objection was one which vitally affected the procedure of the arbitrators, it could not be ignored, although it was not preferred in the lower Courts, and was not to be found in the memorandum of special appeal.

Per PEARSON, J., that the statement of the defendant made on an oath illegally administered could not form a valid basis of an award, and the award was void, and should be set aside.

Per SPANKIE, J., that the plaintiff having offered to be bound by the oath, and the defendant having agreed to take it, the plaintiff was bound by the evidence given on such oath, and that as the arbitrators had by law and consent of parties authority to receive the evidence of the defendant the substitution by them of an oath on the Koran for an affirmation did not, under the provisions of s. 13 of Act X of 1873, invalidate such evidence, and consequently render the award based on such evidence void. WALI-UL-LAH v. GHULAM ALI, 1 A. 535=2 Ind Jur. 468 ... 370

(3) See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITIES), 1 A. 269.

(4) See LIMITATION, 1 A. 508.

(5) See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 567.

———4.—To Privy Council.

(1) Application for leave to—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 65.

(2) Application for leave to—See LIMITATION ACT (XV OF 1877), 1 A. 644.

(3) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 604.

(4) See HIGH COURT, 1 A. 726.

(5) See PRIVY COUNCIL, 1 A. 688.

Appellate Court.

(1) Powers of—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 487, 669, 744, 908.

(2) Powers of—See PARTIES, 2 A. 107.

(3) *Powers of—Act* VIII *of* 1859, *ss.* 337, 351—*Act* XXIII *of* 1861, *s.* 37—*Appeal.*—An appellate Court, hearing an appeal *ex parte* in the absence of the respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the question raised by the appellant. DURGA PRASAD v. KHAIRATI AND OTHERS, 1 A. 545=2 Ind. Jur. 680... 377

(4) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 680.

(5) See EVIDENCE, 1 A. 725.

Application.

For leave to appeal to Her Majesty in Council—See LIMITATION ACT (XV OF 1877), 1 A. 644.

Arbitration. PAGE

(1) *Act* XVIII *of* 1873—*Act* XIX *of* 1873.—Under the general law parties to suits may, if they are so minded, before issue joined, refer the matters in dispute between them to arbitration, and after issue joined, with the leave of the Court.

Act XVIII of 1873 does not prohibit the parties to the suits mentioned therein from referring the matters in dispute between them in such suits to arbitration.

Where, therefore, the parties to a suit under that Act agreed to refer the matters in dispute between them to arbitration, after issues had been framed and evidence recorded, and applied to the Court to sanction such reference, *held* (STUART, C J., dissenting) that the Court was competent to grant such sanction, and on receiving the award to act on it. GOSHAIN GIRDHARJI v. DURGA DEVI, 2 A. 119 ... 626

(2) *Act* X *of* 1877, ss. 2, 520, 521, 522, 525, 526, 588—*Filing of award—Appeal.*—Where, in a suit for the filing of an award made on a private reference to arbitration, the Court of first instance, holding that there was no reason to remit such award to the reconsideration of the arbitrator, under the provisions of s. 520 of Act X of 1877, or to set it aside under s. 521 of that Act, did not proceed to give judgment according to such award followed by a decree, but merely directed that such award should be filed, *held* that its order was not appealable as a decree, or as an order. RAMADHIN v. MAHESH, 2 A. 471=4 Ind. Jur. 585 ... 870

(3) *Insolvent—Act* IX *of* 1872, *s.* 65.—*K*, on the one part, and his creditors including *C* on the other part, agreed in writing to refer to arbitration the differences between them regarding the payment of his debts by *K*. The award compounded *K's* debts, and assigned his property to his creditors and directed that *K* should dispose of such property for their benefit, and that, if he misappropriated any of the property, he should be personally liable for the loss sustained by the creditors on account of such misappropriation. *C* signed the award, amongst other creditors, but the award was not signed by all the creditors. *C* received a dividend under the award. *Held*, in a suit by *C* against *K* to recover a debt which had been compounded under the award, in which suit *C* alleged that several creditors had not signed the award : that some of them had sued *K* and recovered debts in spite of the award ; that *K* had misappropriated some of the property ; and that, if the plaintiff did not sue, there would be no assets left to satisfy his debt, that such suit was not maintainable. KHETO MAL v. CHUNI LAL, 2 A. 173 ... 662

(4) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 156 ; 2 A 181.

Arbitrator.

See APPEAL (SPECIAL APPEAL), 1 A. 535.

Arrest.

(1) Pending appeal—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 340.

(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 386.

Assessment.

(1) Of revenue—See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 415.

(2) See PRE-EMPTION, 1 A. 709.

Assessors.

Omission to take opinion—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 610.

Assignment.

(1) By trustees—See RECORD-OF-RIGHTS, 2 A. 460.

(2) *Jurisdiction—Rent-free grant—Act* XVIII *of* 1873, *ss.* 30, 95 (*c*)—*Act* XIX *of* 1873, *ss.* 79, 241 (*h*).—The plaintiffs in this suit, zemindars of a certain village, sued for the possession of certain land in such village, alleging that it had been assigned to a predecessor of the defendant to hold so long as he and his successors continued to perform the duties of village watchman, and the defendant had ceased to perform those duties, and was holding as a trespasser. The defendant set up as a defence to the suit that he and his predecessors had held the land rent-free for two hundred years, and that he held it as a proprietor. *Held* that such assignment was not a grant

Assignment—(*Concluded*). PAGE

within the meaning of Reg. XIX of 1793, and the plaintiffs' claim was not one to resume such a grant or to assess rent on the land, of which a Revenue Court could take cognizance under ss. 30 and 95 (*c*) of Act XVIII of 1873 or ss. 79 and 241 (*h*) of Act XIX of 1873, but one which was cognizable by the Civil Courts. PURAN MAL *v.* PADMA, 2 A. 732... 1049

(3) Of decrees—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 91.

(4) See MORTGAGE (GENERAL), 2 A. 142.

Attaching Creditor.

Sale in execution—Right of attaching creditor to sale-proceeds—Suit for money received by the defendant for the plaintiff's use—Limitation -Act VIII *of* 1859, *s.* 270—*Act* IX *of* 1871, *sch. ii, cls.* 15, 26, 60, 118.—Certain immoveable property was attached in execution of a money-decree held by *A*, dated the 22nd August 1871, on the 1st April 1872. The same property was subsequently attached in execution of a decree held by *B*, dated the 19th August 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of this decree. The Munsif directed that the proceeds of the sale should be paid to *B*. *A*, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that *A* was entitled to the proceeds, reversed the Munsif's order. *A* then obtained an order from the Munsif directing *B* to refund the money, which he did, and it was paid to *A*. *B* sued *A* to recover the money by establishment of his prior right to the same, and for the cancelment of the Judge's order, alleging that the same was made without jurisdiction.

Held (by a majority of the Full Bench) that the suit was one for money received by the defendant for the plaintiff's use, and was therefore governed by cl. 60, sch. ii of the Limitation Act.

Per STUART, C.J., and SPANKIE, J.—That the suit was not such a suit, but was one for which no period of limitation was provided elsewhere than in cl. 118 of the schedule, and that it was governed by that clause.

Held, by the Division Bench that *A* was not entitled, as the first attaching creditor, to the sale-proceeds. RAM KISHAN *v.* BHAWANI DAS, 1 A. 333. 228

Attachment.

(1) *Act* VIII *of* 1859, *S.* 240—*Attachment of property in execution of decree—Private alienation after such attachment.*—Where certain immoveable property having been attached, the execution case was subsequently struck off the file, and the judgment-debtor applied again for attachment of the same property, *held*, looking to the particular circumstances of the case, that a private alienation of the property, after the date of such application but before attachment, was not void under the provisions of s. 240 of Act VIII of 1859. ZAIB-UN-NISSA *v.* JAIRAM GIR, 1 A. 616 ... 429

(2) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 58, 866.

(3) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 752.

(4) See COURT FEES ACT (VII OF 1870), 2 A. 63.

(5) See JURISDICTION (GENERAL), 2 A. 799.

(6) See MORTGAGE (USUFRUCTUARY), 2 A. 455.

Attempt.

See PENAL CODE (ACT XLV OF 1860), 1 A. 316; 2 A. 105, 253.

Attestation.

Effect of—See MORTGAGOR AND MORTGAGEE, 1 A. 303.

Auction-purchaser.

(1) See CHARGE, 1 A. 433; 2 A. 698.

(2) See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 272.

(3) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 352, 396.

(4) See EXECUTION OF DECREE, 1 A. 568.

(5) See HINDU LAW (JOINT FAMILY), 1 A. 429.

(6) See LIS PENDENS 1 A. 588.

(7) See MONEY-DECREE, 1 A. 240, 446.

(8) See MORTGAGE (GENERAL), 1 A. 126.

Auction-sale.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 374.

(2) See PARTIES, 2 A. 107.

Award. PAGE

(1) See ARBITRATION, 2 A. 471.
(2) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 156.
(3) See EVIDENCE ACT (I OF 1872), 2 A. 809.

Bail.

Power of Sessions Court to admit a convicted person to bail—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 151.

Bailment.

See CONTRIBUTORY NEGLIGENCE, 2 A. 756.

Banns.

Publishing the—See PENAL CODE (ACT XLV OF 1860), 1 A. 316.

Bhaoli.

(1) See ACT X OF 1859 (BENGAL RENT), 1 A. 301.
(2) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 217.

Bigamy.

Attempt to commit—See PENAL CODE (ACT XLV OF 1860), 1 A. 316.

Bill of Exchange.

Act I *of* 1872, *s.* 92—*Bill of exchange—Exclusion of Evidence of oral agreement.*—It was agreed between the Bank of Bengal at Calcutta and *C* and Co., who carried on business there that the Branch of the Bank at Cawnpore, should discount bills to a certain extent drawn by *C*, who carried on business at Cawnpore, on *C* and Co. against goods to be consigned by rail to *C* and Co., and that railway receipts for such consignments should be forwarded to *C* and Co. through the Cawnpore Branch of the Bank. *C* accordingly drew a bill on *C* and Co. payable twenty-one days after date, which the Cawnpore Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to *C* and Co. *C* and Co., having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against *C* on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to *C* and Co. until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, J. (SPANKIE, J., dissenting) that evidence of such oral understanding was not admissible even under proviso 3 of s. 92 of Act I of 1872. COHEN v. THE BANK OF BENGAL, 2 A. 598=5 Ind. Jur. 151 ... 957

Bond.

(1) For performance of duties of office—See ACT XI OF 1865 (MOFUSSIL SMALL CAUSE COURTS), 1 A. 87.
(2) See APPEAL (GENERAL), 1 A. 583.
(3) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 838.
(4) See DAMAGES, 2 A. 617.
(5) See LIMITATION ACT (IX OF 1871), 2 A. 857.
(6) See LIMITATION ACT (XV OF 1877), 2 A. 322.
(7) See MONEY DECREE, 1 A. 240.
(8) See MORTGAGE (SIMPLE), 1 A. 611.
(9) See PENALTY, 2 A. 621, 639, 715, 769.
(10) See POST DIEM INTEREST, 1 A. 603.
(11) See REGISTRATION ACT (XX OF 1866), 1 A. 236; 2 A. 688.
(12) See STAMP ACT (I OF 1879), 2 A. 654.

Bribery.

See PENAL CODE (ACT XLV OF 1860), 1 A. 530.

British Courts.

Jurisdiction of—See ACT XI OF 1872 (FOREIGN JURISDICTION AND EXTRADITION), 2 A. 218.

British Indian Courts.

Jurisdiction of—See CROWN, 2 A. 1.

Burden of Proof. PAGE

(1) See EVIDENCE ACT (I OF 1872), 1 A. 53.
(2) See LIMITATION, 1 A. 425.
(3) See MORTGAGE (REDEMPTION), 1 A. 194.

Cancellation of Document.

(1) *Suit for the—" Subject-matter in dispute"—Appeal—Act VI of 1871, s. 22—Jurisdiction.*—The plaintiffs sued for the cancellation of a bond for the payment of Rs. 6,000, together with interest thereon at the rate of four per cent. per mensem, alleging that they had executed such bond under the impression that it was a bond for the payment of Rs. 3,000 together with interest thereon at the rate of one and a half per cent. per mensem, whereas the defendants had fraudulently caused them to execute the bond in suit. The plaintiffs paid into Court Rs. 3,000 together within terest at the rate of one and a half per cent. per mensem. *Held* that the value of the subject-matter in dispute was the difference between Rs. 3,000 and Rs. 6,000 or thereabouts, and therefore an appeal from the decree of the Court of first instance preferred to the District Judge was cognizable by him. KALI CHARAN RAI v. AJUDHIA RAI, 2 A. 148 ... 646
(2) See DOCUMENT, 1 A. 622.

Carrier.

See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Cause of Action.

(1) Joinder of, between same parties—See CESS, 1 A. 444.
(2) Misjoinder of—See SPECIFIC RELIEF ACT (I OF 1877), 1 A. 555.
(3) *Mortgage—First and second mortgages—Dispossession of second mortgagee—Cause of Action—Limitation—Interest.*—*Z*, being indebted to *A*, executed in his favour a written mortgage of certain lands, in which it was agreed that if the debt was not repaid within a fixed time, *A* should be put into possession of the lands. Subsequently *Z* executed in favour of *P*, to whom also he owed money, a second mortgage of the same lands subject to the same condition. *P* not receiving payment within the stipulated time, sued *Z* on the mortgage and obtained a decree for possession of the lands, under which he was put into possession in the year 1846. After *P* had obtained his decree, *A*, whose debt had likewise remained unpaid, brought a suit, as first mortgagee against *Z* and *P* for the possession of the lands, and obtaining a decree, recovered possession in the year 1847, dispossessing *P*. In the year 1870, the heirs of *Z* having paid off the debt due to *A*, resumed possession, whereupon the heirs of *P* applied to be restored to possession in execution of the decree obtained by *P* in 1846. This application having been rejected on the ground that that decree had been fully executed when *P* obtained possession under it, the heirs of *P* instituted a suit against the heirs of *Z* to recover possession and for interest during the time they were dispossessed.

Held by their Lordships of the Judicial Committee, reversing the decision of the High Court, that the heirs of *P* were entitled to possession on *A*'s mortgage being paid off, and that their cause of action accrued and limitation ran against them from the time when the heirs of *Z* resumed possession.

Held also that they were not entitled to a decree for the interest accruing during the time they were dispossessed. NARAIN SINGH v. SHIMBHOO SINGH, 1 A. 325 (P.C.)=4 I.A. 15=3 Suth. P.C.J. 357=3 Sar. P.C.J. 673 ... 223

(4) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 415.
(5) See CHEQUE, 2 A. 754.
(6) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 543.
(7) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 884.
(8) See FRAUD, 1 A. 403.
(9) See LIMITATION ACT (IX OF 1871), 2 A. 857.
(10) See LIMITATION ACT (XV OF 1877), 2 A. 322.
(11) See MORTGAGE (USUFRUCTUARY), 2 A. 193.

Caveat Emptor.

(1) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 780.
(2) See EXECUTION OF DECREE, 2 A. 828.

Certificate. PAGE

(1) Of Sale—See REGISTRATION, 2 A. 392.
(2) To collect Debts—See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 1 A. 287; 2 A. 513.
(3) To collect Debts—See CIV. PRO. CODE (ACT VIII OF 1859), 1 A. 686.

Certified Purchaser.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 235, 290.

Cess.

(1) *Act* XXIII *of* 1861, s. 27—*Suit cognizable by Courts of Small Causes—Zemindari dues and cesses not coming within the classes of such suits—Joinder of causes of action between same parties.*—The plaintiff claimed from the defendants, as joint decree-holders, a fourth share of the proceeds realized by auction-sale through the Court of the Munsif of certain houses, situate on land subject to a village-custom whereby a proprietary due of the above amount was recognized and payable to the zemindar of the said land. The Division Bench of the High Court having referred to the Full Bench the question whether claims for such zemindari dues or cesses were in the nature of suits cognizable by a Court of Small Causes, *held* by the Full Bench that the claim as brought does not fall within any of the classes of suits cognizable by the Courts of Small Causes: *aliter* if the due is payable in virtue of a contract.

Held by the Division Bench that the claim is not bad for misjoinder, as the due was payable out of the sale-proceeds taken out of Court by the decree-holders. NANKU v. THE BOARD OF REVENUE, 1 A. 444 (F.B.) ... 304

(2) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 49.
(3) See CLAIM, 1 A. 440.
(4) See REGULATION VII OF 1822 (BENGAL LAND REVENUE), 1 A. 373.

Cession.

See CROWN, 2 A. 1.

Charge.

(1) *Jurisdiction—Suit for money charged on Immoveable property—Mortgage—First and second mortgages—Sales in execution of decrees enforcing mortgages—Auction-purchasers.*—*Held* that a suit for money charged on immoveable property in which the money did not exceed Rs. 1,000, although the value of the immoveable property did exceed that sum, was cognizable by a Munsif, such property being situate within the local limits of his jurisdiction.

Certain immoveable property was sold on the same day in the execution of two decrees, one of which enforced a charge upon such property created in 1864 and the other a charge created in 1867. *Held* that the purchaser of such property at the sale in the execution of the decree, which enforced the earlier charge, was entitled to the possession of such property in preference to the purchaser of it at the sale in the execution of the decree which enforced the later charge, notwithstanding the latter had obtained possession of the property in virtue of his purchase. JANKI DAS v. BADRI NATH, 2 A. 698 ... 1026

(2) *Mortgage—Charge against immoveable property—Auction-purchaser's rights subject to lease.*—An obligee under a bond giving him a charge upon land who sues for and obtains only a money decree, under which he himself purchases the land, the sale-proceeds being sufficient to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Semble* that even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not according to the principle laid down in *Khub Chand* v. *Kalian Das* avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond. BULWANT SINGH v GOKARAN PRASAD, 1 A. 433=2 Ind. Jur. 177 ... 297

(3) *Mortgage—Condition against alienation.*—*Held* that where a person stipulates generally not to alienate his property he does not thereby create a charge on any particular property belonging to him. BHUPAL v. JAG RAM, 2 A. 449 ... 855

(4) See LEGACY, 1 A. 753.
(5) See REGISTRATION ACT (VIII OF 1871), 1 A. 274; 2 A. 96.

Chela.

See HINDU LAW (INHERITANCE), 1 A. 539.

Cheque. PAGE

Act X *of* 1877, *s.* 61—*Suit on lost cheque—Parties to suit.*—The indorsees of a cheque sued the indorser, stating in their plaint that the cheque had been lost, and that the defendant refused to give them a duplicate of it, and claiming a duplicate of it or the refund of the money they had paid the defendant on the cheque.

Held that the plaint disclosed a cause of action against the defendant. *Held* also that the plaint should be amended by joining the drawer of the cheque as a defendant in the suit. BALDEO PROSAD v. GIRISH CHUNDER GHOSE, 2 A. 754 ... 1063

Chose in action.

See PROMISSORY NOTE, 1 A. 732.

Civil Procedure Code (Act VIII of 1859).

(1) See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.
(2) See APPEAL (GENERAL), 1 A. 620.
(3) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 74, 275, 299.
(4) S. 2—See HINDU LAW (GIFT), 1 A. 734.
(5) S. 2—See LIS PENDENS, 1 A. 588.
(6) S. 2—See RES JUDICATA, 1 A. 316.
(7) *S.* 2—*Res judicata.*—The plaintiffs in the present suit claimed, as the heirs of *J*, certain property from *M*, the daughter of *R*, alleging that such property was the joint and undivided property of *R* and *J*, to which on *R*'s death *J* had succeeded. The plaintiffs had formerly, after the death of *J*, sued *M* for such property, alleging that it was the separate property of *R*, and that on the death of *R*'s widow they were entitled to succeed thereto. *Held* that the decision in the former suit that such property was the separate property of *R* to which *M* was entitled to succeed on the death of his widow was a bar to their present suit. RADHIA v. BENI, 1 A. 560 ... 388
(8) *S.* 2—*Res judicata.*—When a plaintiff claims an estate, and the defendant, being in possession, and knowing that he has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff.
Where, therefore, the defendants purchased an estate in the plaintiff's possession and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that he was the auction-purchaser of it, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property, a claim which he might have asserted in reply to the former suit, *held* that he was debarred from suing to enforce such claim. BALDEO SAHAI v. BATESHUR SINGH, 1 A. 75 ... 50
(9) *Ss.* 2, 139—*Trial and Determination of Issues—Res Judicata.*—A Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal. *Held* that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit. MAN SINGH v. NARAYAN DAS, 1 A. 480=2 Ind. Jur. 387 ... 330
(10) *S.* 5—*Dwelling-place—Act* XXIII *of* 1861, *s.* 4—*Jurisdiction.*—The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of s. 5 of Act VIII of 1859 and s. 4 of Act XXIII of 1861. FATIMA BEGAM v. SAKINA BEGAM, 1 A. 51 ... 34
(11) Ss. 5, 13—See REGULATION VII OF 1825 (BENGAL, EXECUTION OF DECREE), 1 A. 431.
(12) *S.* 6—*Act* XXIII *of* 1861, *s.* 38—*Execution of Decree—Miscellaneous Proceedings—Transfer.*—A District Court is competent, under s. 6 of Act VIII of 1859, and s. 38 of Act XXIII of 1861, to transfer to its own file proceedings in execution of decree pending in a Court subordinate to it. GAYA PARSHAD v. BHUP SINGH, 1 A. 180 ... 121
(13) *S.* 7.—*D*, being able to sue for the possession of certain property, omitted to do so, and sued in the first instance only for a declaration of her right to such property. The Court refusing to make any such declaration on the

Civil Procedure Code (Act VIII of 1859)—(*Continued*). PAGE

ground that she could sue for possession, *D* then sued for possession. *Held* that the second suit was not barred by s. 7 of Act VIII of 1859. DARBO v. KESHO RAI, 2 A. 356 (F.B.) ... 789

(14) *S.* 7.—The fact that, at the time when the purchaser of certain lands sued, with a view of confirming his title to the lands under his purchase, for a decree declaring such title, he was in a position to have sued for possession of the lands, was no bar, under the provisions of s. 7 of Act VIII of 1859, to his subsequently suing for possession of the same. TULSI RAM v. GANGA RAM, 1 A. 252 ... 170

(15) *S.* 7—*Relinquishment or Omission of Portion of Claim.*—*Held*, where two suits were instituted simultaneously, and one of such suits had been determined, that, assuming that the claims in such suits arose out of the same cause of action and should have been included in one suit, the provisions of s. 7 of Act VIII of 1859 were no bar to the entertainment of the second suit. KALESHAR PARSHAD v. JAGAN NATH, 1 A. 650 ... 453

(16) *S.* 7—*Relinquishment or omission to sue for any part of claim—Fraud—Cause of Action.*—*S*, as one of the heirs of his brother *M*, sued the sons of *M*, the other heirs of *M*, for, amongst other things, a declaration of his right to share in the rights and interests of *M* as the mortgagee under a deed of mortgage, which he valued at the principal sum advanced under the mortgage, *viz*, Rs. 5,600, stating his cause of action to be the obstruction caused by the sons of *M* to his sharing in *M*'s estate. He obtained a decree declaring his title to the share claimed. *L*, one of the sons of *M*, had fraudulently concealed from and kept *S* in ignorance of the fact that previously to the suit he had realized Rs. 8,624 under the mortgage. On this fact coming to *S*'s knowledge he sued the sons of *M* to recover his share of that sum. *Held* that the second suit was not barred by s. 7 of Act VIII of 1859. LACHMAN SINGH v. SANWAL SINGH, 1 A. 543 ... 375

(17) *Ss.* 7, 97—*Omission of part of claim—Withdrawal of suit—Institution of fresh suit including part of claim omitted.*—Where the plaintiffs in a suit were permitted to withdraw from the same, with a view to bringing a fresh suit which should include a portion which had been omitted of the claim arising out of the cause of action, and such fresh suit was brought, the additional portion of the claim in that suit was not barred by s. 7 of Act VIII of 1859. ILAHI BAKHSH v. IMAM BAKHSH, 1 A. 324=1 Ind. Jur. 561 ... 222

(18) Ss. 8, 9—See COURT FEES ACT (VII OF 1870), 1 A. 552.

(19) S. 9—See COURT FEES ACT (VII OF 1870), 2 A. 676.

(20) S. 13—See COURT FEE, 2 A. 241.

(21) S. 73—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 738.

(22) *Ss.* 109, 110, 111, 119, 147—Ex parte *Judgment—Appeal.*—The provision in s. 119 of Act VIII of 1859 that "no appeal shall lie from a judgment passed *ex parte* against a defendant who has not appeared," must be understood to apply to the case of a defendant who has not appeared at all, and not to the case of a defendant who, having once appeared, fails to appear on a subsequent day to which the hearing of the cause has been adjourned. ZAINUL-ABDIN KHAN v. AHMAD RAZA KHAN, 2 A. 67 (P.C.)=5 I.A. 233=3 Ind. Jur. 186=3 Sar. P.C J. 879 ... 590

(23) S. 110—See COURT FEE, 2 A. 318.

(24) S. 119—See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 748.

(25) S. 119—See LIMITATION ACT (IX OF 1871), 2 A. 273.

(26) *S.* 189—*Act* X *of* 1877, *s.* 206—*Decree—What it is to contain.*—Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought" without any specification in it as to the relief he sought by charging the property hypothecated, *held* that such a decree was a decree for money only, and did not enforce the charge on the property. HARSUKH v. MEGHRAJ, 2 A. 345 ... 781

(27) *S.* 194—*Act* X *of* 1877, *s.* 210—*Decree payable by instalments—Quære.*—Whether "a decree for the payment of money" means merely what is commonly known as a money-decree, or includes a decree in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting such property within the meaning of s. 194 of Act VIII of 1859, and s. 210 of Act X of 1877.

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Where a Court on the ground that the defendant was "hard pressed," directed the amount of a decree to be paid by instalments extending over ten years, allowed only one half of the usual rate of interest, *held*, that there was no "sufficient reason" for directing payment of the amount of the decree by instalments, and that such Court had exercised its discretion injuriously to the plaintiff by the length of the period over which instalments were extended, and by allowing a rate of interest less than the ordinary rate. BINDA PRASAD v. MADHO PRASAD, 2 A. 129 = 3 Ind. Jur. 518 ... 632

(28) *S.* 200—*Decree for performance of a particular act—Execution of decree.*—*A*, who had been directed by a decree to refrain from preventing her daughter returning to her husband, after the date of the decree permitted her daughter, who was of age, to reside in her house. *Held* that such conduct on the part of *A* was no such evidence of interference with her daughter's return as would justify the execution of the decree against her, under the provisions of s. 200 of Act VIII of 1859. AJNASI KUAR v. SURAJ PRASAD, 1 A. 501 ... 345

(29) S. 206—See EXECUTION OF DECREE, 2 A. 291.

(30) *S.* 208—*Execution of decree—Transfer of decree by operation of Law—Act XXVII of 1860—Certificate to collect debts.*—To enable the heir of a deceased person to apply under s. 208 of Act VIII of 1859 for the execution of a decree held by such person, a certificate under Act XXVII of 1860 is not indispensable. KARAM ALI v. HALIMA, 1 A. 686 ... 479

(31) *S.* 209—*Attachment—Cross-decrees.*—In April 1877 *M* sued *S* for money, and on the 10th May 1877, *S* sued *M* for money, both suits being instituted in the same Court. In the meantime, on the 9th May 1877, *B* applied for the attachment of the money claimed by *M* in his suit, and obtained an order prohibiting *M* from receiving, and *S* from paying, any sum which might be found in that suit to be due by *S* to *M*. On the 23rd June 1877 *M* obtained a decree in his suit against *S*, and *S* obtained a decree in his suit against *M*, *S*'s decree being for the larger sum. On the same day, under the provisions of s. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of *S*'s decree for so much as remained due. At the same time *S* objected to *B*'s attachment, but his objection was disallowed. *Held*, in a suit by *S* against *B* to have the order disallowing his objection set aside and the propriety and legality of the set-off above mentioned established, regard being had to the provisions of s. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that even if *B* had followed up that order and attached *M*'s decree against *S* that step would not have put him in a better position, for the same section being followed, and the decrees being essentially cross-decrees, that for the smaller sum became absorbed in the one for the larger and attachment could affect it. BUJHAWAN LAL v. SUKHRAJ RAI, 2 A. 866 ... 1142

(32) Ss. 212, 216—See LIMITATION, 1 A. 675.

(33) Ss. 212, 285—See LIMITATION ACT (IX OF 1871), 1 A. 525.

(34) S. 230—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 94.

(35) Ss. 236, 252—See DECREE, 1 A. 348.

(36) *Ss.* 239, 240—*Attachment of land—Private alienation after attachment.*—Certain land was attached in the execution of a decree in the manner required by s 235 of Act VIII of 1859, but a copy of the order of attachment was not, as required by s. 239 of that Act, fixed up in a conspicuous part or in any part at all of the Court house of the Court executing the decree nor was it sent or fixed up in the office of the Collector of the district in which the land was situated. Subsequently to the attachment of the land the judgment-debtor privately alienated it by sale. *Held* that, as the attachment had not been made known as prescribed by law, the provisions of s. 240 of Act VIII of 1859 did not apply, and the sale was not null and void. NURAHMAD v. ALTAF ALI, 2 A. 58 ... 583

(37) S. 240—See ATTACHMENT, 1 A. 616.

(38) *Ss.* 240, 248—*Sale in execution—Act XIX of 1873, s. 3, c. 1—Irregularity in publication of Court-sale of Khalisa Mahal.*—In the case of a sale by the Civil Court of forest land, which formed a grant from Government under a deed describing the property as a "Khalisa Mahal," subject to the payment of revenue after a term of years, the sale not having been proclaimed at the site of the grant, *held*, that the sale was invalid by reason of irregularity in the publication, and because it was not competent

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to the Civil Court to sell land chargeable with, although not actually paying, revenue at the time of sale, such Khalisa Mahals being revenue-paying lands within the meaning of s. 248 of Act VIII of 1859, and s. 3, cl. 1 of Act XIX of 1873, and that therefore the sale should have been held by the Collector. SHOWERS v. GOBIND DAS, 1 A. 400=2 Ind. Jur. 66 274

(39) S. 246—See COURT FEES ACT (VII OF 1870), 1 A. 360; 2 A. 63.

(40) S. 246—See LIMITATION ACT (IX OF 1871), 1 A. 355.

(41) S. 246—See MORTGAGE (USUFRUCTUARY), 2 A. 455.

(42) *S. 246—Adjudication of right—Binding on parties to proceedings—Claimant—Conclusive order—Defendant in possession—Limitation—Objector—Suit to establish right—Title.*—In a suit brought by plaintiff to establish his right as auction purchaser to certain immoveable property sold in execution of a decree, under the provisions of s. 246 of Act VIII of 1859, disallowing the claim of the objector—represented by the defendant—and adjudging the property attached to be that of the judgment-debtor, represented by the plaintiff—the said order not having been set aside in a regular suit by the defendant, *held* (by a majority of the Full Court) that an order passed under the provisions of s. 246 of Act VIII of 1859, unless overruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it and is conclusive.

PEARSON, J. *per contra*—S. 246 of Act VIII of 1859 provides for an adjudication of proprietary right on the basis of possession, but the matter is not "*res judicata*" as to matters in dispute between decree-holder and claimant, unless the party against whom an order is passed under s. 246 of Act VIII of 1859 fails to bring a regular suit to establish his right. In the case mentioned in the order of reference as apparently conflicting with the above view there had been no adjudication on the basis of possession by the Court passing an order under s. 246 of Act VIII of 1859, and the defendant in possession was therefore at liberty to assert his proprietary title against the lien set up by plaintiff under the said order, passed without jurisdiction on the miscellaneous side. BADRI PRASAD v. MUHAMMAD YUSUF, 1 A. 382 (F.B.) ... 262

(43) *S. 246—Effect of order under s. 246—Suit to establish right—Limitation.*—*B* caused a certain dwelling-house to be attached in execution of a decree held by him against *M* as the property of *M*. *J* preferred a claim to the property which was disallowed by an order made under s. 246 of Act VIII of 1859. Two days after the date of such order *M* satisfied *B*'s decree. More than a year after the date of such order *J* sued *B* and *M* to establish her proprietary right to the dwelling-house, alleging that *M* had fraudulently mortgaged it to *B*. *Held*, following the Full Bench ruling in *Badri Parshad* v. *Muhammad Yusuf*, that *J*, having failed to prove her right within the time allowed by law, was precluded from asserting it by the order made under s. 246 of Act VIII of 1859, and that whether or not the decree was satisfied after order was made, the effect of the order was the same. JEONI v. BHAGWAN SAHAI, 1 A. 541=2 Ind. Jur. 680 ... 374

(43-*a*) *S. 254—Sale in execution—Defaulting purchaser—Appeal—High Court—Appellate Civil Jurisdiction—Division Court—Letters Patent, cl. 10.*—An appeal lies from an order passed on an application under s. 254, Act VIII of 1859, to make a defaulting purchaser liable for the loss occasioned by a re-sale.

Held (SPANKIE, J., dissenting) that the appeal given to the Full Court, under cl. 10, Letters Patent, is not confined to the point on which the Judges of the Division Court differ. RAM DIAL v. RAM DAS, 1 A. 181 ... 122

(44) *Ss. 256, 257—Act XXIII of 1861, ss. 11, 35—Auction-sale—Order cancelling sale—Appeal—Suit to set aside.*—A Munsif having cancelled an auction-sale of landed property on the sole objection of the judgment-debtor that the property realized a low price, and the Judge having dismissed the auction-purchaser's appeal from the said order on the ground that the Munsif had no authority to cancel the sale under the terms of s. 257 of Act VIII of 1859, without some irregularity in conducting or publishing the sale being proved, and that the said order must therefore be taken to have been passed under s. 11, Act XXIII of 1861, which admits of no appeal by the auction-purchaser who was no party to the execution proceedings, *held* that such order passed by the Munsif was not a proceeding under s. 11 of Act XXIII of 1861, but an order passed *ultra vires* under

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s. 257 of Act VIII of 1859, and that a suit would lie for its cancelment, the finality of an order under ss. 256 and 257 of Act VIII of 1859 depending on its compliance with the terms of those sections. SUKHAI v. DARYAI, 1 A. 374=1 Ind. Jur. 779 ... 257

(45) Ss. 256, 257, 258—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 780.

(46) S. 257—See EXECUTION OF DECREE, 1 A. 212.

(47) S. 260—*Certified purchaser.*—The certified purchaser of certain property at a sale in execution of decree sued to establish his right to the property and for possession thereof.

Held, that the defendant in the suit was not precluded by s. 260, Act VIII of 1859, from resisting the suit on the ground that he was the actual purchaser of the property. JAN MUHAMMAD v. ILIAHI BAKHSH, 1 A. 290... 197

(48) S. 260—*Execution of decree—Certified purchaser.*—A sued for a declaration that *P*, the certified auction-purchaser of certain immoveable property, was merely a trustee for *R*, *P*'s judgment-debtor, that the purchase in *P*'s name was made with the intent of defeating or delaying him in the execution of his decree, and that he was at liberty to apply for execution against the property as the property of his judgment-debtor. *Held*, following *Sohun Loll* v. *Gya Parshad*, that s. 260, Act VIII of 1859, was in no way a bar to the suit. PURAN MAL v. ALI KHAN, 1 A. 235 ... 158

(49) S. 270—See ATTACHING CREDITOR, 1 A. 333.

(50) Ss. 270, 309—See COURT FEES, 1 A. 596.

(51) S. 271—See EXECUTION OF DECREE, 1 A. 727.

(52) S. 273—*Act* XX *of* 1866, s 52—*Act* VIII *of* 1871, ss. 53, 54, 55—*Appeal—Execution—Procedure—Repeal.*—No appeal lies against orders passed in execution of decrees under Act XX of 1866, the procedure under that Act having been expressly saved by Act VIII of 1871, which repealed Act XX of 1866. RAMANAND v. THE BANK OF BENGAL, 1 A. 377 ... 259

(53) Ss. 285, 348—*Execution of decree—Act* XIV *of* 1859—*Act* IX *of* 1871—*Compromise under decree—Limitation—Payments under compromise—Proceedings under barred decree.*—Where a decree-holder entered into a compromise with the judgment-debtor, agreeing to accept payment by instalments, which was ratified by the Court executing the decree, the case being struck off the execution file on the basis of the compromise, and more than three years after the date of the Court's order sanctioning the compromise subsequent proceedings were taken by the decree-holder to enforce the original decree, *held* that such subsequent proceedings when execution of the original decree had been already barred by limitation could not avail to keep the decree alive. STOWELL v. BILLINGS, 1 A. 350 ... 239

(54) S. 308—*Pauper suit—Institution of suit—Presentation of plaint—Limitation.*—Where an application for permission to sue in *forma pauperis* is numbered and registered, and deemed to be the plaint in the suit, not in consequence of proof of the plaintiff's pauperism, but in consequence of his abandoning his claim to sue as a pauper and paying for the stamps required for the institution of the suit, the date of such payment, and not the date of the application, must be taken, in computing the period of limitation, to be the date of the presentation of the plaint and the institution of the suit. SKINNER v. ORDE, 1 A. 230 ... 154

(55) S. 309—See COURT FEES, 2 A. 196.

(56) S. 311—See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 745.

(57) Ss. 323, 324—*Arbitration.*—The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage, which he alleged the defendants had received and appropriated to their own use. The defendants denied that they had received such moneys, but admitted that such moneys had been credited by the plaintiff's father to the firm in which they, the plaintiff, and the plaintiff's father, were jointly interested, against a larger amount of moneys belonging to the firm which had been expended on the plaintiff's marriage. The parties agreed to refer the matter in dispute between them to arbitration, and to abide by the decision of the arbitrator. The arbitrator decided that the plaintiff could not recover the moneys he sued for, and which had been credited to the firm of which he was a partner, as a larger sum had been expended on his marriage out of funds of the firm. The plaintiff obtained the opinions of certain *pandits* to the effect that, under Hindu Law, gifts on marriage are regarded as separate acquisitions, and prayed that the Munsif would remit the award with these opinions to the arbitrator. The Munsif

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remitted the award with the opinions, requesting the arbitrator to consider them and to return his opinion in writing within a certain period. The arbitrator having refused to act further, the Munsif proceeded to determine the suit, and gave the plaintiff a decree on the ground that, in a joint Hindu family, presents received on marriage do not fall into the common fund. *Held* (PEARSON, J., dissenting) that, there being no illegality apparent on the face of the award, the Munsif was not justified in remitting the award, or in setting the award aside and proceeding to determine the suit himself, but that he should have passed judgment in accordance with the award. NANAK CHAND v. RAM NARAYAN ... 2 A. 181 (F B.) ... 668

(58) *S. 327—Arbitration—Award—Appeal.*—The plaintiff sought to file and to enforce a private award, under the provisions of s. 327, Act VIII of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after inquiry into the matter, overruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of ch. vi, Act VIII of 1859. *Held*, that the order was not open to appeal, as it did not operate as a decree.

Per SPANKIE, J.—S. 327 intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made. Where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award. HUSAINI BIBI v. MOHSIN KHAN, 1 A. 156 ... 105

(59) *S. 336—Appeal when instituted—Memorandum of appeal—Limitation.*—Where, under the provisions of s. 336, Act VIII of 1859, a memorandum of appeal is returned for the purpose of being corrected, the appellate Court should specify a time for such correction.

Where an appellant presented an appeal within the period of limitation prescribed therefor, and the appellate Court returned the memorandum of appeal for correction without specifying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was first presented. JAGAN NATH v. LALMAN, 1 A. 260 ... 175

(60) S. 338—See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 178.

(61) S. 350—See EVIDENCE, 1 A. 725.

(62) S. 350—See RELEASE, 2 A. 554.

(63) S. 351—See LIMITATION, 1 A. 508.

(64) *S. 354—Remand — Objection — Procedure.*— Where an appellate Court, under s. 354 of Act VIII of 1859, refers issues for trial to a lower Court and fixes a time within which, after the return of the finding, either party to the appeal may file a memorandum of objections to the same, neither party is entitled, without the leave of the Court, to take any objection to the finding, orally or otherwise, after the expiry of the period so fixed without his having filed such memorandum. RATAN SINGH v. WAZIR, 1 A. 165 (F.B.) ... 111

(65) *Ss. 376, 378—Review of Judgment—Appeal.*—Although the order itself for granting a review of judgment is final, yet in appeal against the decision passed in review, objection may be taken that the review was improperly granted.

An application for a review of judgment was made to a Court of appeal on the ground that certain very material documents on which the Court of first instance had relied had been summarily discredited without being inspected by the Court of appeal, and that the Court of appeal had erred in declaring the report of a commissioner appointed by the Court of first instance for the purpose of making a local inquiry to be unworthy of reliance, because he was a muharir of the Court of first instance. *Held* that, in granting the review applied for, the lower appellate Court had not exceeded the discretion vested in it by law. ABDUL RAHIM v. RACHA RAI, 1 A. 363 = 1 Ind. Jur. 818 ... 248

(66) *S. 377—Review of Judgment—Limitation.*—The plaintiff in a suit applied, more than two years after the proper time for a review of judgment in such suit, filing with his application a copy of a decision by the High Court, which had been passed subsequently to the date of such judgment,

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in support of a contention contained in his application which should have been, but was not, urged at the hearing of his suit. Such contention and the other arguments and statements contained in his application might have been adduced whithin the time allowed by law for an application for a review of judgment. *Held* that, as such contention might have been urged at the first hearing of the case, there was no "just and reasonable cause" for preferring the application after time, and the Court of first instance was therefore not warranted in granting the application and reviewing its judgment. MADHO DAS v. RUKMAN SEWAK SINGH, 2 A. 287 ... 740

(67) S. 378—See STATUTE, 24 AND 25 VICT., C. 104 (HIGH COURT'S ACT), 1 A. 296.

Civil Procedure Code Amendment Act (XLIII of 1860).

S. 1—See APPEAL (SPECIAL APPEAL), 2 A. 112.

Civil Procedure Code (Act XXIII of 1861).

(1) See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.
(2) S. 4—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 51.
(3) S. 4—See HUNDI, 1 A. 392
(4) Ss. 5 and 7—See COURT FEE, 2 A. 318.
(5) S. 11—*Barred suit—Excess payment made by mistake in execution of decree—Jurisdiction—Small Cause Court—Suit in nature of damages.*—Where the plaintiff sued defendant in a Civil Court for recovery of a sum alleged to have been paid by plaintiff to defendant under a mistake, in excess of the sum due in satisfaction of a decree of the Small Cause Court, *held* by STUART, C.J., PEARSON, J., dissenting, that such a suit was in the nature of one for damages cognizable by the Court of Small Causes, and was not barred by the terms of s. 11 of Act XXIII of 1861, the question involved in the claim not being one which could properly arise in execution proceedings, that must be confined to matters embraced in the decree passed between the parties to the suit. AGRA SAVINGS BANK LIMITED v. SRI RAM MITTER, 1 A. 388 = 2 Ind. Jur. 23 ... 266
(6) Ss. 11 and 35—See CIV. PRO. CODE (ACT VIII OF 1859), 1 A. 374.
(7) S. 14—*Act* XVIII *of* 1873, *s.* 177—*Pattidari Estate—Pre-emption—Act* XIX *of* 1873, *s.* 188.—The provisions of s. 14 of Act XXIII of 1861 are not applicable, where the land is sold in execution of a decree of a Revenue Court.
Held, on the assumption that, where land is sold in execution of such a decree, a claim to the right of pre-emption can be preferred under the provisions of s. 177 of Act XVIII of 1873 and s. 188 of Act XIX of 1873, that such claim can only be preferred where the land is a patti of a mahal, not where it is part only of a patti of a mahal. *Semble* that, where land which is a patti of a mahal is sold in execution of such a decree, a claim to the right of pre-emption can be preferred under the provisions of s. 177 of Act XVIII of 1873 and s. 188 of Act XIX of 1873. NARAIN SINGH v. MUHAMMAD FARUK, 1 A. 277 = 1 Ind. Jur. 269 ... 188
(8) S. 14—*Pre-emption—Pattidari estate—Co-sharer— Stranger— Auction-purchaser.*—A share-holder in one patti of a pattidari estate is not a "stranger" with reference to a share-holder in another patti of the estate, within the meaning of that term in s. 14, Act XXIII of 1861.
The auction-purchaser at a sale in execution of a decree of a share in a pattidari estate seeking to establish his right as against a person whose claim to the right of pre-emption under the provisions of s. 14, Act XXIII of 1861, has been allowed and in whose favour the sale has been confirmed, cannot maintain a suit for possession of the share, but should sue for a declaration that the person claiming the right of pre-emption has no such right and to set aside the sale. FARZAND ALI v. ALIMULLAH, 1 A. 272 184
(9) S. 27—See APPEAL (SPECIAL APPEAL), 2 A. 112.
(10) S. 27—See CESS, 1 A. 444.
(11) S. 37—See APPELLATE COURT, 1 A. 545.
(12) S. 38—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 180.
(13) S. 38—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 338—*Execution of decree—Appeal—Miscellaneous Proceedings.*—Pending the determination of the appeal against an order passed in execution of decree, the appellate Court has power, under s. 338 of Act VIII of 1859 and s. 38 of Act XXIII of 1861, to stay execution. *In the matter of the petition of* HAR SHANKAR PARSHAD, 1 A. 178 ... 178

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(1) See APPEAL (GENERAL), 2 A. 616.

(2) See HIGH COURT, 1 A. 726.

(3) *Ss.* 2, 3, 244, 584, 588 *(j)—Execution of decree—Appeal from order—Act* VIII *of* 1859—*Repeal—Pending—Proceedings—Act* I *of* 1868, *s.* 6.—The Court executing a decree for the removal of certain buildings made an order in the execution of such decree directing that a portion of a certain building should be removed as being included in the decree. On appeal by the judgment-debtor the lower appellate Court, on the 22nd September, 1877, reversed such order. *Held, per* PEARSON, J., on appeal by the decree-holder from the order of the lower appellate Court, that the lower appellate Court's order being within the scope of the definition of "decree" in s. 2 of Act X of 1877, was appealable under s. 584 of that Act, as well as under Act VIII of 1859, notwithstanding its repeal, in reference to s. 6 of Act I of 1868.

Held per STUART, C.J., dissenting from the Full Bench ruling in *Thakur Prasad* v. *Ahsan Ali*, that a second appeal in the case would not lie. UDA BEGAM v. IMAM-UD-DIN, 2 A. 74 ... 594

(4) *Ss.* 2, 13, 540—*Decree—Judgment—Appeal.*—The plaintiff in this suit sued for the possession of certain land, on the ground that he was the owner thereof in virtue of a purchase from *N.* The defendants claimed such land as owners on the ground that it was included in a certain garden which they had previously purchased at a sale in the execution of a decree against *N*, and they also claimed it on the ground that they were lessees thereof under a lease from *N*, the term whereof had not expired. They also set up as a defence to the suit that it had been finally determined in a former suit between themselves and *N*, whom the plaintiff represented that such land was included in such garden, and that consequently their title to such land as owners could not be questioned in the present suit. The Court of first instance held that such land was not included in the defendant's garden, and they were not the owners of it, but that they could not be ejected from it as they were in possession under the lease which had not expired, and that the question whether such land was included in the defendants' garden and they were the owners of it was not *res judicata.* It made a decree dismissing the suit in these terms: "Ordered, that the plaintiff's claim, as it stands at present be dismissed." *Held* (STRAIGHT, J., dissenting) that the defendants were entitled, under s. 540 of Act X of 1877, to appeal from such decree. LACHMAN SINGH v. MOHAN, 2 A. 497 (F.B.) = 4 Ind. Jur. 644 ... 888

(5) *Ss.* 2, 54, 407, 314, 460, 588—*Application for leave to sue as a pauper—Appeal—Act* VIII *of* 1859, *s.* 311.—No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for permission to sue as a pauper. COLLIES v. MANOHAR DAS, 1 A. 745 (F.B.) ... 520

(6) *Ss.* 2, 103, 108, 244, 540, 588—*Application to set aside an* ex parte *decree—Appeal—Act* VIII *of* 1859, *s.* 119.—No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for an order setting aside a decree made *ex parte* against a defendant. GOLAB SINGH v. LACHMAN DAS, 1 A. 748 (F.B.) ... 522

(7) *Ss.* 2, 232, 233, 246, 540—*Execution of decree—Appeal from order—Assignment of decrees—Cross-decrees.*—An order made in the execution of a decree disallowing the objections taken by the judgment-debtor to execution of the decree being taken out by a transferee by assignment of the decree, being the final order in a judicial proceeding, and therefore a "decree" within the meaning of s. 2 of Act X of 1877, is appealable under that act.

S and two other persons held a decree for costs against *M*, which did not specify the separate interests of each in the decree, and *M* held a decree for money against *S* alone, which he wished to treat as a cross decree under s. 246 of Act X of 1877. *Held* that the decree held by *S* and the other persons was not a decree between the same parties as the parties to the decree held by *M* and *M's* decree could not therefore be treated as a cross-decree under that section. MURLI DHAR v. PARSOTAM DAS, 2 A. 91 ... 605

(8) Ss. 2, 520, 521, 522, 525, 526, 588—See ARBITRATION, 2 A. 471.

(9) *S.* 13—Res judicata.—*M* sued *R* in the Court of the Munsif for a bond, alleging that he had satisfied the bond-debt, and for a certain sum which he alleged had been paid by him to *R* in excess of the bond-debt. On the 24th November 1875, the Munsif, having taken an account and found that

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Rs. 188-7-4 of the bond-debt were still due, made a decree dismissing the suit. *R* appealed to the Subordinate Judge, who on the 16th September 1876, finding that Rs. 520-2-2 of the bond-debt were still due, affirmed the Munsif's decree. *M* appealed to the High Court on the ground that an appeal by *R* did not lie to the Subordinate Judge, as *R* was not aggrieved by the Munsif's decree. The Division Bench before which the appeal came, on the 10th August, 1877, holding that *R* was not competent to appeal to the Subordinate Judge, set aside the proceedings of the Subordinate Judge. In deciding the case the Division Bench made certain observations to the effect that the account between the parties was not finally settled, but might be taken again in a fresh suit. In November 1877, *M* instituted a fresh suit against *R* to recover the bond on payment of Rs. 188 7-4, the sum found by the Munsif in the former suit to be due by him to *R*. *Held*, on the question whether the finding of the Munsif in the former suit was final and conclusive between the parties or the account might be again taken, that that finding, being a finding on a matter directly and substantially in issue in the former suit which was heard and finally decided by the Munsif, was final and conclusive between the parties and the account could not be again taken.

Held also that the observations of the Division Bench in the former suit were mere "*obiter dicta*" which did not bind the Courts disposing of the fresh suit. MOHAN LAL v. RAM DIAL, 2 A. 843 (F.B.) ... 1126

(10) *Ss.* 13, 43—*Act XII of* 1879, *s.* 7—*Bond for the payment of money hypothecating property as collateral security for such payment—Omission of claim.*—The obligee of a bond for the payment of money, hypothecating immoveable property as collateral security for such payment sued for the moneys due on the bond, but omitted to claim the enforcement of his lien, and obtained a decree only for the payment of the amount of the bond-debt. He subsequently sued to enforce his lien. *Held* that, under s. 43 of Act X of 1877, as amended by s. 7 of Act XII of 1879, he could not be permitted to sue to enforce his lien. GUMANI v. RAM PADARNATH LAL, 2 A. 838. 1122

(11) *Ss.* 28, 29, 32—*Addition of parties.*—*Held*, reading ss. 28, 29, and 32 of Act X of 1877 together, that, where an application is made under s. 32 for the addition of a person whether as plaintiff or defendant, such person should, as a general rule, be added, only where there are questions directly arising out of and incidental to the original cause of action, in which such person has identity or community of interest with the original plaintiff or defendant.

Two suits against *K* for possession of the property of *B*, deceased, were instituted in the Court of a Subordinate Judge by parties claiming adversely to one another as heirs to *B*. The Subordinate Judge on the applications of the plaintiffs in these suits, under s. 32, Act X of 1877, added the plaintiffs in the first suit as defendants in the second and the plaintiffs in the second suit as defendants in the first. *Held*, on appeal by the defendant *K*, from the orders of the Subordinate Judge applying the rule stated above, that such addition of parties, not being necessary to enable the Subordinate Judge "effectually and completely to adjudicate upon and settle all the questions involved in the suits," were not proper.

The principles on which s. 73 of Act VIII of 1859 should be interpreted enunciated by Sir Barnes Peacock in 7 W.R. 202 ; 8 W.R. 15 and 10 W. R. 369=3 B.L.R.A.C. 28 and the remarks of Pontifex, J., in 4 C. 355 followed and applied. NARAINI KUAR v. DURJAN KUAR; NARAINI KUAR v. PIAREY LAL, 2 A. 738 ... 1053

(12) *S.* 32, *Act* XVIII *of* 1873, *s.* 106—*Dismissal or addition of parties—Revenue Court, power of.*—*B* and *N*, the mortgagees of a mahal, granted the mortgagors a lease of the mahal, the mortgagors agreeing to pay "the mortgagees" a certain rent half yearly, "on account of the right they held in equal shares," and that, in default of payment of such rent, the "mortgagees" should be entitled to sue for payment. The mortgagors having made default in payment of the rent, and *N* refusing to join in a suit against the mortgagors to enforce payment, *B* sued them alone for a moiety of the rent due. The Revenue Court of first instance held, with reference to s. 106 of Act XVIII of 1873, that *B* could not sue separately. *Held* by the High Court that the order of the Revenue Court of first appeal directing, *inter alia*, that the Court of first instance should retry the suit after making *N* a defendant in the suit was not illegal,

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notwithstanding that the provisions of s. 32 of Act X of 1877 were not made applicable to the procedure of the Revenue Court by Act XVIII of 1873.

Held per SPANKIE, J., that s. 106 of Act XVIII of 1873 did not apply, and *B* was entitled separately to sue for the whole of the rent. SHIB GOPAL v. BALDEO SAHAI, 2 A. 264 ... 724

(13) *Ss.* 32, 311, 312, 588 (*m*), 647—*Execution of decree—Application to set aside sale of immoveable property—Auction purchaser—Appeal.*—Where, after a judgment-debtor has applied under s 311 of Act X of 1877, to have a sale set aside, the auction purchaser is made a party to the proceedings and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale. GOPAL SINGH v. DULAR KUAR, 2 A. 352=4 Ind. Jur. 468. ... 786

(14) *Ss.* 32, 582—*Appellate Court, powers of—Addition of parties—Act* XV *of* 1877, s. 22.—*S* sued *N* and *R* jointly and severally for certain moneys. The Court of first instance gave *S* a decree for such moneys against *N* and dismissed the suit against *R*. *N* appealed from the decree of the Court of first instance, but *S* did not appeal from it. The appellate Court, at the first hearing of *N*'s appeal, made *R* a respondent, the period allowed by law for *S* to have preferred an appeal having then expired, and eventually reversed the decree of the Court of the first instance, dismissing the suit as against *N* and giving *S* a decree against *R*. *Held* that, although the appellate Court was competent to make *R* a party to the appeal, under ss. 32 and 532 of Act X of 1877, yet it was not competent, with reference to s. 22 of Act XV 1877, to give *S* a decree against *R* the former not having appealed from the decree of the Court of first instance within the time allowed by law. RANJIT SINGH v. SHEO PRASAD RAM, 2 A. 487=4 Ind. Jur. 641 ... 881

(15) *Ss.* 32, 588—*Addition of parties—Appeal—Act* XII *of* 1879, s. 90 (2).—An order refusing an application under s. 32 of Act X of 1877, by a person to be added as a defendant in a suit is not appealable. KARMAN BIBI v. MISRI LAL, 2 A. 904 ... 1168

(16) Ss. 44, 45—See COURT FEES ACT (VII OF 1870), 2 A. 676, 682.

(17) Ss. 50, 53—See CONTRACT ACT (IX OF 1872), 2 A. 671.

(18) *S.* 53—*Act* XV *of* 1877—*S.* 4—*Amendment of Plaint—Limitation—Mortgage—Oral Evidence—Documentary Evidence—Act* I *of* 1872, ss. 92, 95.—The plaint in a suit for money charged upon immoveable property which described such property as "the defendant's one biswa five biswansi share within the jurisdiction of the Court," was presented on the 21st November 1878, within the period of limitation prescribed for such a suit by Act XV of 1877. It was subsequently returned for amendment, and, having been amended by the insertion of the words "in mauza *S*, pargana *S*" after the word "share," was presented again on the 8th January 1879, after such period *Held* that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court did not constitute a fresh institution of the suit.

The obligors of a bond for the payment of money describing themselves as "sons of *R*, zemindar and pattidar, resident of mauza *S*" hypothecated as collateral security for such payment "their one biswa five biswansi share" *Held* in a suit on the bond to enforce a charge on the one biswa five biswansi share of the obligors in mauza *S*, that, under *proviso* 6, s. 92 and s 95 of Act I of 1872, evidence might be given to show that the obligors hypothecated by the bond their share in mauza *S*. RAM LAL v. HARRISON, 2 A. 832 ... 1118

(19) *Ss.* 53, 562—*Plaint, amendment of—Remand by appellate Court.*—By the amendment of the plaint, a suit for the restoration of a bond, which it was alleged the defendants were wrongfully filling up, to its original condition, was altered into one for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water, by way of easement. *Held* that the alteration in the plaint was a material one.

Held, also that an appellate Court is not empowered by Act X of 1877 to order or allow a plaint to be amended, or to remand a case under s. 562 of that Act for the purpose of such amendment. FARZAND ALI v. YUSUF ALI, 2 A. 669=5 Ind. Jur. 268 ... 1006

(20) S. 54 (*b*)—See APPEAL (GENERAL), 2 A. 875.

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(21) *Ss.* 57 (*c*) *and* 588 (*e*)—*Return of Plaint—Appeal—Act* XII *of* 1879, *s.* 2.—Although s. 57 of Act X of 1877 contemplates the return of the plaint, should error be patent, when it is first presented yet there is nothing in the wording of that section which forbids the return of the plaint at a later stage in the suit.

Where, therefore, after the issues in a suit were framed, the Court decided that it had no jurisdiction, and returned the plaint to be presented in the proper Court, *held* that in so doing the Court acted under s. 57 of Act X of 1877, and its decision, not coming within definition of a "decree" in s. 2 of Act XII of 1879, was not appealable as such but was appealable under s. 588 of Act X of 1877 as an order. ABDUL SAMAD v. RAJINDRO KISHOR SINGH, 2 A. 357=4 Ind. Jur. 469 ... 790

(22) S. 61—See CHEQUE, 2 A. 754.

(23) S. 99—See COURT FEE, 2 A. 318.

(24) *S.* 111—*Set-off—Mortgage*—The usufructuary mortgagee of certain land sued the mortgagor for the money due under the mortgage. The mortgagor alleged the mortgagee had committed waste and was liable to him for compensation which he claimed to set-off. *Held* that under s. 111 of Act X of 1887 the amount of such compensation could not be set-off. RAGHU NATH DAS v. ASHRAF HUSAIN KHAN, 2 A. 252=4 Ind. Jur. 249 715

(25) *Ss.* 166, 273—*Execution of decree—Sale of a money decree.*—*Held* that Act X of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in s. 273 cannot lead to its sale.

Held also that the last clause but one of s. 273 applies to other than money-decrees.

Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provisions of the first clause of s. 273 of Act X of 1877 were applicable on principle. SULTAN KUAR v. GULZARI LAL, 2 A. 290=4 Ind. Jur. 359 ... 742

(26) S. 206—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 345.

(27) *S.* 206—*Decree—What it is to contain.*—The plaintiff sued on a bond in which real property was hypothecated. In his claim the property hypothecated was detailed, and the property itself was impleaded as a defendant, and he obtained a decree in the following terms:—"Decree for plaintiff in favour of his claim and costs against defendant."

Held that the decree was to be regarded as simply for money and not for enforcement of lien. THAMMAN SINGH v. GANGA RAM, 2 A. 342 ... 779

(28) S. 210—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 129.

(29) *S.* 210—*Decree for money.*—There is nothing in s. 210 of Act X of 1877, or elsewhere in that Act, authorising a Court to direct that the amount of a decree should be paid within a fixed time from its date. *Semble* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond debt by the sale of the "*nankar*" allowance hypothecated by such bond. BACHCHU v. MADAD ALI, 2 A. 649 ... 993

(30) *S.* 210—*Decree payable by instalments.*—*Held* that the provisions of s. 210 of Act X of 1877 are not applicable in a suit for the recovery of the amount of a bond debt by the sale of the property hypothecated by such bond.

In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments. HARDEO DAS v. HUKAM SINGH, 2 A. 320=4 Ind. Jur. 415 ... 764

(31) *Ss.* 211, 561—*Mesne profits—Procedure on hearing of appeal—Objection.*—Where the parties to a suit for certain land and for the payment of mesne profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land, *held* that the most reasonable and fitting mode of assessing such mesne profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant and had not been cultivated by the defendants.

Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower appellate Court. The plaintiff appealed to the High Court from the decree of the lower appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower appellate Court dismissing his appeal. *Held* that such objections could not be entertained. GANGA PRASAD v. GAJADHAR PRASAD, 2 A. 651 ... 994

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(32) S. 214—*Suit for pre-emption—Deposit of purchase-money—Appellate Court, powers of.*—The decree of the Court of first instance, in a suit to enforce a right of pre-emption, directed that the sum which that Court had ascertained to be the purchase-money should be deposited within one month from the date of the decree. The plaintiff appealed contending that such sum was not the purchase-money. While the appeal was pending the time fixed by the decree of the Court of first instance expired without any deposit having been made. The appellate Court dismissed the appeal, fixing by its decree, of its own motion, a further time for the deposit. *Held* following 3 Agra 254 that the appellate Court was competent to extend the time for making the deposit, and its action and order did not contravene the provisions of s. 214 of Act X of 1877. PARSHADI LAL v. RAM DIAL, 2 A. 744 ... 1057

(33) Ss. 228, 232—*Execution of decree—Power of the Court in executing transmitted decree—Transfer of decree.*—Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferee applied for the execution of the decree to the Court to which the decree was sent for execution, *held* that such application should be made, not to such Court, but to the Court which passed the decree. KADIR BAKHSH v. ILAHI BAKHSH, 2 A. 283 = 4 Ind. Jur. 358 ... 737

(34) S. 230—*Execution of decree.*—*Held* that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 mean an application under that section, and not an application under Act VIII of 1859. RAM KISHEN v. SEDHU, 2 A. 275 = 4 Ind. Jur 357 ... 731

(35) S. 230—*Execution of decree—Limitation.*—The concluding clause of s. 230 of Act X of 1877 refers to the question of limitation, not that of due diligence.

Where, therefore, the decree-holder had not on the last preceding application under s. 230 of Act X of 1877 used due diligence to procure complete satisfaction of the decree, and Act X of 1877 had not been in force three years, *held* that the provisions of the third clause of s. 230 of Act X of 1877 were applicable to a subsequent application under that section. SOHAN LAL v. KARIM BAKHSH, 2 A. 281 = 4 Ind. Jur. 357 ... 736

(36) Ss. 230, 232—*Execution of decree—Transfer of decree—Due diligence.*—The transferee of a decree applied, while an application by the original holder of such decree to execute it was pending, to be allowed to execute it. The Court in accordance with s. 232 of Act X of 1877 directed notice of the transferee's application to be given to the transferor and the judgment-debtor. The transferee failed to pay the Court-fee leviable for the issue of such notice, and the Court dismissed his application. The transferee subsequently made a second application to be allowed to execute the decree. *Held* that such application could not be rejected, with reference to s. 230 of Act X of 1877, on the ground that due diligence had not been used on the former application to procure complete satisfaction of the decree, because such application had not been granted, and therefore, the question whether "on the last preceding application" due diligence was used to procure such satisfaction did not arise. SADIK ALI KHAN v. MUHAMMAD HUSAIN KHAN, 2 A. 384 ... 809

(37) S. 244—*Execution of decree—Separate suit.*—Moneys realized as due under a decree if unduly realized are recoverable by application to the Court executing the decree and not by separate suit. PARTAB SINGH v. BENI RAM, 2 A. 61 (F.B.) = 3 Ind. Jur. 321 ... 585

(38) Ss. 253, 610—*Appeal to Her Majesty in Council—Security for the costs of the respondent—Execution of decree against surety.*—An appeal was preferred to Her Majesty in Council from a final decree passed on appeal by the High Court, and *B* and certain other persons on behalf of the appellant gave security for the costs of the respondent. Her Majesty in Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against *B* and the other persons as sureties. *Held* by STUART, C.J., PEARSON, J., and OLDFIELD, J., that, under ss. 610 and 253 of Act X of 1877, such order could be executed against the sureties. *Per* SPANKIE, J., and STRAIGHT, J., *contra*. BANS BAHADUR SINGH v. MUGHLA BEGAM, 2 A. 604 (F.B.) ... 961

(39) S. 264—See PENAL CODE (ACT XLV OF 1860), 2 A. 465.

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(40) Ss. 278, 279, 280, 281, 282, 283—*Objection to attachment of attached property by judgment-debtor—Order against decree-holder—Decree-holder's remedy—Appeal—Suit to establish right.*—An objection was made to the attachment of certain property in the execution of a decree, by the judgment-debtor, on the ground that such property was in his possession, not as his own property, but on account of an endowment. This objection was one of the nature to be dealt with under s. 278 and following sections of Act X of 1877. The Court executing the decree made an order against the decree-holder releasing the property from attachment. *Held* that such order was not appealable, the fact that the objection was made by the judgment-debtor notwithstanding, and the decree-holder's proper remedy was to institute a suit under the provisions of s. 283 of Act X of 1877. SHANKAR DIAL v. AMIR HAIDAR, 2 A. 752 ... 1062

(41) S. 310—*Sale in execution of decree—Pre-emption.*—A co-sharer in undivided immoveable property of which a share is sold in the execution of a decree does not, under s. 310 of Act X of 1877, acquire the right of pre-emption as against a stranger to whom such share has been knocked down, by merely asserting such right at the time of sale and fulfilling the conditions of sale required by ss. 306 and 307 of that Act. He must bid at the sale and as high as the stranger before he can acquire a right of pre-emption under that section. TEJ SINGH v. GOBIN SINGH, 2 A. 850 ... 1130

(42) Ss. 311, 312—*Sale in execution—Review of judgment.*—On the day fixed for the sale of certain immoveable property in the execution of a decree, the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, no application having been made to set aside the sale passed an order confirming it. Subsequently, an application by the decree-holder for a review of this order having been granted, the Court passed an order setting the sale aside as illegal. *Held* that the sanction to the sale originally given having been withdrawn, the sale could not legally be held, and that the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid, and in reviewing its first order and in setting aside the sale as illegal the Court executing the decree had not acted *ultra vires* and its action was not otherwise illegal. MIAN JAN v. MAN SINGH, 2 A. 686=5 Ind. Jur. 323 ... 1017

(43) Ss. 311, 312, 313, 588 (*m*)—*Execution of decree—Application to set aside sale of immoveable property—Auction-purchaser—Appeal.*—*Held* that, although the auction-purchaser may not apply under s. 311 of Act X of 1877 to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such order under s. 588 (*m*) of Act X of 1877. KANTHI RAM v. BANKEY LAL, 2 A. 396 ... 817

(44) Ss. 312, 315—*Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Act* VIII *of* 1859, ss. 256, 257, 258—*Warranty*—Caveat emptor.—Certain immoveable property was attached and proclaimed for sale in the execution of a decree on the application of the decree-holder, *H* as the property of his judgment-debtor, *W* objected to the attachment and sale of such property on the ground that it did not belong to the judgment-debtor, but was endowed property. His objections were disallowed, and the property was put up for sale on the 20th July 1875, under the provisions of Act VIII of 1859 and was purchased by *K*. *W* subsequently sued *K* to establish his claim to the property and to have the sale set aside, and on the 18th August 1876, obtained a decree setting it aside. Thereupon *K* sued *H* to recover the purchase-money, alleging a failure of consideration. *Held* that, the sale not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity effecting the sale, but having been set aside in favour of a third party who had established his title to the property, and there being no question of fraud or misrepresentation on the part of the decree-holder, the suit was not maintainable.

Held also that the auction-purchaser could not have applied under s. 315 of Act X of 1877 for the return of the purchase-money, as the provisions of that section could not have retrospective effect, and would not apply to a sale which had taken place before that Act came into operation.

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Per STRAIGHT, J.—That, had the provisions of that section been applicable, instead of instituting a suit, the auction purchaser should have applied for the return of her purchase-money in the execution of the decree. HIRA LAL v. KARIM-UN-NISA, 2 A. 780 ... 1085

(45) *Ss.* 312, 588 (*m*)—*Appeal from order setting aside sale of immoveable property in the execution of decree—Act* XII *of* 1879, *ss.* 90 (16), 102—*Act* I *of* 1868, *s.* 6.—On the 25th June, 1879, a Subordinate Judge made an order setting aside the sale of immoveable property in the execution of a decree from which an appeal was preferred, under Act X of 1877, to the District Court, on the 25th July, 1879, before Act XII of 1879 came into force. *Held* that, as the appeal would not have lain at all, had Act XII of 1879 been in force on the date of its institution, s. 102 of that Act did not apply, but as the appeal lay to the District Court under the law in force on that date, it was competent to dispose of it under the provisions of s. 6 of Act I of 1868

Appeal from order No. 138 of 1879 and Revision Case No. 38-B of 1879 observed on. DURGA PRASAD v. RAM CHARAN, 2 A. 785 ... 1085

(46) *S.* 315—*Sale in execution of decree—Return of purchase-money to auction-purchaser—Act* VIII *of* 1859.—Where immoveable property was sold in the execution of a decree under the provisions of Act VIII of 1859, and the auction-purchaser, having been subsequently deprived of such property on the ground that the judgment-debtor had no saleable interest in it, applied under s. 315 of Act X of 1877 to the Court executing such decree for the return of the purchase-money, *held* that the Court could entertain the application. *In the matter of the petition of* MULO, 2 A. 299=4 Ind. Jur. 357 ... 749

(47) *S.* 326—*Execution of decree.*—S. 326 of Act X of 1877 does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under s. 326. BHAGWAN PRASAD v. SHEO SAHAI, 2 A. 856 ... 1135

(48) *S.* 332—*Execution of decree—Resistance to execution—Act* VIII *of* 1859, *s.* 230—*Repeal.*—A mortgagee who is in possession of the mortgage property under the mortgage is in possession "on his own account" within the meaning of s. 230, Act VIII of 1859 and s. 332 of Act X of 1877.

Where, in pursuance of an order made in the execution of a decree while Act VIII of 1859 was in force, certain persons were dispossessed of certain property after that Act was repealed, and Act X of 1877 came into force, and such persons applied, under s. 332 of Act X of 1877, to be restored to the possession of such property on certain of the grounds specified in that section, *held* that such persons were entitled to the benefit of that section.

A person claiming under s. 332 of Act X of 1877 need not prove his title but only the fact of possession. SHAFI-UD-DIN v. LOCHAN SINGH, 2 A. 94... 608

(49) *Ss.* 542, 584, 587—*Pre-emption—Cause of action—Conditional sale—Second appeal*—*Per* PEARSON, J., and STRAIGHT, J. (SPANKIE, J., dissenting)—That in disposing of a second appeal the High Court is competent, under s 542 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.

Also *per* PEARSON, J., and STRAIGHT, J. (SPANKIE, J., dissenting)—That the cause of action of a person claiming the right of pre-emption in the case of a conditional sale arises when the conditional sale takes place and not when it becomes absolute; and therefore, where a conditional sale took place in 1867, and after it had become absolute a person sued to enforce his right of pre-emption in respect of the property sold, basing his claim upon a special agreement made in the interval between the date of the conditional sale and the date that it became absolute, and alleging that his cause of action arose on the latter date, that the suit was not maintainable, the plaintiff having no right of pre-emption at the time of the conditional sale. LACHMAN PRASAD v. BAHADUR SINGH, 2 A. 884 1154

(50) *S.* 549—*Procedure in appeal from decree—Security for costs.*—Where the appellate Court demands from an appellant security for costs, the Court may extend the time within which it orders such security to be furnished, but if no application is made for such extension of time and such security

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is not furnished within the time ordered, it is imperative on the Court to reject the appeal. HAIDRI BAI v. THE EAST INDIAN RAILWAY COMPANY, 1 A. 687 ... 480

(51) S. 551—See AJMERE COURTS REGULATION (I OF 1877), 2 A. 819.

(52) *Ss.* 560, 584, 588—*Hearing of appeal* ex parte—*Refusal to re-hear appeal—Appeal from appellate decree.*—An appeal was heard *ex parte* in the absence of the respondent (defendant), and judgment was given against him. He applied to the appellate Court to re hear the appeal and the appellate Court refused to re-hear it. He then appealed, not from the order refusing to re-hear the appeal, but from the decree of the appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the appellate Court. RAMJAS v. BAIJ NATH, 2 A. 567 ... 937

(53) *Ss* 566, 567, 578—*Remand—Objection to finding—Appellate Court, powers of—Error or irregularity.*—*Held* that an appellate Court is not bound to accept a finding returned to it by a Court of first instance under s. 566 of Act X of 1877 merely because no objections to such finding are preferred, but is competent to examine the evidence on which such finding is founded and to satisfy itself that it is correct and fit to be accepted.

Held also that, assuming that an appellate Court, in deciding a case in a manner inconsistent with and opposed to the finding returned to it by the Court of first instance under that section, in the absence of objections, acted irregularly, its decree could not be reversed, or the case remanded on account of such irregularity, such irregularity not affecting the merits of the case or the jurisdiction of the Court. AKBARI BEGAM v. WILAYAT ALI, 2 A. 908 ... 1171

(54) S. 578—See RELEASE, 2 A. 554.

(55) *S.* 578—*Error or irregularity—Court-fees—Appeal.*—The refusal of a plaintiff-respondent to make good a deficiency in Court-fees in respect of his plaint when called upon to do so by the appellate Court is not a ground upon which the appellate Court should reverse the decree of the Court of first instance and dismiss the suit. MEDHI HUSAIN v. MADAR BAKHSH, 2 A. 889 ... 1158

(56) S. 584—See APPEAL (GENERAL), 1 A. 620.

(57) *Ss.* 594, 595, 596—*Appeal to Her Majesty in Council—Interlocutory Order—Order.*—The District Judge of Ghazipur recalled to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad, and disallowed an application for the execution of the decree which had been preferred to that Judge. The High Court, on appeal from an order of the District Judge, annulled his order as void for want of jurisdiction and remitted the case in order that the application might be disposed of on its merits, directing that the record of the case should be returned to the Subordinate Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, *held* that such order was in the nature of an interlocutory order, and was not one from which the High Court could or ought to grant leave to appeal to Her Majesty in Council. PALAK DHARI RAI v. RADHA PROSAD SINGH, 2 A. 65=3 Ind Jur. 419 ... 588

(58) Chapter XIV—See LIMITATION ACT (XV OF 1877), 1 A. 644.

Claim.

(1) *Custom—Manorial dues and cesses—Feudal system—Immemorial custom—What is best proof thereof—Custom must be definite to be good—Parol and Documentary evidence.*—The plaintiffs, zemindars, sued for a declaration of their ancient rights, as against all the tenants of a certain village, to appropriate all trees of spontaneous growth and the fruits of other trees planted by the tenants: also to receive as manorial tribute a certain number of ploughs annually and a certain offering of poppy seed and other farm-produce on the occasion of the marriage of persons of the lower caste of tenants, with a further right to levy a certain proportion of the produce of the sugar cane manufactories and fields in the village. The lower Courts having decreed the suit on vague and general parol evidence as to the existence of the said customs, *held* (*a*) that where a custom regarding several cesses is alleged, the existence of the custom regarding each cess should be tried as a separate issue; (*b*) that parol evidence as to the existence of such customs should be tested by ascertaining the grounds of the witness's opinion; (*c*) that the best proof of custom

Claim—(*Concluded*). PAGE

is instances in which it has been acted on and documentary evidence that it has been enforced; (*d*) that a custom to be good must be definite. LACHMAN RAI v. AKBAR KHAN, 1 A. 440=2 Ind. Jur. 216 ... 301

(2) For mesne profits against trespasser—See MESNE PROFITS, 1 A. 518.
(3) Omission of—See CIV. PRO. CODE (ACT X OF 1877), 2 A. 838.
(4) Relinquishment of part of—See CIV. PRO. CODE (ACT VIII OF 1859), 1 A. 650.
(5) To attached property—See MORTGAGE (USUFRUCTUARY), 2 A. 455.

Commitment.

See CRIM. PRO. CODE (ACT X OF 1872), 2 A. 570, 910.

Compensation.

(1) For wrongful dispossession—See JURISDICTION (OF CIVIL COURT), 2 A. 707.
(2) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 338.
(3) See CIV. PRO. CODE (ACT X OF 1877), 2 A. 252.
(4) See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Compounding of Offences.

See CRIM. PRO. CODE (ACT X OF 1872), 2 A. 339.

Compromise.

(1) See CIV. PRO. CODE (ACT VIII OF 1859), 1 A. 350.
(2) See HINDU LAW (JOINT FAMILY), 1 A. 651.

Condition against alienation.

(1) See MONEY DECREE, 1 A. 240.
(2) See MORTGAGE (GENERAL), 1 A. 126, 610.

Conditional Decree.

(1) In redemption suit—See INTEREST, 1 A. 344.
(2) See PRE-EMPTION, 1 A. 132, 291, 293, 591.

Conditional Sale.

(1) See CIV. PRO. CODE (ACT X OF 1877), 2 A. 884.
(2) See MORTGAGE (USUFRUCTUARY), 1 A. 524.

Confession.

(1) See CRIM. PRO. CODE (ACT X OF 1872), 2 A. 260, 646.
(2) See EVIDENCE ACT (I OF 1872), 1 A. 664, 675; 2 A. 444.

Consequential Relief.

(1) See COURT FEES ACT (VII OF 1870), 1 A. 360; 2 A. 63.
(2) See DECLARATORY DECREE, 2 A. 869.
(3) See DECLARATORY SUIT, 2 A. 720.

Consideration.

(1) See AGREEMENT, 1 A. 618.
(2) See CONTRACT ACT (IX OF 1872), 1 A. 309, 478.
(3) See VOLUNTARY ALIENATION, 2 A. 891.

Construction (of Statutes).

(1) See PRE EMPTION, 1 A. 311.
(2) See REGISTRATION ACT (VIII OF 1871), 1 A. 465.

Constructive Trust.

See LIMITATION, 2 A. 361.

Contempt of Court.

(1) See CRIM. PRO. CODE (ACT X OF 1872), 1 A. 129, 162, 625.
(2) See PENAL CODE (ACT XLV OF 1860), 2 A. 405.

Contract.

(1) Of sale—See REGISTRATION ACT (III OF 1877), 2 A. 46.
(2) See CONTRACT ACT (IX OF 1872), 1 A. 79, 478.
(3) See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 567.
(4) See PRE EMPTION, 1 A. 563.
(5) See SPECIFIC RELIEF ACT (I OF 1877), 1 A. 555.

Contract Act (IX of 1872). PAGE

(1) *Ss.* 2 (*d*), 25—*Consideration—Agreement without consideration—Void agreement.*—While certain hundis were running the acceptor gave the holder, the drawer having become bankrupt, a mortgage of certain immoveable property as security for the payment of the hundis in the event of their dishonour when they became due. *Held*, in a suit on the mortgage-deed, the hundis having been dishonored, that there was no consideration, within the meaning of that term in Act IX of 1872, for the agreement of mortgage, and the same was void under s. 25 of that Act. MANNA LAL v. THE BANK OF BENGAL, 1 A. 309 ... 211

(2) S. 23—See ACT XL OF 1858 (MINORS), 2 A. 902.

(3) *S.* 23—*Government Ferry—Lease—Regulation* VI *of* 1819—*Illegality of contract.*—*M* took a lease for three years of a Government ferry and covenanted with the Magistrate, who granted the lease, not to under-let or assign the lease without leave or license of the Magistrate. *M* subsequently admitted *B* as his partner to share with him equally in the profits to be derived from the lease.

Held that such partnership was not void by reason of the covenant not to under-let or assign the lease. GAURI SHANKAR v. MUMTAZ ALI KHAN, 2 A. 411 (F.B.) ... 828

(4) Ss. 23, 24—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 751.

(5) Ss. 23, 25—See AGREEMENT, 1 A. 618.

(6) *Ss.* 23 *and* 25—*Contract—Consideration—Immoral consideration—Void agreement.*—*M* had for many years lived with *G* as his concubine. In consideration of such past cohabitation, *G*, by an agreement in writing dated the 28th March 1869, and duly registered, settled an annuity on *M*, charging a portion of his real estate with the payment of such annuity. *Held* in a suit by *M* against *G's* heir, his married wife, to enforce the agreement, that the consideration for the agreement was not under the law then in force immoral, nor was the agreement, under the same law, void for want of consideration. *Held* also that, before *M* could recover from the defendant on the agreement, it was necessary to show that the defendant had received funds available to meet the claim from the profits of the estate charged with the payment of the annuity or other property of *G*. MAN KUAR v. JASSODHA KUAR, 1 A. 478=2 Ind. Jur. 356 ... 329

(7) *S.* 28—*Agreement not to appeal—Void agreement.*—Where, in consideration of *A* giving *B* time to satisfy a decree against him held by *A*, *B* agreed not to appeal against the decree and did appeal, *held* that the agreement was not prohibited by s. 28 of Act IX of 1872, and that the appellate Court was bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow *B* to proceed with the appeal which he had instituted in contravention of it. ANANT DAS v. ASHBURNER and CO., 1 A. 267 (F.B.) ... 181

(8) *S.* 29—*Mortgage—Uncertain agreement—Ambiguous or defective document—Act* I *of* 1872, *s.* 93.—*Semble* that where certain persons, describing themselves as residents of J, give a bond for the payment of money in which, as collateral security, they charge "their property" with such payment, they do not thereby create a charge on their immoveable property situated in J. DEOJIT v. PITAMBAR, 1 A. 275 ... 187

(9) S. 62—See PROMISSORY NOTE, 1 A. 732.

(10) S. 65—Applicability—See ARBITRATION, 2 A. 173.

(11) *S.* 72—*Act* XI *of* 1865, *s.* 6—*Small Cause Court—Implied contract—Mistake—Damages—Act* X *of* 1877, *ss.* 50, 53—*Plaint, amendment of.*—A suit under s. 72, of the Indian Contract Act to recover from a creditor the amount of an overpayment made to him by mistake is a suit for damages, within the meaning of Act XI of 1865, s. 6, and is accordingly cognizable by a Mufassil Court of Small Causes.

Semble that where at the first hearing of a suit the plaint is returned for amendment within a fixed time under the provisions of s. 53 of Act X of 1877, and it is amended accordingly, it cannot afterwards be again returned for amendment. BADR-UN-NISA v. MUHAMMAD JAN, 2 A. 671 ... 1007

(12) *S.* 72—*Contract—Liability of person to whom money is paid by mistake.*—A treasury officer, under the imposition of a gross fraud, paid money to the defendant, who was the innocent agent of the person who contrived the fraud. In paying the money the treasury officer neglected no reasonable precaution, nor was he in any way guilty of carelessness.

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Held that the defendant was bound to repay the money received by him, and that he could not defend himself by the plea that he had paid it to his principal; nor could the Court allow that the circumstance that the principal was himself a servant of the plaintiff, and in the course of his employment obtained facilities for committing the fraud, relieved the defendant from his liability. SHUGAN CHAND v. THE GOVERNMENT, NORTH-WESTERN PROVINCES, 1 A. 79 ... 53

(13) Ss. 127, 111 (c)—See SURETY, 1 A. 487.

Contribution.

(1) See MORTGAGE (CONTRIBUTION), 1 A. 455; 2 A. 115, 807.

(2) *Act XIX of 1873, s. 241, cl. (i)—Revenue—Pattidar—Suit for contribution—Jurisdiction—Civil Court—Revenue Court.*—The question in the case was whether the plaintiff, a pattidar who had paid a sum on account of a demand for Government revenue, should sue to recover from the defendants, his co-pattidars, the balance in excess of his own quota in the Civil or in the Revenue Courts.

Held (SPANKIE, J., dissenting) that the Civil Courts were competent to entertain suits of the nature. *Per* SPANKIE, J., *contra*. RAM DIAL v. GULAB SINGH, 1 A. 26 (F.B.) ... 17

Contributory Negligence.

Contract—Bailment—Government Promissory Note—Master and servant.—The agent of the plaintiff delivered to the Treasury Officer at Meerut nine Government Promissory notes, aggregating Rs. 48,000 in value, in order that such notes might be transmitted to the Public Debt Office at Calcutta for cancellation and consolidation into a single note for Rs. 48,000, having previously indorsed the plaintiff's name on such notes at the request of a subordinate of the Treasury Officer, and received a receipt for such notes under the hand of the Treasury Officer. Owing partly to such indorsements and partly to the negligence of the Treasury Officer, such subordinate was enabled to misappropriate and negotiate two of such notes, aggregating Rs. 12,000 in value. The remaining seven of such notes were despatched to Calcutta, and a consolidated note for Rs. 31,200 was returned and delivered to the plaintiff, when the misappropriation of the two notes was discovered. The plaintiff sued Government claiming "that it might be directed to make restitution of the two notes or to deliver two other notes of equal value or their value in cash" with interest. On behalf of Government it was contended that it was not liable to the plaintiff's claim, inasmuch as the plaintiff, by his agent, had contributed to the loss of the two notes, and a master was not liable in damages for loss or injury sustained through the fraud or dishonesty of his servant without the scope of his employment. *Held* that the two notes not having been delivered to the Treasury Officer as a bailee, but having been surrendered, the receipt given by that officer must be regarded as an undertaking on the part of Government to deliver a consolidated note for Rs. 48,000 in due course, and the plaintiff's suit was in reality one for damages on account of the refusal of Government to discharge its obligation, the measure of those damages being the amount by which the note for Rs. 31,200 fell short of Rs. 48,000, with interest, and such being the suit, the contention of Government was not any answer to it. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SHEO SINGH RAI, 2 A. 756. ... 1065

Conveyance.

Mortgage—Sale in execution of decree—Vendor and purchaser.—The proprietors of a taluka and mahal called *B*, assessed with revenue at Rs. 6,800-4-7, to which certain lands which had been gained by alluvion appertained, which lands had been formed into a separate mahal and assessed with revenue at Rs. 88 mortgaged it in these terms: "We agree mutually to mortgage the said taluka *B*, and accordingly after mortgaging and hypothecating the whole of the mauzas original and appended, yielding a *jama* of Rs. 6,800-4-7, along with all original and appended rights, water and forest produce, high and low lands, cultivated and uncultivated lands, &c., &c., and all and every portion of our proprietary, possessory, and demandable rights, without excepting any right or interest obtained or

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obtainable, &c." Subsequently, the mahal taluka *B*, "together with original and attached mahal and all the zamindari rights appertaining thereto," was sold in the execution of a decree enforcing the mortgage. The auction-purchaser subsequently contracted to sell the "entire taluka *B*, *jama* Rs, 6 800-4-7," but afterwards refused to perform the contract and was sued for its specific performance. The plaint in this suit stated that the subject-matter of the contract was the "entire taluka *B*, *jama* Rs. 6,800-4-7." and the decree which the purchasers obtained for the specific performance of the contract referred to its subject-matter in similar terms.

Held, in a suit by the purchasers for the possession of the alluvial mahal, that the terms of the mortgage were sufficiently comprehensive to include that mahal, and it was not intended by the entry of the *jama* of mahal *B*, exclusive of the *jama* of the alluvial mahal, to exclude the latter from the mortgage, the entry of the *jama* being merely descriptive. Also that the alluvial mahal passed to the auction-purchaser at the auction-sale, under the words "attached mahal." Also that the sale to the plaintiffs passed the alluvial mahal, the words "the entire taluka *B*" being sufficient to include it, the entry of the *jama* of mahal *B* in the sale contract plaint, and decree being merely descriptive. GANPATJI v. SAADAT ALI, 2 A. 787. ... 1087

Convicted Person.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 151.

Co-sharers.

(1) *Trust—Trustee—Wajib-ul-arz—Absconding co-sharers.*—Where a clause of the *wajib-ul-arz* of a village stated in general terms that absconders from such village should receive back their property on their return, and certain persons who absconded from such village before such *wajib ul-arz* was framed sued to enforce such clause against the purchaser of their property from the co-sharer who had taken possession of it on their absconding, and who was no party to such *wajib-ul-arz*, alleging that their property had vested in such co-sharer in trust for them, *held* that before such co-sharer could be taken to have held their property as a trustee there must be evidence that he accepted such trust, and this fact could not be taken as proved by the *wajib-ul-arz*.

Held also that, assuming the trust to be established, as the purchaser had purchased in good faith for value and without notice of the trust, and was not the representative of such co-sharer within the meaning of s. 10 of Act IX of 1871, and had been more than twelve years in possession, the suit was barred by limitation. PIAREY LAL v. SALIGA, 2 A. 394 ... 816

(2) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 512.

(3) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 619.

(4) See CIV. PRO. CODE (ACT XXIII OF 1861), 1 A. 272.

(5) See LAMBARDAR, 1 A. 135.

Costs.

(1) Allowance for, of collection, etc.—See MESNE PROFITS, 1 A. 518.

(2) Security for—See CIV. PRO. CODE (ACT X OF 1877), 1 A. 687 ; 2 A. 604.

(3) See EXECUTION OF DECREE, 1 A. 568.

(4) See SURETY, 2 A. 582.

Court Fees.

(1) *Act* VIII *of* 1859—*S.* 309—*Pauper suit—Sale in execution of decree—Distribution of sale-proceeds—Prerogative of the Crown.*—With a view to recover the amount of Court-fees which J would have had to pay had he not been permitted to bring a suit as a pauper, the Government caused certain property belonging to *B*, the defendant in such suit, who had been ordered by the decree in such suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against *B* which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled to be paid first out of the proceeds of such sale the amount of Court-fees *J* would have had to pay had he not been allowed to sue as a pauper, the principle that Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. THE COLLECTOR OF MORADABAD v. MUHAMMAD DAIM KHAN, 2 A. 196 ... 678

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(2) *Act* X *of* 1877, *s.* 99—*Failure of plaintiff to pay Court-fee for issue of summons—Non-appearance of defendant—Act* VIII *of* 1859, *s.* 110—*Act* XXIII *of* 1861, *ss.* 5, 7—*Fresh suit.*—Where the plaintiff in a suit failed to deposit *talabana* required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in such suit, and the Court on that ground irregularly dismissed such suit as against such original defendants by an order purporting to be made under s. 110 of Act VIII of 1859 on a day previous to that fixed for the hearing of such suit, *held* that such order of dismissal did not preclude the plaintiff from instituting a fresh suit. GULAB DAI v. JIWAN RAM, 2 A. 318 ... 762

(3) *Limitation Act* VIII *of* 1859, *s.* 13—*Pauper petition—Payment of Court-fees by petitioner—Date of institution of suit—Transfer of the suit.*—Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date he filed his pauper petition, and limitation runs against him only up to that time.

S. 13, Act VIII of 1859, enacts that where a suit is brought for immoveable property situated within districts subject to different Sudder Courts, the Judge in whose Court the suit is brought shall apply to the Sudder Court to which he is subject for authority to proceed, and the Sudder Court to which the application is made, with the concurrence of the other Sudder Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sudder Court to a Court Subordinate to another Sudder Court. *Quære*—Whether Sudder Courts acting in concurrence have power to make such a transfer. STUART SKINNER *alias* NAWAB MIRZA v. WILLIAM ORDE, 2 A. 241=4 C.L R. 331=6 I.A. 126=3 Suth. P.C.J. 627=3 Ind. Jur. 334=4 Sar. P.C.J. 31 ... 708

(4) *Pauper suit—Act* VIII *of* 1859, *ss.* 270, 309—*Attachment in execution of decree—Prerogative of the Crown.*—*N* was allowed to bring a suit as a pauper. His suit was dismissed, the decree directing that he should pay the costs of the defendant. On the defendant's application certain immoveable property belonging to *N* was attached in execution of this decree, and was sold. *Held* that the Crown was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees *N* would have had to pay if he had not been allowed to sue as a pauper. GULZARI LAL v. THE COLLECTOR OF BAREILLY, 1 A. 596=2 Ind. Jur. 722 ... 414

(5) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 889.

(6) See DECLARATORY DECREE, 2 A. 869.

Court Fees Act (VII of 1870).

(1) *Ss.* 3 (c), 12, *sch.* ii, *art.* 17 (iii)—*Suit for a declaratory decree—Consequential Relief—Decision of questions relating to valuation—Appeal.*—S. 12 of the Court Fees Act prohibits appeals on questions relating to valuation for the purpose of determining the amount of a fee, but does not prevent a Court of appeal from determining whether or not consequential relief is sought in a suit, so that it may determine under what class of cases the suit falls for the purpose of the Court Fees Act.

A suit by a person against whom an order has been made, under s. 246 of Act VIII of 1859, disallowing his claim to the attached property for a decree declaring his right to the property, need not be valued according to the value of the property, but can be brought on a stamp of Rs. 10, under Act VII of 1870, sch. ii, art. 17 (iii). CHUNIA v. RAM DIAL, 1 A. 360=1 Ind. Jur. 851 ... 247

(2) *S.* 7 *and sch.* ii, 17—*Suit for a declaration of right—Suit to set aside an order under s.* 246 *of Act* VIII *of* 1859 *disallowing a claim to property under attachment—Consequential relief.*—*Held* that a suit for a declaration of the plaintiff's proprietary right to certain moveable property attached in the execution of a decree while in the possession of the plaintiff, and for the cancelment of the order of the Court executing the decree, made under s 246 of Act VIII of 1859, disallowing his claim to the property, could be

Court Fees Act (VII of 1870)—(*Concluded*). PAGE

brought on a stamp of Rs. 40, and need not be valued according to the value of the property under attachment. GULZARI LAL v. JADAUN RAI, 2 A. 63 ... 587

(3) S. 7, cl. IV (c) and sch. ii, art. 17 (iii)—See DECLARATORY SUIT, 2 A. 720, 869.

(4) *Ss. 7, 12, 17, 28—Act X of 1877, ss. 44, 45—Multifarious suit—"Distinct subjects"—Plaint—Memorandum of appeal—Suit for money—Power of the High Court to levy Court-fee on improperly stamped document.*—The plaintiffs sued in virtue of a conditional sale which had been foreclosed for (i) possession of a house, (ii) compensation, in the nature of rent, for its use and occupation from the date of foreclosure to the date of suit, and (iii) like compensation from the latter date to the date on which possession of the house should be delivered to them, the defendants having purchased the house subsequently to the conditional sale but before the same was foreclosed. The plaintiffs stated that their cause of action arose on the date of foreclosure.

Held (SPANKIE, J., dissenting) that the suit embraced "distinct subjects" within the meaning of s. 17 of the Court Fees' Act, 1870, and the plaint and memorandum of appeal were chargeable with the aggregate amount of fees to which the plaints or memoranda of appeal in separate suits for the different claims would have been liable.

Held also that, if a document which ought to bear a stamp under the Court Fees Act has been used in the High Court, and the mistake or inadvertence which permitted its reception in a lower Court, without being properly stamped, comes to light in the High Court, any Judge of that Court may, under s. 28 of the Court Fees Act, direct that it should be properly stamped.

Per SPANKIE, J.—That cl. ii, s. 7 of the Court Fees Act, did not apply to the third claim, nor was it one for money within the meaning of cl. i of that section, but one for which s. 11 of that Act provided.

Per OLDFIELD, J.—That Court-fees were leviable in respect of the third claim, with reference to cl. i, s. 7 and s. 11 of the Court Fees Act. CHEDI LAL v. KIRATH CHAND, 2 A. 682 ... 1014

(5) *S. 17—Act VIII of 1859, s. 9—Act X of 1877, ss. 44, 45—Multifarious suit—"Distinct subjects"—Plaint—Memorandum of appeal.—Held* that the words "distinct subjects" in s. 17 of the Court Fees Act, 1870, mean distinct and separate causes of action.

The plaintiff sued his brothers and a nephew for his share, according to the law of inheritance, and under a will, of the moveable and immoveable property of his deceased uncle, by the cancelment of a deed of gift of the immoveable property in favour of the nephew. *Held, per* STUART, C. J., and STRAIGHT, J., that, under s. 17 of the Court Fees Act, 1870, the plaint and memorandum of appeal in the suit were chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in separate suits for the moveable and immoveable property would have been liable under that Act.

Per OLDFIELD, J., that Court-fees were leviable on the plaint and memorandum of appeal on the total value of the claim, the suit not being one of the nature to which s. 17 of the Court Fees Act referred. MUL CHAND v. SHIB CHARAN LAL, 2 A. 676 ... 1010

(6) *Ss. 17, 27—Act VIII of 1859, ss. 8, 9—Multifarious suit—"Distinct subjects"—Plaint—Memorandum of Appeal.—Held* (SPANKIE, J., dissenting) that the words "distinct subjects" in s. 17 of Act VII of 1870 mean distinct cause of action or distinct kinds of relief.

Per SPANKIE, J.—Such words mean every separate matter distinctly forming a subject of the claim. CHAMAILI RANI v. RAM DAI, 1 A. 552 (F.B.) = 2 Ind. Jur. 836 ... 382

Court of Session.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 771.

Court of Wards.

See ACT XXXV OF 1858 (LUNACY, DISTRICT COURTS), 1 A. 476.

Court Sale.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 400.

Covenant. PAGE

Running with the land—See ALLOWANCE, 2 A. 162.

Creditors and Debtors.

Agreement between—See ARBITRATION, 2 A. 173.

Criminal Intimidation.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 351.

Criminal Procedure Code (Act X of 1872).

(1) See ACT XVII OF 1862 (REPEALING ENACTMENTS RELATING TO CRIMINAL LAW), 1 A. 599.

(2) See PENAL CODE (ACT XLV OF 1860), 2 A. 522.

(3) *Ss.* 4, 296—*Definition of Sessions Case—Power of Sessions Court.*—The appellant after his discharge by the Assistant Magistrate upon a charge under s. 457 of the Indian Penal Code was committed to the Sessions Court by order of the Sessions Judge under the Crim. Pro. Code, 1872, s. 296, upon charges under ss. 380 and 457 of the Penal Code.

Held by the Full Bench (SPANKIE, J. and OLDFIELD, J., dissenting) that the commitment was illegal, and that "Sessions case" within the meaning of s. 296 of the Code Criminal Procedure is a case exclusively triable by the Court of Session. EMPRESS OF INDIA v. KANCHAN SINGH, 1 A. 413 (F.B.) ... 283

(4) *Ss.* 4, 297—*High Court's Powers of Revision—Judicial Proceeding.*—An appeal having been preferred to the High Court against a judgment of acquittal of the Court of Session, the persons who had been acquitted were arrested by the Police and brought before the Magistrate, who illegally directed that they should be detained in custody pending the decision of the appeal. TURNER, O.C.J. and PEARSON, J., were of opinion that the High Court had no power as a Court of Revision to interfere with the order. SPANKIE, J. and OLDFIELD, J., *contra*. QUEEN v. GHOLAM ISMAIL, 1 A. 1 ... 1

(5) *Ss.* 4, 297, 415, 416, 417, 418, 419, 420—*Stolen property—High Court, powers of revision—"Judicial proceeding."*—Where a person was accused of dishonestly receiving stolen property, knowing it to be stolen, and was discharged by the Magistrate on the ground that there was no evidence that the property was stolen, *held* that the Magistrate was competent, believing that the property was stolen, to make an order under s. 418 of Act X of 1872 regarding its disposal.

Where there is a Court of appeal, resort should be had thereto before application is made to the High Court for the exercise of its powers of revision.

Quære.—Whether the issue by the Magistrate of a proclamation under s. 416 of Act X of 1872 is a "judicial proceeding" within the meaning of s. 297 of that Act. EMPRESS OF INDIA v. NILAMBAR BABU, 2 A. 276 ... 732

(6) *Ss.* 30, 270, 271—*Appeal by person convicted by Deputy Commissioner invested under s.* 36 *of Act* X *of* 1872—*High Court.*—*Quære*—Whether, where a person has been convicted by a Deputy Commissioner invested under s. 36 of Act X of 1872, and sentenced to a term of imprisonment requiring under that section to be confirmed by the Sessions Judge to which such Deputy Commissioner is subordinate, and such sentence has been confirmed accordingly, an appeal lies to the High Court against such conviction and sentence. EMPRESS OF INDIA v. NADUA, 2 A. 53 ... 579

(7) *Ss.* 44, 296—*Discharge of accused persons under s.* 215—*Revival of proceedings at the instance of the Court of Session—Commitment of accused persons.*—Certain persons were charged under s. 417 of the Indian Penal Code, and were discharged by the Magistrate inquiring into the offence, under s 215 of Act X of 1872. The Court of Session, considering that the accused persons had been improperly discharged, forwarded the record to the Magistrate of the District, suggesting to him to make the case over to Subordinate Magistrate, with directions to inquire into any offence other than the offence in respect of which the accused persons had been discharged, which the evidence on the record showed to have been committed. The Subordinate Magistrate, to whom the case was made over, made an inquiry, and committed the accused persons for trial before the Court of Session on charges under ss. 363 and 420 of the Indian Penal Code. It was contended that the Court of Session was not competent to "direct the accused persons to be committed," under s. 296 of Act X of 1872, the case not being a "Sessions case," within the meaning of that section, and that the commitment was consequently illegal. *Held* that

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there was no "direction to commit" within the meaning of that section, that is to say, to send the accused persons at once to the Sessions Court, without further inquiry, and whether or not the inquiry was made in consequence of the suggestions of the Court of Session was immaterial, and that the inquiry upon the charges under ss. 363 and 420 of the Penal Code was rightly held by the Subordinate Magistrate and the commitment could not be impeached. EMPRESS OF INDIA v. BHUP SINGH, 2 A. 570 ... 938

(8) *Ss.* 149, 272—*Act* I *of* 1872. *s.* 118—*Arrest pending appeal—Admissibility of the evidence of the respondent against another person concerned in the same offence—Accomplice.*—*K* and *B* were accused of being concerned in the offence. *K* was first apprehended, and the Magistrate inquired into the charge against him, and committed him for trial, but the Court of Session acquitted *K*. The Local Government preferred an appeal against his acquittal, and the Magistrate arrested him with a view to his detention in custody until such appeal was determined. While *K* was so detained, the Magistrate inquired into the charge against *B*, who had meanwhile been arrested, and made *K*, a witness for the prosecution, and committed *B* for trial. *K's* evidence was taken on *B's* trial.

Held per STUART, C.J. (SPANKIE, J., doubting), that *K's* arrest was lawful, and that his evidence was admissible against *B*.

Held per SPANKIE, J., that assuming that the Magistrate looked on *K* as an accused person and his arrest was lawful, the Magistrate should not have examined him as a witness against *B* and that, assuming that *K's* arrest was unlawful and that when he made his statements he was a free man, his evidence, if admissible was not evidence on which a Court should place much reliance. EMPRESS OF INDIA v. KARIM BAKHSH, 2 A. 386. 810

(9) *S.* 188—*Act* XLV *of* 1860, *s.* 497—*Adultery—Compounding of offences.*—*N* charged *T* with having committed adultery with his wife. On enquiry into the charge by the Magistrate the case was committed to the Sessions Court for trial when *T* was convicted. *T* appealed to the High Court. After conviction *N* and his wife were reconciled, and *N* at the hearing of the appeal asked for leave to compound the offence. *Held* that at that stage of the case sanction could not be given to withdraw the charge. EMPRESS OF INDIA v. THOMPSON, 2 A. 339 ... 776

(10) *S.* 215—*Examination of witnesses named for the prosecution—Discharge of accused without examining all the witnesses* —Before a Magistrate discharges an accused person under s. 215 of Act X of 1872, he is bound, under that section, to examine all the witnesses named for the prosecution. EMPRESS OF INDIA v. KASHI, 2 A. 447 = 4 Ind. Jur. 582 ... 853

(11) Ss. 218, 351—See PENAL CODE (ACT XLV OF 1860), 2 A. 253.

(12) *Ss.* 228, 283—*Summary trial—Record in appealable case—Judgment—Error or defect in proceedings.*—*K* was tried by a Magistrate in a summary way and convicted. He appealed to the Court of Session, which quashed his conviction on the ground merely that the substance of the evidence on which the conviction was held was not embodied in the Magistrate's judgment. *Held* that the Court of Session should not have quashed the conviction merely by reason of such defect, but, if it found it impossible to dispose of the appeal because of such defect, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a re-trial with that view. EMPRESS OF INDIA v. KARAN SINGH, 1 A. 680 = 2 Ind. Jur. 864 ... 475

(13) *S.* 249—*Act* I *of* 1872, *ss.* 30, 33—*Trial by the Court of Session—Admissibility of evidence given at preliminary inquiry by absent witness—Confession made by one of several persons being tried jointly* —*Held* that it is only in extreme cases of delay or expense that the personal attendance of a witness before the Court of Session should be dispensed with and the evidence given by him before the committing Magistrate referred to.

Held also, where a person being tried jointly with other persons made a statement deprecating any guilty knowledge and seeking to clear himself at the expense of such other persons, that such statement could not be taken into consideration under s. 30 of Act I of 1872 against such other persons. EMPRESS OF INDIA v. MULU, 2 A. 646 = 5 Ind. Jur. 263 ... 991

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(14) *Ss* 255, 283 297, 300—*Acquittal of accused without asking Assessors their Opinion—Error or defect in proceedings—High Court, powers of Revision of*.—*Held*, where without asking the opinion of the Assessors a Court of Session acquitted an accused person, after his defence had been heard, that such omission, although a serious irregularity, was not such an error or defect in the proceedings as was with reference to the provisions of ss. 283 and 300 of Act X of 1872, a ground for revisional interference. *In the matter of the petition of* NARAIN DAS, 1 A. 610 ... 424

(15) Ss. 271, 287, 464—See PENAL CODE (ACT XLV OF 1860), 2 A. 33.

(16) *Ss.* 272, 297—*Arrest pending appeal.*—When an appeal has been preferred under s. 272 of Act X of 1872, the High Court may order the accused to be arrested pending the appeal. EMPRESS OF INDIA v. MANGU, 2 A. 340 (F B) ... 777

(17) *Ss.* 272, 297—*High Court, powers of revision—Power of private prosecutor to move the Court, in a case of acquittal*—A private prosecutor can move the High Court, in the case of an acquittal, to exercise its powers of revision under s. 297 of Act X of 1872. SUKHO v. DURGA PRASAD, 2 A. 448 ... 854

(18) Ss. 288, 297—See ACT XI OF 1872 (FOREIGN JURISDICTION AND EXTRADITION), 2 A. 218.

(19) *S.* 296 *Reference to High Court under s.* 296 *of Act X of* 1872 *by Court of Session*—A Court of Session, after it had asked the assessors their opinion in a case which was being tried by it, suspended the trial of the case and made a reference to the High Court under s. 296 of Act X of 1872, on a question of jurisdiction which had arisen in the trial of the case. *Held* that it was not intended that that section should be so used, and the Court of Session must dispose of such question itself. EMPRESS OF INDIA v. BHUP SINGH, 2 A. 771 ... 1075

(20) *S* 297—*High Court, powers of revision*.—*Held*, that great laxity in weighing and testing evidence is a material error in a judicial proceeding within the meaning of s. 297 of Act X of 1872. EMPRESS OF INDIA v. MURLI, 2 A. 336 ... 774

(21) *S.* 297—*High Court's Powers of Revision—Judgment of acquittal.*—The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297 of Act X of 1872.

Per TURNER, J. and SPANKIE, J.—Such powers can only be exercised where the judgment of acquittal has proceeded on an error of law and not where it has proceeded on an error of fact. *In the matter of* HARDEO, 1 A 139 (F.B.)=1 Mad. L.R. 51 ... 94

(22) *S.* 297—*Penal Code, ss* 192, 193, 414—*Fabricating false evidence—Voluntarily assisting in concealing stolen property—Separate offences.*—Where the petitioner was convicted of having voluntarily assisted in concealing stolen railway pins in a certain person's house and field, with a view to having such innocent person punished as an offender, *held* that the Magistrate was right in convicting and punishing the petitioner for the two separate offences of fabricating false evidence for use in a stage of a judicial proceeding under s. 193 of the Indian Penal Code, and of voluntarily assisting in concealing stolen property under s. 414, Indian Penal Code. EMPRESS OF INDIA v. RAMESHAR RAI, 1 A. 379=1 Ind Jur. 743 ... 260

(23) *Ss.* 297, 472—*High Court, powers of Revision—Court of Session, powers of.*—*L* made a complaint against *S* by petition, in which he only charged *S* of having committed offences punishable under ss. 193 and 218 of the Indian Penal Code, but in which he also accused *S* of acts, which, if the accusation had been true, would have amounted to an offence punishable under s. 466 of that Code with seven years imprisonment. The Magistrate enquired into the charges against *S* under ss. 193 and 218 of the Indian Penal Code, and directed his discharge. *L* then applied to the Court of Session to direct *S* to be committed for trial on the ground that he had been improperly discharged, which the Court of Session did, and *S* was committed for trial charged under s. 218 of the Code, and was acquitted by the Court of Session The Court of Session then, under s. 472 of Act X of 1872, charged *L* with offences punishable under ss. 193, 195, 211, and 211 and 209 of the Indian Penal Code, and committed him for trial.

Held, that such commitment was not bad by reason that an offence under s. 193 of the Indian Penal Code is not exclusively triable by a Court of Session.

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Held also, *per* STUART, C. J. (SPANKIE, J., doubting), that the High Court is competent, in the exercise of its power of revision under s. 297 of Act X of 1872, to quash a commitment made by a Court of Session under the provisions of s. 472 of that Act.

Held also, *per* SPANKIE, J., that the Court of Session was competent, notwithstanding that *L* had only charged *S* with offences under ss. 193 and 218 of the Indian Penal Code, to charge *L* with offences under ss. 195 and 211, if such offences had come under its cognizance. EMPRESS OF INDIA v. LACHMAN SINGH, 2 A. 398 ... 819

(24) *S.* 309 *Act* VIII *of* 1873, *s.* 70—*Act* XLV *of* 1860, *s.* 65—*Act* I *of* 1868, *s.* 5.—S. 309 of the Crim. Pro. Code, does not extend the period of imprisonment which may be awarded by a Magistrate under s. 65 of the Indian Penal Code; it only regulates the proceedings of Magistrates whose powers are limited. EMPRESS OF INDIA v. DARBA, 1 A. 461 (F.B.) = 2 Ind. Jur. 322 ... 317

(25) *Ss.* 344, 345, 347—*Evidence of accomplice—Confession by accused person—Act I of* 1872, *s.* 24—*Pardon.*—Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, *held* that the tender of pardon to such person not being warranted by s. 347 of Act X of 1872, he could not legally be examined on oath, and his evidence was inadmissible.

Held also that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X of 1872 and s. 24 of Act I of 1872. EMPRESS OF INDIA v. ASHGAR ALI, 2 A. 260 = 4 Ind. Jur. 250 ... 721

(26) *Ss* 314, 452, 454, 455—*Trial of more than one offence—Act* XLV *of* 1860, *s* 71—*Joinder of charges—Limit of conviction*—*Held* that, where in the course of one and the same transaction an accused person appears to have committed several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been committed, yet in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the gravest offence proved.

Where, therefore, a person who broke into a house by night and committed theft therein was charged and tried for offences under ss. 380 and 457 of the Penal Code, and was convicted of both those offences, and punished for each with rigorous imprisonments for eighteen months, the Court convicted him of the offence under s. 457 and sentenced him to rigorous imprisonment for three years. and, acquitted him of the offence under s. 380. EMPRESS OF INDIA v. AJUDHIA, 2 A. 644 = 5 Ind. Jur. 262 ... 989

(27) *S.* 390—*Convicted Person—Bail—Sessions Court.*—The Court of Session has no power under s. 390, Act X of 1872, to admit a convicted person to bail, a *convicted person* not being an *accused person* within the meaning of that section. QUEEN v. THAKUR PARSHAD, 1 A. 151 (F B.) ... 101

(28) *Ss.* 435, 436, 467, 468, 469, 471, 472, 473—*False evidence—Offence against Public Justice—Offence in Contempt of Court—Act* XLV *of* 1860, *s.* 193—*Prosecution—Procedure.*—*Held* (STUART, C.J., dissenting) that an offence under s. 193 of the Indian Penal Code, being an offence in contempt of Court within the meaning of s. 473 of Act X of 1872, cannot, under that section, be tried by the Magistrate before whom such offence is committed.

Per STUART, C.J.—A Magistrate before whom such an offence is committed, if competent to try it himself, is not precluded from so doing by the provisions of s. 471 of Act X of 1872. EMPRESS OF INDIA v. KASHMIRI LAL, 1 A. 625 (F.B.) ... 436

(29) Ss. 454, 460—See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

(30) S. 454—See PENAL CODE (ACT XLV OF 1860), 2 A. 101.

(31) *Ss* 467, 468, 469, 471—*Prosecution—Procedure.*—S 471, Act X of 1872, does not deprive the Court, which possesses the power of trying an offence mentioned in Ss. 467, 468 and 469 of the power of trying it when committed before itself. QUEEN v. GUR BAKSH, 1 A. 193 ... 130

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(32) *S.* 468—*Sanction to prosecute—Relative positions of a Magistrate of the First Class, the Magistrate of the district, and the Court of Session.—Held* (OLDFIELD, J., dissenting) that for the purposes of s. 468 of Act X of 1872 a Magistrate of the First Class is subordinate to the Magistrate of the district, and consequently application for sanction to prosecute a person for intentionally giving false evidence before the former may, where such sanction is refused by the former, be made to the latter, and not to the Court of Session, which has not power to give such sanction. *In the matter of the petition of* GUR DAYAL, 2 A. 205 (F.B.) = 4 Ind. Jur. 35 ... 684

(33) *Ss.* 468, 469—*Prosecution—Sanction—Jurisdiction.—Held* that the sanction referred to in ss. 468 and 469 of Act X of 1872, when given by any of the Courts empowered under the Act, cannot be disturbed by a superior Court.

Per TURNER, Offg. C.J., and PEARSON and OLDFIELD, JJ—When sanction is refused by one of the Courts, the refusal does not deprive the other Courts of the discretion given to them.

Per SPANKIE, J.—When sanction is refused by one of the Courts, the refusal does not deprive the superior Courts of the discretion given to them. BARKAT-UL-LAH KHAN *v.* RENNIE, 1 A. 17 ... 11

(34) *Ss.* 468, 469, 470—*Prosecution for offence against public justice and offence relating to document given in evidence—Nature of sanction necessary—Act* XLV *of* 1860, *ss.* 193, 471—"*Subordination*" *of Revenue Courts to High Court.—Held* (SPANKIE, J., doubting), on a reference to the Full Bench, that a Court of Revenue is a Civil Court, within the meaning of ss. 468 and 469 of Act X of 1872.

Held also that the declining by a Court of Revenue to sanction a prosecution under ss. 468 and 469 of Act X of 1872, under a mistaken view of the law and under the impression that sanction was unnecessary did not constitute sanction.

Held, also that under the words "at any time" in s. 470 of Act X of 1872 sanction to prosecute cannot be given after the trial and conviction of the accused person.

Observations by STUART, C.J., on the "subordination" of Courts of Revenue to the High Court, within the meaning of ss. 468 and 469 of Act X of 1872.

Held by the Judge making the reference (STRAIGHT, J.), on the case being returned to him, that the accused persons having been prosecuted without the sanction required by ss. 468 and 469 of Act X of 1872, all the proceedings were invalid, and must be quashed, and the accused must be retried sanction to their prosecution having been obtained. EMPRESS OF INDIA *v.* SABSUKH, 2 A. 533 (F.B.) = 5 Ind. Jur. 49 ... 913

(35) *Ss.* 468, 471, 472, 473—*Offence against Public Justice—Offence in Contempt of Court—Prosecution—Procedure.*—An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1872.

But notwithstanding this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged. QUEEN *v.* KULTARAN SINGH, 1 A. 129 ... 87

(36) *Ss.* 468, 471, 473—*Offence against Public Justice—Offence in Contempt of Court—Prosecution—Procedure.*—An offence against public justice is not an offence in contempt of Court within the meaning of s. 473 of Act X of 1872.

The Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469 of Act X of 1872, is not precluded by the provisions of s. 471 from trying the accused person itself for the offence charged. QUEEN *v.* JAGAT MAL, 1 A. 162 ... 109

(37) Ss. 471, 473—See PENAL CODE (ACT XLV OF 1860), 2 A. 405.

(38) *S.* 489—*Act* XLV *of* 1860, *ss.* 503, 506—*Security for keeping the peace—Criminal intimidation.*—The words in s. 489 of the Crim. Pro. Code, "taking other unlawful measures with the evident intention of committing a breach of the peace," do not include the offence of intimidation by threatening to bring false charges.

Where, therefore, a person was convicted under ss. 503 and 506 of the Indian Penal Code of such offence, held that the Magistrate by whom such person

Criminal Procedure Code (Act X of 1872)—(*Concluded*). PAGE

was convicted could not, under s. 489 of the Crim. Pro. Code, require him to give a personal recognizance for keeping the peace. EMPRESS OF INDIA v. RAGHUBAR, 2 A. 351 ... 785

(39) Ss. 504, 505—See ACT VI OF 1864 (WHIPPING), 1 A. 666.

(40) *S. 506—Act IX of 1872, ss. 23, 24—Unlawful consideration—Void agreement.*—*F* was required by the Magistrate, under the Code of Criminal Procedure, to furnish two sureties who should be responsible for his good behaviour each in a certain sum. *S* agreed to become a surety on condition that *F* would deposit with him the amount of the security. *F* made the deposit, and *S* became a surety. The period for which *S* was responsible for *F*'s good conduct having expired without *F* committing any act to forfeit the security and *S* refusing to return the deposit, *F* sued *S* to recover the deposit. *Held* that, as the consideration for the agreement defeated the object of the law, the consideration was unlawful, and *F* was not entitled to relief. FATEH SINGH v. SANWAL SINGH, 1 A. 751 ... 524

(41) *S. 506—Security for Good Behaviour.*—*Held* that S. 506 of Act X of 1872 solely relates to the calling upon persons of habitually dishonest lives, and in that sense "desperate and dangerous," to find security for good behaviour, as a protection to the public against a repetition of crimes by them in which the safety of property is menaced and not the security of the person alone is jeopardised.

Where, therefore, the evidence adduced before the Magistrate did not show that a person was "by habit a robber house-breaker, or thief, or a receiver of stolen property, knowing the same to have been stolen," but showed only that he had been guilty of acts of violence, *held* that the Magistrate could not, under s. 506 of Act X of 1872, order such person to furnish security.

Observations regarding the evidence on which the procedure of s. 506 should be enforced. EMPRESS OF INDIA v. NAWAB, 2 A. 835 ... 1120

(42) S. 521—See ENCROACHMENT, 1 A. 249.

(43) *Ch. XV—Commitment—Inquiry into case triable by Court of Session.*—*Held* where a Magistrate had tried a case exclusively triable by a Court of Session, and the conviction of the accused person and the sentence passed upon him at such trial were for that reason annulled by the Court of Session, but the proceedings held at such trial were not annulled, that such Magistrate might commit the accused person to the Court of Session on the evidence given before him at such trial. EMPRESS OF INDIA v. ILAHI BAKHSH, 2 A. 910. ... 1173

Criminal Trespass.

See PENAL CODE (ACT XLV OF 1860), 1 A. 527; 2 A. 101, 465.

Cross decrees.

See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 91, 866.

Cross-suits.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 866.

Crown.

(1) *British Territory in India, Power of the Crown to cede.*—*Held* that the British Crown has the power, without the intervention of the Imperial Parliament, to make a cession of territory within British India to a foreign Prince or feudatory. Question as to what amounts to a cession in sovereignty discussed. LACHMI NARAIN v. RAJA PRATAB SINGH, 2 A. 1 ... 545

(2) Prerogative of—See COURT-FEES, 2 A. 196.

Culpable Homicide.

See PENAL CODE (ACT XLV OF 1860), 2 A. 349, 522, 766.

Custom.

(1) Evidence of—to be definite—See CLAIM 1 A. 440.

(2) Requisites of valid—See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 49.

(3) See PRE-EMPTION, 1 A. 563, 567.

Cyprus.

Offence committed by a Native Indian British subjects in—See ACT XI OF 1872 (FOREIGN JURISDICTION AND EXTRADITION), 2 A. 218.

Damages. PAGE

(1) *Bond—Interest.*— *Held*, where a bond for the payment of certain money within a certain time did not contain any agreement fixing the rate of interest to be paid after the date it became due, that the question as to the amount of interest to be allowed after that date should be treated as one of damages, and that, having regard to the length of time that had elapsed since the bond ran out (February 1870) to the date on which the suit thereon was instituted 26th November 1878, interest at the rate of eight annas per cent. per mensem was an equitable rate to allow after the date the bond became due.

Held also that but for the plaintiff's laches the rate agreed by the defendant to be paid under the bond (one rupee per cent. per mensem was a reasonable basis on which to estimate the subsequent damages. JUALA PRASAD v. KHUMAN SINGH 2 A. 617=5 Ind. Jur. 154 ... 970

(2) Suit for See LIMITATION ACT (XV OF 1877), 2 A. 354.
(3) See ACT XV OF 1859 (PATENTS), 2 A. 668.
(4) See CONTRACT ACT (IX OF 1872), 2 A. 671.

Death.

See EVIDENCE ACT (I OF 1872), 1 A. 53.

Debt.

(1) See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 2 A. 513.
(2) See HINDU LAW (DEBTS), 2 A. 800.
(3) See LIMITATION, 1 A. 663.

Declaration.

(1) Suit for, of right—See COURT FEES ACT (VII OF 1870), 2 A. 63.
(2) Suit for, that a legally invalid document is not genuine—See DOCUMENT, 1 A. 622.

Declaratory Decree.

(1) *Court Fees Act* (VII *of* 1870) *ss.* 7, iv, *sch.* ii, 17 (*iii*), 1—*Consequential Relief—Court-fees.*—In a suit for a declaration of proprietary right in respect of a house in which the removal of an attachment of such house in the execution of a decree was sought, the plaintiff did not, as s. 7 of the Court Fees Act directs, state in his plaint the amount at which he valued the relief sought, nor did the Court of first instance cause him to supply this defect. On appeal by the plaintiff from the decree of the Court of first instance dismissing his suit, the lower appellate Court demanded from the plaintiff Court-fees in respect of his plaint and memorandum of appeal computed on the market-value of such house, the plaintiff having only paid in respect of those documents respectively the Court fees payable in a suit for a declaration of right where no consequential relief is prayed. *Held*, that the market-value of the property could not be taken by the lower appellate Court to be the value of the relief sought, as the plaintiff did not seek possession of the property, and that, as the valuation of the relief sought rested with the plaintiff and not the Court, and as in this instance the declaration of right claimed, necessarily carried with it the consequential relief sought, of which the value was merely nominal, further Court-fees could not be demanded by the lower appellate Court from the plaintiff. OSTOCHE v. HARI DAS, 2 A. 869 ... 1144

(2) *Hindu law—Declaratory Decree—Inheritance—Sudra—Illegitimate son.*—In a suit merely for a declaration of right in respect of certain property, the lower appellate Court, considering that the suit was really one for the possession of such property, allowed the plaintiff to make up the full amount of Court-fees required for a suit for possession. The plaint in the suit was not amended, and the lower appellate Court eventually gave the plaintiff a declaratory decree. *Held*, on second appeal by the defendant, who objected that a suit merely for a declaratory decree could not be maintained, that such objection ought not to be allowed under the circumstances.

The illegitimate offspring of a kept woman or continuous concubine amongst Sudras are on the same level as to inheritance as the issue of a female slave by a Sudra. Under the Mitakshara law the son of a female slave by a Sudra takes the whole of his father's estate, if there be no sons by a wedded wife, or daughters by such a wife, or sons of such daughters. If there be any such heirs the son of a female slave will participate to the extent of

Declaratory Decree—(*Concluded*). PAGE

half a share only. *Held*, therefore, that *M*, the illegitimate son of an *abir* by a continuous concubine of the same caste, took his father's estate in preference to the daughter of a legitimate son of his father who died in the father's lifetime. SARSUTI v. MANNU, 2 A. 134 ... 635

(3) See COURT FEES ACT (VII OF 1870), 1 A. 360.
(4) See DECLARATORY SUIT, 2 A 720.
(5) See HINDU LAW (REVERSIONER), 1 A. 371.
(6) See PRIVY COUNCIL, 1 A. 688.

Declaratory Suit.

Act X *of* 1877, *s.* 283—*Declaratory decree—Consequential relief—Act* VII *of* 1870, *s.* 7, *cl* iv (*c*), *and sch* ii, *art* 17 (*iii*)—*Suit to establish right to attached property.*—In a suit, under s. 283 of Act X of 1877, for a declaration of her proprietary right to certain immoveable property attached in the execution of a decree, the plaintiff asked that the property might be "protected from sale." *Held* that consequential relief was claimed in the suit and Court fees were therefore leviable under s 7, cl. iv (c) and not under sch. ii, art. 17 (iii) of Act VII of 1870. RAM PRASAD v. SUKH DAI, 2 A 720 ... 1041

Decree.

(1) *Act* VIII *of* 1859. *ss.* 236, 252—*Decree charging land—Immoveable property—Sale of judgment-creditor's right in immoveable property.*—The sale of a decree charging land for its satisfaction in the course of execution proceedings against the judgment-creditor is a sale of an interest in immoveable property. *Held* that the provisions of the Code of Civil Procedure relating to sales of immoveable property will apply to such sale. BHAWANI KUAR v. GULAB RAI, 1 A, 348=1 Ind. Jur. 704 ... 238
(2) Conditional, in pre-emption suit—See PRE-EMPTION, 1 A. 291, 293.
(3) Contents of—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 342.
(4) Directing payment by instalments—Discretion—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 129.
(5) For money payable by instalments—See EXECUTION OF DECREE, 2 A. 291.
(6) For money payable by instalments—See LIMITATION, 2 A. 443.
(7) For the performance of a particular Act—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 501.
(8) Payable by instalments—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 320, 649.
(9) Proceedings under, barred—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 350.
(10) Several claims in one suit—Final, of appellate Court—See LIMITATION, 1 A. 508.
(11) See APPEAL (GENERAL), 1 A. 266.
(12) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 497.
(13) See EXECUTION OF DECREE, 1 A 456.
(14) See LIMITATION ACT (IX OF 1871), 1 A. 510.
(15) See MONEY-DECREE, 1 A. 446.
(16) See PRE-EMPTION, 1 A. 132.
(17) See SMALL CAUSE COURT, 1 A. 624.

Decree-holder.

See EXECUTION OF DECREE, 1 A. 568.

Defaulting Purchaser.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 181.

Destruction.

Action for compensation for, of life—See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Devise.

See LEGACY, 1 A. 753.

Division Court.

See LIMITATION ACT (IX OF 1871), 1 A. 34.

Document. PAGE

(1) Ambiguous or defective—See CONTRACT ACT (IX OF 1872), 1 A. 275.

(2) *Cancellation of—Suit for a declaration that a document is not genuine—Reasonable apprehension of injury.*—Where a void or a voidable document cannot legally be used for the purpose which is apprehended, there is no such reasonable apprehension that such document, if left outstanding, will cause injury as will entitle the person claiming the cancellation of such document to relief. SAHIB LAL v. HIRA LAL, 1 A. 622 ... 434

Documentary Evidence.

See CUSTOM, 1 A. 440.

Dwelling Place.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 51.

Easement.

See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITIES), 1 A. 557.

Ejectment.

See JURISDICTION (OF CIVIL COURT), 1 A. 448.

Encroachment.

Public Thoroughfare—Obstruction—Jurisdiction—Act X of 1872, *s.* 521.—No suit for obstructing a public thoroughfare can be maintained in a Civil Court without proof of special injury. KARIM BAKSH v. BUDHA, 1 A. 249 ... 168

Enhancement.

Of rent—See ACT X OF 1859 (BENGAL RENT), 1 A. 301.

Equity.

Justice, and good conscience—See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 533.

Error.

(1) Or defect in proceedings—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A 610, 680.

(2) Or irregularity—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 889, 908.

Estoppel.

See EVIDENCE ACT (I OF 1872), 2 A. 809.

Estoppel (by plea).

See FRAUD, 1 A. 403.

Estoppel (in Pais).

Estoppel—Laches—Acquiescence—Limitation—Equitable.—The plea of acquiescence is applicable to suits for which a fixed term of limitation is prescribed by law, but mere delay in enforcing a right does not constitute acquiescence.

The defendants took possession of, and erected buildings on, land which they knew belonged to the plaintiff and they had no claim to, without applying to the plaintiff for consent. The plaintiff abstained from suing to eject them for one or two years, knowing that the defendants were building on the land.

Held, under the circumstances, that the delay in the institution of the suit was not sufficient to deprive the plaintiff of her right to relief. UDA BEGAM v. IMAM-UD-DIN, 1 A. 82 ... 55

Evidence.

(1) *Act* VIII *of* 1859, *s.* 350 —*Improper reception in evidence of unstamped document—Irregularity not affecting the merits of the case—Appeal.*—Where a Court of first instance, treating an unstamped promissory note, the after stamping of which was inadmissible, as a bond, received such instrument in evidence, on payment of the stamp duty chargeable on it as a bond and of the penalty, *held* that the reception of such instrument by such Court being an irregularity not affecting the merits of the case, was no ground for reversing the decree of such Court when the same was appealed from. AFZUL-UN-NISSA v. TEJ BAN, 1 A. 725 ... 506

Evidence—(*Concluded*). PAGE

(2) Admissibility of—given at preliminary inquiry by absent witness—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 386, 646.
(3) Reception in, of unstamped and unregistered document—See RELEASE, 2 A. 554.
(4) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 260.

Evidence Act (I of 1872).

(1) See APPEAL (SPECIAL APPEAL), 1 A. 535.
(2) S. 24—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 260.
(3) *S. 30—Confession made by one of several persons being tried jointly for the same offence.*—Where the confession of a person being tried jointly with other persons did not implicate him to the same extent as it implicated such other persons, and was not sufficient of itself to justify his conviction, *held* that such confession could not be taken into consideration under s. 30 of Act I of 1872 against such other persons. EMPRESS OF INDIA v. GANRAJ, 2 A. 444=4 Ind Jur. 581 ... 851
(4) *S. 30—Confession made by one of several persons being tried jointly for the same offence—Conviction on uncorroborated confession.* A conviction of a person who is being tried together with other persons for the same offence cannot proceed merely on an uncorroborated statement in the confession of one of such other persons. EMPRESS OF INDIA v. BHAWANI, 1 A. 664 463
See, also, EMPRESS OF INDIA v. RAM CHAND, 1 A. 675 ... 471
(5) Ss. 30, 33—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 646.
(6) S. 92—See BILL OF EXCHANGE 2 A. 598.
(7) Ss. 92, 95—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 832.
(8) S 93—See CONTRACT ACT (IX OF 1872), 1 A. 275.
(9) *S. 108—Hindu Law—Inheritance—Act* XVIII *of* 1872, s. 9—*Missing person—Presumption of death—Burden of proof—Act* VI *of* 1871, s. 24.—The reversioners next after *J* to the estate of *S* deceased sued to avoid an alienation of *S*'s estate affecting their reversionary right made by his widow. *J* had not been heard of for eight or nine years, and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of s. 108, Act I of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead. PARMESHAR RAI v. BISHESHAR SINGH, 1 A. 53 F.B.) 36
(10) *S. 108—Muhammadan Law—Missing person—Act* VI *of* 1871 *s.* 24.—*F.*, one of the heirs to the property of his parents (the family being Muhammadans) was "missing" when they died, and subsequently when the other heirs to such property sued his daughter *M* for the possession of a portion of such property. *M* set up as a defence to the suit that her father was alive, and that during his lifetime the plaintiffs could not claim his share in such portion. *Held* by STUART, C.J., and SPANKIE, J., that the suit, being one to enforce a right of inheritance, must be governed by the Muhammadan law relating to a "missing" person.
Held by STUART, C.J., that, according to Muhammadan law, ninety years not having elapsed from F's birth, his share could not be claimed by the plaintiffs, but must remain in abeyance until the expiry of that period or his death was proved.
Held by PEARSON, J., and SPANKIE, J., that *F* being a "missing" person when his parents died, his daughter, according to that law, was not entitled to hold his share either as heir or trustee. HASAN ALI v. MAHRBAN, 2 A. 625. ... 976
(11) S. 110—See MORTGAGE (REDEMPTION), 1 A. 194.
(12) *S. 115—Hindu Law—Award—Estoppel—Inheritance.*—D, who was the natural brother of *H*, but had been adopted into another family, on the one part, and *G*, on the other part, referred to arbitration a dispute between them concerning the succession to the estate of *S*. the father of *D* and *H*, *H* having been born deaf and dumb, was, under Hindu Law, incapable of inheriting his father's estate, and he was not a party to the arbitration proceedings. The award, to which *G*, after it was made, expressed his assent in writing, declared that *H* was the heir to his father's estate.
Held (SPANKIE, J., dissenting), in a suit by *H* against *G* for possession of a portion of his father's estate that the plaintiff, not being a party to the award, was not bound thereby, and, not being bound thereby, could not claim to take any advantage therefrom; that the award could not confer

Evidence Act (I of 1872)—(*Concluded*). PAGE

on him a right which he did not possess by law, nor could it constitute evidence of a right which the law disallowed; that the assent of the defendant to the award could not convey to the plaintiff a right of inheritance which did not devolve on him by law; that it could not be contended that the defendant had made a gift of the property to the plaintiff, inasmuch as it had been adjudged by the award that the property did not belong to the defendant: that the defendant by his assent to the award was not estopped from questioning the plaintiff's right of inheritance by the provisions of s. 115 of Act I of 1872; and that, under these circumstances, the plaintiff could not succeed in his suit. GANGA SAHAI v. HIRA SINGH. 2 A. 809 ... 1102

(13) S. 118—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 386.

Evidence Act Amendment Act (XVIII of 1872).

See EVIDENCE ACT (I OF 1872), 1 A. 53.

Execution of Decree.

(1) *Acquiescence.*—Certain property was attached in execution of a decree against the judgment-debtor in the year 1847. This attachment was set aside on the application of persons claiming the property as their own. These persons were sued together with the judgment-debtor by the judgment-creditor, and another decree was passed in 1855, declaring the said property liable to sale in execution of the decree of 1847. The decree of 1847 had been satisfied in part in execution-proceedings taken under the decree of 1855 against the heirs of the judgment-debtor. *Held* that the balance of the decree of 1847 could not be recovered in execution under the decree of 1855 against the heirs of the judgment-debtor, and that no acquiescence in the past on the part of the judgment-debtor under the decree of 1847 could render such execution valid. BINDA PRASAD v. AHMAD ALI, 1 A. 368=1 Ind. Jur. 741 ... 252

(2) *Act* VIII *of* 1859, *S.* 271—*Sale in execution of decree—Surplus sale-proceeds—Lien.*—Certain immoveable property was attached on the 13th April 1876 in execution of two decrees, *viz*, *M's* dated the 15th January 1876, which declared a lien created by a bond dated the 17th July 1873, and *P's* dated the 21st January 1876, which declared a lien created by a bond dated the 28th September 1875. *M* had another decree dated the 11th November 1875, declaring a lien on the same property created by a bond dated the 27th October 1874. On the 2nd June 1876, before the sale of the property, *M* applied for the attachment in the execution of that decree of the surplus remaining from the sale-proceeds after his claim under the decree dated the 15th January 1876 was satisfied in full. The Court made an order in accordance with his application. *Held* that, under such circumstances, *M*, as the holder of the decree dated the 11th November, 1875, was entitled to share in the surplus sale-proceeds under the provisions of s. 271 of Act VIII of 1859, and further was entitled to share before *P*. MANIK SINGH v. PARAS RAM, 1 A. 727 ... 506

(3) *Act* XIV *of* 1859, *S.* 20—*Proceeding to enforce decree—Limitation*—Application for the execution of a decree was made on the 21st December 1864, and in pursuance of such application the notice required by law was issued to the judgment-debtor. On the 7th February 1865 the Court executing the decree called on the decree-holder to produce proof of the service of such notice within four days. On the 23rd February 1865, in consequence of the decree-holder having failed to produce such proof, the Court dismissed the application. There was no proceeding either of the decree-holder or of the Court between the 7th and the 23rd February 1865. On the 18th February 1868, application was again made for the execution of the decree. *Held* that the proceeding of the Court of the 23rd February 1865, striking off the former application for default of prosecution, was not a proceeding to keep the decree alive, and the latter application was therefore beyond time. RAGHU RAM v. DANNU LAL, 2 A. 285 ... 739

(4) *Act* IX *of* 1871. *Sch.* II, *Art.* 167—*Decree for money payable by instalments—Adjustment of decree—Act* VIII *of* 1859, *s.* 206.—A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable, and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the money due under the decree.

Execution of Decree—(*Continued*). PAGE

Held, per PEARSON, J., that, whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was, with reference to art. 167, sch. ii of Act IX of 1871, within time.

SPANKIE, J., refused to interfere in second appeal, inasmuch as the lower appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree. KANCHAN SINGH v. SHEO PRASAD, 2 A. 291 ... 743

(5) *Limitation.—Held* that an application to the Court which passed a decree, that it may be sent for execution to another Court is an application to keep such decree in force within the meaning of the Limitation Act. COLLINS v. MAULA BAKHSH, 2 A. 284 ... 738

(6) *Rival decrees—Decree of Her Majesty in Council—Decree of the High Court.* On appeal by *U* the High Court set aside a decree which the sons of *K* had obtained in the Court of first instance against *U* and certain other persons, in a suit brought by them for possession of one-third of certain real property. At the same time on appeal by two of the other persons aforesaid, it affirmed a decree which *U* had obtained against these persons and the sons of *K*, for possession of two-thirds of the same property, in a suit in which he had claimed possession of the whole. It subsequently, on appeal by *U*, against that portion of the decree made in the suit brought by him which dismissed his claim in respect to one-third of the property, reversed that portion and gave him a decree for the whole. The sons of *K* appealed to Her Majesty in Council only from the decree of the High Court setting aside the decree obtained by them in the Court of first instance for one-third of the property. Her Majesty in Council set aside this decree of the High Court and restored the decree of the Court of first instance. In the meantime *U* was put into possession of the whole property in execution of the decree of the High Court which he had obtained in the suit brought by him. When the sons of *K*, in execution of the decree of Her Majesty in Council, applied for possession of one-third of the property, *U* opposed the application on the ground that he was in possession under a decree of the High Court which had become final. *Held*, by a Full Bench of the High Court, that the decree of Her Majesty in Council must be executed, notwithstanding that its execution involved the disturbance of the possession obtained by *U* under the decree of the High Court which had become final. UDAI SINGH v. BHARAT SINGH, 1 A. 456 (F.B.) = 2 Ind. Jur. 260 ... 313

(7) Sale in—See LIS PENDENS, 1 A. 588.

(8) *Sale in execution of decree—Irregularity—Act* VIII *of* 1859, *s.* 257.—*G* and *M* obtained a money decree against *K* in the Court of the Principal Sadr Amin on the 12th December 1864. This decree was reversed by the District Judge, but on the 5th March 1866 the Sudder Court set aside the Judge's decree and ordered a new trial. On the 5th May 1866 the District Judge affirmed the decree of the Court of first instance. On the 3rd December 1866 the High Court again set aside the Judge's decree and ordered a new trial. On the 14th January 1867 the District Judge again affirmed the decree of the Court of first instance, and no appeal being preferred, the decree became final. The decree-holders had in the meantime taken proceedings to execute the decree dated the 5th May 1866, and from time to time and finally on the 7th November 1870 they renewed these proceedings, in each instance referring to the decree dated the 5th May 1866, even after it was set aside and the decree dated the 14th January 1867 passed. On the last application a sale of certain immoveable property belonging to *K* was ordered and took place on the 15th February 1871. *K* objected to the confirmation of the sale on the ground of the irregularity in the application, but his objections were disallowed and the sale was confirmed. He brought a suit to recover possession of the property from the auction-purchaser on the ground that the sale was a nullity.

Held per STUART, C.J., and PEARSON, TURNER and SPANKIE, JJ., that the sale ought not to be set aside, as the irregularity in applying for execution of the decree dated the 5th May 1866 was an irregularity which did not prejudice the judgment-debtor.

Per OLDFIELD, J.—That with reference to s. 257, Act VIII of 1859, the suit was not maintainable. GHAZI v. KADIR BAKSH, 1 A. 212 (F.B.) ... 143

Execution of Decree—(*Continued*). PAGE

(9) *Sale in execution of decree—Right of auction-purchaser to recover purchase-money on the sale being set aside—Fraud on the part of decree-holder—Fraud on the part of auction-purchaser—Minor—Costs.*—A decree-holder fraudulently caused the sale in execution of his decree of certain immoveable property belonging to a minor. The minor brought a suit for a declaration that such sale was invalid and obtained possession of the property from the auction-purchaser. The auction-purchaser sued the decree-holder to recover his purchase-money and the costs incurred by him in defending the suit brought by the minor.

Held, *per* PEARSON, TURNER, SPANKIE, and OLDFIELD, JJ., it being found that the auction-purchaser was not a party to or cognizant of the fraud on the part of the decree-holder, that neither the mere fact that the auction-purchaser knew that he was purchasing the property of a minor, nor the mere fact that he did not ascertain whether or not the sale was justified by the terms of the decree, disentitled him to recover the purchase-money from the decree-holder.

Held also that, being innocent of fraud and having purchased in the *bona fide* belief that the property of the minor was saleable, he was entitled to recover the purchase money.

Held also that he could not recover the costs incurred by him in defending the suit brought by the minor, being a suit he ought not to have defended.

Per STUART, C.J.—That the auction-purchaser, being guilty of fraud, was not entitled to recover the purchase-money, and, assuming that he was innocent of fraud, that having purchased with the knowledge that the property was the property of a minor and without ascertaining that the sale was justified by the terms of the decree, he could not recover the purchase-money. MAKUNDI LAL v. KAUSILA, 1 A. 568 (F.B.) ... 394

(10) *Sale in execution of decree—Warranty—Caveat Emptor.*—In a sale in the execution of a decree of the rights and interests of a judgment debtor in an estate of which he is the recorded proprietor in the revenue registers, it is usual to describe such rights and interests in the sale-proceedings as recorded in such registers, but such description does not amount on the part of the decree-holder or the officer conducting the sale to a warranty that such rights and interests are correctly described.

Where, therefore, according to the usual practice, the rights and interests of a judgment-debtor in a share of a village of which he was the recorded proprietor in the revenue registers, were proclaimed for sale in the execution of a decree and sold, described as recorded, and the sons of the judgment-debtor subsequently sued the auction-purchaser to recover their interests in such share and obtained a decree for such interests, and the auction-purchaser thereupon sued the decree-holder for a refund of the purchase-money proportionate to such interests and for the costs of defending such suit, *held* there being no fraud or misrepresentation on the part of the decree-holder, or anything of an exceptional nature showing an express or implied warranty on his part, that the suit was not maintainable. RAM NARAIN SINGH v. MAHTAB BIBI, 2 A. 828 ... 1114

(11) See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.
(12) See ACT XVIII OF 1873 (N W.P. RENT), 1 A. 547; 2 A. 451.
(13) See APPEAL (GENERAL), 1 A. 583.
(14) See ATTACHMENT 1 A. 616.
(15) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 180, 235, 350, 377, 501, 541, 686.
(16) See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 178, 388.
(17) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 61, 74, 94, 275, 281, 283, 290 299, 352, 384, 396, 604, 785, 850, 856.
(18) See CONVEYANCE, 2 A. 787.
(19) See COURT FEES, 1 A. 596, 2 A. 196.
(20) See HINDU LAW (DEBTS), 2 A. 800.
(21) See HINDU LAW (JOINT FAMILY), 2 A. 746.
(22) See LIMITATION, 1 A. 508, 675.
(23) See LIMITATION ACT (IX OF 1871), 1 A. 97, 231, 355, 510, 525, 580, 586, 2 A. 273.
(24) See LIMITATION ACT (XV OF 1877), 2 A. 763.
(25) See MORTGAGE (USUFRUCTUARY), 2 A. 455.
(26) See PARTIES, 2 A. 107.

Execution of Decree—(*Concluded*). PAGE

(27) See PRE-EMPTION, 1 A. 293.
(28) See REGISTRATION ACT (XX OF 1866), 1 A. 236.
(29) See SMALL CAUSE COURT, 1 A. 624.
(30) See STATUTE 40 VICT., C. 7 (MUTINY ACT), 1 A. 730.

Execution Proceedings.

See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.

Executor.

(1) See LEGACY, 1 A. 753.
(2) See SUCCESSION ACT (X OF 1865), 1 A. 710.

Ex parte Decree.

See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 748.

Ex parte Judgment.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 2 A. 67.

Exposure of Child.

See PENAL CODE (ACT XLV OF 1860), 2 A. 349.

Exproprietary Tenant.

(1) See ACT XVIII OF 1873 (N.-W.P. RENT), 1 A. 459 ; 2 A. 145.
(2) See JURISDICTION (OF CIVIL COURT), 1 A. 448.
(3) See OCCUPANCY RIGHT, 2 A. 735.
(4) See SIR-LAND, 1 A. 659.

Factum Valet.

See HINDU LAW (SELF ACQUISITION), 1 A. 394.

False Charge.

(1) What constitutes—See PENAL CODE (ACT XLV OF 1860), 1 A. 497.
(2) See PENAL CODE (ACT XLV OF 1860), 1 A. 527.

False Evidence.

(1) Fabricating—See PENAL CODE (ACT XLV OF 1860), 2 A. 105.
(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 379; 2 A. 205.

Family Dwelling-house.

See HINDU LAW (ALIENATION), 2 A. 141.

Final Decree.

See PRE-EMPTION, 1 A. 132, 293.

Forfeiture.

See HINDU LAW (WIDOW), 1 A. 503.

Fraud.

(1) *Estoppel—Agreement not to execute decree—Breach of faith—Deed of conditional sale—Defeating claims of third persons—Disavowal of trust—Execution—Ex parte decree—Fictitious transaction—Foreclosure proceedings—Justice, equity, and good conscience—Limitation—Position under deed—Prejudice—Real nature of transaction—Relief—Suit to enforce agreement—Wrongful execution.*—The plaintiff sued in 1875 to recover possession of immoveable property which the defendant had obtained in 1873 in execution of an *ex parte* decree dated the 8th June 1861. That decree was founded on a deed purporting to be a deed of conditional sale dated the 24th December 1853, executed by the plaintiff in favour of the defendant. The plaintiff alleged that the deed was executed in order to protect the property against the claims of plaintiff's son, and the plaintiff sought to set it aside on account of defendant's breach of an agreement dated the 16th January 1856, whereby the defendant stipulated that plaintiff's possession should not be disturbed. The defendant *inter alia* pleaded estoppel, and the bar of limitation, against plaintiff's suit.

Held, that the suit was not barred by limitation, as plaintiff's cause of action only arose when defendant first practically disavowed the trust by seeking more than nominal execution of decree, and that plaintiff is not estopped from showing the real truth of the transaction between plaintiff and defendant, and from obtaining relief through the Court against defendant's

Fraud—(*Concluded*). PAGE

breach of good faith, because of plaintiff's attempt to hinder or defeat the possible claim of a third party, the maxim "*in pari delicto potior est conditio possidentis*" not being applicable without qualification to India, where justice, equity, and good conscience require no more than that a party should be precluded from contradicting, to the prejudice of another, an instrument pretending to the solemnity of a deed, when the parties claiming under it or their representatives have been induced to alter their position on the faith of such instrument. PARAM SINGH v. LALJI MAL, 1 A. 403 ... 276

(2) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 543.
(3) See EXECUTION OF DECREE, 1 A. 568.
(4) See HINDU LAW (ALIENATION), 2 A. 41.
(5) See MORTGAGOR AND MORTGAGEE, 1 A. 303.
(6) See RELEASE, 2 A. 554.
(7) See VOLUNTARY ALIENATION, 2 A. 891.

Fresh Suit.

See COURT FEE, 2 A. 318.

Good Faith.

(1) See ACT XVIII OF 1850 (JUDICIAL OFFICERS' PROTECTION), 1 A. 280.
(2) See VOLUNTARY ALIENATION, 2 A. 891.

Good Conscience.

Justice, equity and—See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 533.

Goods.

Duty of persons sending, of a dangerous nature—See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Government Ferry.

See CONTRACT ACT (IX OF 1872), 2 A. 411.

Government Promissory Note.

See CONTRIBUTORY NEGLIGENCE, 2 A. 756.

Grant.

Jurisdiction—Grant of land exempt form revenue—Grant of land exempt from rent—Regulation XIX of 1793, s. 10—Regulation XLI of 1795, s. 10: Act XVIII of 1873, ss. 30, 95—Act XIX of 1873, ss. 79, 241.—The plaintiff in this suit claimed the possession of certain land in virtue of a grant thereof to him, not merely of the proprietary right in such land, but of the rents of the same undiminished by the payment of the revenue assessed thereon, which the grantor took upon himself to pay.

Held by STUART, C.J., PEARSON, J., and OLDFIELD, J., that the grant was null and void and liable to resumption, with reference to s. 10 of Regulation XIX of 1793 and Regulation XLI of 1795, and s. 30 of Act XVIII of 1873 and s. 79 of Act XIX of 1873.

Per SPANKIE, J.—That the question whether the grant was null and void with reference to those Regulations and Acts did not arise as the grant, on the facts found by the Court below, was not one within the terms of those Regulations.

Held per STUART, C. J., PEARSON, J., and SPANKIE, J., that the suit was cognizable by the Civil Courts. JAGAN NATH PANDAY v. PRAG SINGH, 2 A. 545 = 2 Ind. Jur. 681 ... 377

Guardian.

(1) See ACT IX OF 1861 (MINORS), 1 A. 428.
(2) See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 598.

Guru.

See HINDU LAW (INHERITANCE), 1 A. 539.

Haq-i-chaharum.

(1) *Suit of the nature cognizable in Small Cause Court—Second Appeal.*—A suit by a zamindar for one-fourth of the price of trees cut by tenants is when based upon contract, one of the nature cognizable in a Court of Small Causes,

Haq-i-chaharum—(*Concluded*). PAGE

and consequently, where the amount claimed is under five hundred rupees, no second appeal lies in such a suit. HARI SINGH v. BALDEO SINGH, 2 A. 905 ... 1169

(2) See LIMITATION ACT (XV OF 1877), 2 A. 358.

Havalat.

Entering a, with intent to convey food to prisoner.—See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

High Court.

(1) *Act X of 1877—Interlocutory order—Appeal to Her Majesty in Council—Act VI of 1874—Letters Patent, cl.* 31.—*Held* that the High Court has not any power, under Act X of 1877, or cl. 31 of the Letters Patent, to grant leave to appeal to Her Majesty in Council from an order of the Court remanding a suit for retrial.

The provisions of cl 31 of the Letters Patent are repealed by the Code and Act VI of 1874 which preceded it. TETLEY v. JAI SHANKAR, 1 A. 726... 507

(2) Appellate Civil Jurisdiction.—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 181.

(3) Appellate Civil Jurisdiction.—See LETTERS PATENT, 1865, 1 A. 31.

(4) Powers of revision—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 1, 139, 610; 2 A. 276, 336, 398, 448.

(5) Powers of Superintendence—See STATUTE 24 AND 25 VICT., C. 104 (HIGH COURT'S ACT), 1 A 296.

(6) *Powers of Superintendence of—Stat.* 24 *and* 25 *Vic., c.*104, *s.*15—*Revision of Judicial Proceedings—Jurisdiction.*—The High Court is not competent in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s 15 of 24 and 25 Vic., c. 104, to interfere with the order of a Court subordinate to it on the ground that such order has proceeded on an error of law or an error of fact.

Where, therefore, on appeal by the judgment-debtor against an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale on a ground not provided by law, and the auction-purchasers applied under the above-mentioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere. TEJ RAM v. HARSUKH, 1 A. 101 (F B.) ... 68

(7) Reference to.—See PENAL CODE (ACT XLV OF 1860), 2 A. 33.

(8) Reference to—by Sessions Court—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 771.

(9) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 53.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—CASTE.
4.—DEBTS.
5.—GIFT.
6.—INHERITANCE.
7.—JOINT FAMILY.
8.—MAINTENANCE.
9.—MARRIAGE
10.—MINORITY and GUARDIANSHIP.
11.—PARTITION.
12.—REVERSIONERS.
13.—SELF ACQUISITION.
14.—STRIDHAN.
15.—SUCCESSION.
16.—WIDOW.

—— **1.—Adoption.**

(1) *Inheritance.*—An adopted son under Dattaka Mimansa and Mitakshara succeeds to property to which his adopted mother succeeded as the heiress of her father. SHAM KUAR v. GAYA DIN, 1 A. 255=1 Ind. Jur. 198 ... 178

(2) *Jain Law.*—The question of the validity of an adoption, the parties between whom the question arose being Jains, was decided in accordance with the law of that sect, and not in accordance with Hindu law. Under Jain law the adoption of a sister's son is valid. HASSAN ALI v. NAGA MAL, 1 A. 288 ... 196

Hindu Law—1.—Adoption—(*Concluded*). PAGE

(3) *Of an only son.* *Held* (TURNER, J., dissenting), that the adoption of an only son cannot, according to Hindu Law, be invalidated after it has once taken place. HANUMAN TIWARI v. CHIRAI, 2 A. 164 (F.B.) ... 656

(4) *Held* that, when an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father. SUKHBASI LAL v. GUMAN SINGH, 2 A. 366 ... 796

——2.— **Alienation.**

(1) *Family dwelling-house—Ancestral property—Mortgage—Sale in execution of decree.—L*, a Hindu, mortgaged the dwelling-house of his family, such dwelling-house being ancestral property. *Held* in a suit against *L*'s mother and wife to enforce the mortgage, brought after *L*'s decease, that the mortgage could be enforced. BHIKHAM DAS v. PURA, 2 A. 141 ... 640

(2) *Power of the father to alienate ancestral property.—D*, in pursuance of a promise to give his daughter a dowry, about two years after her marriage, made a gift of joint ancestral property to *G*, her father-in-law. *P*, *D*'s son, sued his father and *G* to have the gift set aside as invalid under Hindu law. *Held* that the gift, not having been made with the plaintiff's consent, and not being for any purpose allowed by Hindu Law, was invalid, and that the plaintiff was entitled to have it set aside, not to the extent only of his own share in such property, but altogether. GANGA BISHESHAR v. PIRTHI PAL, 2 A. 635=5 Ind. Jur. 212 ... 983

(3) *Power of the father to alienate ancestral property.—F*, during the minority of his son *R*, sold in order to raise money for immoral purposes, the ancestral property of the family. The purchaser acted in good faith and gave value for such property. *Held* by the majority of the Full Bench (SPANKIE, J., and OLDFIELD, J.) in a suit by *R* against the purchaser and *F* to recover such property and to have such sale set aside as invalid under Hindu law, that such sale was not valid even to the extent of *F*'s share, and that *R* was entitled to recover such property as joint family property. *Held per* PEARSON, J. that *R* could not recover such property, and that the purchaser, having acted in good faith, took by the sale *F*'s share in such property, and might have such share ascertained by partition. CHAMAILI KUAR v. RAM PRASAD, 2 A. 267 (F.B.)=4 Ind. Jur. 251 ... 726

(4) *Reversioner—Fraud.—S* was entitled under the Mitakshara law, to succeed, on the death of *M*, her mother, to the real estate of *N*, her father. Certain persons disputed *S*'s right of succession and claimed that they were entitled to succeed to *N*'s estate on *M*'s death, and complained that *M* was wasting the estate. The differences between such persons and *M* and *N* were referred by them to arbitration, and an award was made and filed in Court which, among other things, partitioned the estate between *S* and such persons. *G*, who claimed the right to succeed to the estate on *S*'s death, sued for the cancellation of the award on the ground that it was fraudulent and affected his reversionary interests. *Held*, relying on 1 A. 274 that the suit was maintainable notwithstanding that *G*, was not the next reversioner. GAURI DAT v. GUR SAHAI, 2 A. 41 ... 571

(5) See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION) 2 A. 513.

(6) See HINDU LAW (DEBTS), 2 A. 800.

(7) See HINDU LAW (GIFT), 1 A. 734.

(8) See HINDU LAW (JOINT FAMILY), 2 A. 746, 898, 899.

——3.—**Caste.**

See HINDU LAW (MINORITY AND GUARDIANSHIP), 1 A. 549.

——4.—**Debts.**

(1) *Mitakshara—Mortgage by a father of ancestral property—Sale of father's rights and interests in the execution of decree—Liability of son's share.—* The undivided estate of a joint Hindu family consisting of a father and his minor sons and grandsons, while in the possession and management of the father, was mortgaged by him as security for the re-payment of moneys borrowed by him. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale. The right, title, and interest of the father only in the family estate was sold in the execution of this decree. The auction-purchasers having taken possession of the family estate, the

Hindu Law – 4.— Debts—(*Concluded*). PAGE

sons and grandsons joined in a suit against them to recover their shares of the estate. *Held* that the sons and grandsons were entitled to recover their shares of the estate, inasmuch as the auction-purchasers had only acquired by their auction-purchase the rights and interests of the father in the estate, and that, for the same reason, it was unnecessary to inquire into the nature of the debt on account of which the father's rights and interests in the estate were sold.

Held also that the rulings in those two cases are perfectly consistent. BIKA SINGH v. LACHMAN SINGH 2 A 800 ... 1096

(2) ACT XXVIII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 2 A. 513.

——— **5.— Gift.**

(1) *Gift of separate property to Hindu widow—Stridhan—Widow's power of alienation—Reversioner—Mitakshara*— Res judicata.— *C*, a Hindu subject to the Mitakshara law, died leaving a widow *R*, but no issue. In his lifetime he had transferred to *R* by gift mauza *R* a portion of his real estate. After his death *J* and *P*, his brothers, sued *R* for the possession of *C's* real estate on the ground that it was ancestral property. This suit was dismissed, it being held by the Sudder Court that *C's* real estate was separate property, to which his widow would be entitled to succeed by inheritance. The Sudder Court determined that *R* had acquired mauza *R* by gift from *C*, and that *R* took under the gift a life-interest in the property only. *J* and *P* having died, *R* made a gift of mauza *R* to her agent as a reward for his faithful services. *N*, the son of *J*, sued as the heir of his uncle *C*, to set aside this gift to the agent as illegal.

Held that the decision in the former suit did not make the question as to the interest *R* took under the gift from her husband *res judicata*, inasmuch as *N* did not claim through his father when suing as heir to his uncle. *Held* also, on the finding that *R* had acquired the property from her husband by gift, that she did not take an absolute interest in the property under the gift, and her husband's heirs could question the validity of the gift to the agent.

Held also that the gift to the agent, being made only out of motives of generosity, was invalid. RUDR NARAIN SINGH v. RUP KUAR 1 A. 734 ... 513

(2) *Illegal consideration—Immoral consideration.*—In the year 1870 *H* made a gift of certain immoveable property to *W*, who was his mistress but lived with him as his wife, "on condition of her continuing to be his wife and remaining obedient to him, her husband." *W* acquired possession of the property in virtue of the gift, and had held it for eight years, when a creditor of *H* under a decree enforcing a debt created by *H* subsequently to the gift, sued, amongst other things, for a declaration that the gift was invalid, as it had been made for an illegal consideration, *viz.*, the future immoral cohabitation of *W* with *H*. *Held* that, assuming that the consideration for the gift was illegal, in the absence of fraud, the gift could not be set aside so many years after *W* had acquired possession thereunder. LACHMI NARAIN v. WILAYATI BEGAM, 2 A. 433=4 Ind. Jur. 525 ... 843

(3) See HINDU LAW (JOINT FAMILY), 1 A. 429.

(4) See HINDU LAW (SELF-ACQUISITION), 1 A. 394.

——— **6 — Inheritance.**

(1) Disqualified heir—See EVIDENCE ACT (I OF 1872), 2 A. 809.

(2) *Saniasi—Inheritance—Guru—Chela.*—Amongst Saniasis generally no *chela* has a right as such to succeed to the property of his deceased guru. His right of succession depends upon his nomination by the deceased in his lifetime as his successor, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together to perform the funeral obsequies of the deceased. Where a *guru* does not nominate his successor from among his *chelas*, such successor is elected and installed by the *mahants* and principal persons of the sect in the neighbourhood upon the occasion of the funeral obsequies of the deceased.

Where therefore a *chela* sued for possession of a village belonging to his deceased *guru*, founding such suit on his right of succession as *chela*, without alleging that he had been nominated by the deceased as his successor and confirmed, or that he had been elected as successor to the deceased, such suit was held to be unmaintainable. MADHO DAS v. KAMTA DAS, 1 A. 539=2 Ind. Jur. 609 ... 372

Hindu Law—6.—Inheritance—(*Concluded*). PAGE

(3) Stridhan—*Inheritance Unchastity.*—*Per* TURNER, OFFG. C.J., and OLDFIELD, J.—Unchastity in a woman does not incapacitate her from inheriting *stridhan*.

Per PEARSON and SPANKIE, JJ.—Unchastity in a woman does not preclude her from keeping possession by right of inheritance of *stridhan*. GANGA JATI v. GHASITA, 1 A. 46 (F.B.) ... 31

(4) *Succession of daughters—Reversioners.*—So long as a daughter not disqualified, or in whom a right of inheritance has once vested, survives, a daughter's son acquires no right by inheritance in his maternal grandfather's estate.

Where, therefore, *R* died leaving issue two daughters, *B* and *P*, and P died shortly after *R* leaving sons, and while *B* was alive her sons and the sons of *P* sued, as the heirs of *R*, to set aside a mortgage of his real estate made by *B* as the guardian of her minor sons, and by *A*, the father of *P's* sons, as their father and guardian, such suit was held not to be maintainable. BAIJ NATH v MAHABIR, 1 A. 608 ... 422

(5) See DECLARATORY DECREE, 2 A. 134.

(6) See HINDU LAW (ADOPTION), 1 A. 255.

(7) See HINDU LAW (JOINT FAMILY), 1 A. 105.

(8) See HINDU LAW (STRIDHAN), 1 A. 561.

———7.—Joint Family.

(1) *Destruction of character of joint undivided family property by introduction of stranger in blood as auction-purchaser—Assent of co-parceners no longer necessary to constitute valid gift.*—The introduction of a stranger in blood as auction-purchaser of a portion of the rights and interests of an undivided Hindu family, breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property, and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the auction-purchasers, is not invalid by reason of the principle of Hindu law which requires the assent of co-parceners in an undivided Hindu family to give validity to such a gift. BALLABH DAS v. SUNDER DAS, 1 A. 429 ... 295

(2) *Joint and undivided ancestral property—Separate property—Compromise.*—Certain ancestral estate was recorded as held in equal shares by four brothers, *A*, *B*, *C* and *D*. On *A's* death his son *E* was recorded as the holder of his share. On the deaths of *B* and *D*, *C* was at first recorded as the owner of their shares. Shortly afterwards *B's* widow, *F*, and *D's* widow, *G*, were recorded as the holders of their husbands' shares. Again, at a later period, the names of *H* and *I*, the sons of *E* were substituted for those of the widows. The estate was subsequently sold for arrears of Government revenue, but a farm of it was given to *E*, *H*, *I*, and *C*. In 1853 the Government having purchased the estate proposed to regrant it to the old zamindars and farmers, and a report regarding the ownership of the estate was called for. It was reported that it appeared from the statements of *E* and *J*, the son of *C*, that the widows of *B* and *D* had made a gift of their shares to *H* and *I*. In 1853 *E*, *J*, *H*, and *I* were asked by the Collector in what manner they proposed to divide the estate if it were granted to them, and they replied that they would hold it in equal shares. The estate was eventually granted to these persons on payment of the arrears of revenue. Each of them contributed his quota in making such payment. In 1855 an administration-paper was framed in which they were entered, at their own request, as in possession each of equal shares. In 1864 they agreed to a partition of the shares by arbitration. These proceedings were stopped by *J* advancing a claim to a moiety of the estate. In March 1867 *J* sued for possession of a moiety of the share originally held by *B's* widow, then deceased, and for a declaration of his right to a moiety of the share held originally by *D's* widow. In June 1867 the parties to the suit effected a compromise, agreeing to divide the estate into four lots on certain conditions. A decree was accordingly passed in the terms of the compromise. *K*, *J's* son, sued in 1876, in his father's lifetime, to obtain the same relief as his father had sought in 1867, and a declaration that the arrangement effected by the compromise and the decree was ineffectual. *Held* that, assuming that the estate was joint until 1867, *K* was, in the absence of fraud, bound by the compromise entered into by his father and his suit was not maintainable.

Hindu Law—7.—Joint Family—(*Continued*). PAGE

Assuming that the estate was held in separate shares, the shares of *K*'s great uncles descended as inheritance liable to obstruction and *K* could not have questioned his father's acts. PITAM SINGH v. UJAGAR SINGH, 1 A. 651 ... 454

(3) *Joint Hindu family property—Alienation by Father—Son's Rights.*—*G*, a member of a joint undivided Hindu family consisting of himself and his sons, having wrongfully converted to his own use the property of another person, such person sued him for damages for such conversion, and obtained a decree in the execution of which *G*'s rights and interests in the family property were put up for sale and purchased by *C*, who in execution of such decree took possession of such property. *G*'s sons thereupon sued *C* to recover their shares according to Hindu Law of such property *Held per* OLDFIELD, J., that, although the father's debt was not one which the sons were in duty bound to pay, it might be that, had the family estate passed out of the family under the execution-sale, the sons could not have recovered it from *C*, who was an auction-purchaser and a stranger to the suit against the father. Inasmuch as, however, the claim in that suit was not for a joint family debt, but a personal claim against the father who was alone represented in that suit, and the decree in that suit was against him personally, and it was only his rights and interests that were put up for sale and purchased by *C*, the sons were entitled to recover from *C* their shares of the family property.

Per STRAIGHT, J.—That the sons were entitled to recover their shares of the family property, the decree being purely a personal decree against the father, and his rights and interests only in such property having been put up for sale and purchased by *C*. CHANDRA SEN v. GANGA RAM, 2 A 899 1165

(4) *Joint undivided family property—Alienation— Assent of co-parceners—Stranger.*—The member of a joint Hindu family, who alienates his rights and interests in the family property to a stranger in blood, thereby incapacitates himself from objecting to a similar alienation by another member of such family of his rights and interests in such property, on the ground that such alienation was made without his consent, and such stranger is not competent to make such objection. GANRAJ DUBEY v. SHEOZORE SINGH, 2 A. 898 ... 1164

(5) *Mitakshara—Mortgage by father of joint ancestral property—Sale of joint ancestral property in the execution of a decree against father—Liability of son's share.*—The undivided estate of a joint Hindu family, consisting of a father and his sons, while in the possession and management of the father, was mortgaged by him, with the knowledge of the sons, as security for the re-payment of moneys borrowed and lent for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the family estate, and obtained a decree against him directing its sale, and sought to bring the family estate to sale in the execution of this decree. *Held*, in a suit by one of the sons to protect his share in such estate from sale in the execution of such decree, that such decree could not be regarded as against the father only, and his share in such property was not alone saleable in execution of it, but such suit and decree must be regarded as against the father as representing the joint family, and the whole of the family estate was saleable in execution of such decree. DEVA SINGH v. RAM MANOHAR, 2 A. 746 ... 1053

(6) *Undivided Hindu family—Ancestral immoveable property—Partition.*—In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the lifetime, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family. KALI PARSHAD v. RAM CHARAN, 1 A. 159 (F.B.) ... 107

(7) *Undivided Hindu family—Ancestral immoveable property—Rights of father and son.*—The sons in an undivided Hindu family, although they have a proprietary right in the paternal and ancestral estate, have not independent dominion.

Where, therefore, the plaintiff sued to eject the defendant, his son, from a portion of a house, partly self acquired by the plaintiff and partly ancestral property, in which the defendant was living against the plaintiff's will, the Court decreed the claim. BALDEO DAS v. SHAM LAL, 1 A. 77 = 11 Mad. Jur. 222 ... 52

(8) *Undivided Hindu family—Inheritance.*—When in an undivided Hindu family living under the Mitakshara law, a brother dies without having issue, but

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leaving brothers and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but on partition the whole estate, including the interest of the brother so dying, is divisible, and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken had he survived the period of distribution. DEBI PARSHAD v. THAKUR DIAL, 1 A. 105 (F.B.)=11 Mad. Jur. 260 ... 71

(9) See HINDU LAW (DEBTS), 2 A. 800.

——— **8.—Maintenance.**

(1) *Decree for maintenance—Suit for reduction of maintenance.*—A Hindu lady obtained a decree awarding her maintenance at a certain fixed rate and charging the assets of a certain firm with the payment of such maintenance. There was no provision in this decree that such rate was subject to any modification which future circumstances might render necessary. The assets of such firm having diminished, the proprietor of the same brought a suit for the reduction of such rate of maintenance. *Held* that such suit was maintainable. RUKA BAI v. GANDA BAI, 1 A. 594=2 Ind. Jur. 722 413

(2) *Hindu widow.*—A wife is under the Hindu law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property, or dispose of it by will, in such a wholesale manner as to deprive her of maintenance.

Held, therefore, where a husband in his lifetime made a gift of his entire estate leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance. JAMNA v. MACHUL SAHU, 2 A. 315=4 Ind. Jur. 414 ... 761

(3) *Widow.*—*Held*, in a suit by a Hindu widow for maintenance, that the circumstance that she was not a childless widow, but had had a son who had died a minor subsequently to his father, was not a ground for reducing the allowance she would have been reasonably entitled to had she been a childless widow. NARHAR SINGH v. DIRGNATH KUAR, 2 A. 407 ... 824

(4) *Widow.*—In a case where a Hindu widow is entitled to maintenance, it is better to award a fixed annual sum and not a share of the income of the estate. JHUNNA v. RAMSARUP, 2 A. 777 ... 1079

(5) See HINDU LAW (WIDOW), 1 A. 170.

——— **9.—Marriage.**

See HINDU LAW (MINORITY AND GUARDIANSHIP), 1 A. 549.

——— **10.—Minority and Guardianship.**

Guardian and Minor—Act XXI of 1850—Caste—Marriage—Medical Examination.—A Hindu who has been deprived of caste by the members of his brotherhood on account of intending, for a money consideration, to give his infant daughter in marriage to a man both old and impotent, does not, under Hindu law, thereby forfeit his right as guardian to the custody of such daughter. Even if there were a rule of Hindu law which in such a case inflicted a forfeiture of such right, such rule could not, with reference to the provisions of Act XXI of 1850, be enforced.

Where accordingly, because a Hindu had been deprived of caste for the reason above-mentioned, a person sued to have the custody of the infant himself as her guardian in lieu of her father, and as such to be declared empowered to arrange for her marriage to a suitable husband, basing his suit on Hindu Law, *held* that such suit was not maintainable.

Held also that the lower Courts properly refused to cause the intended husband in this case to be medically examined as to his alleged impotency, he not being a party to the suit, and there being no provision of law authorising such a procedure. KANAHI RAM v. BIDDYA RAM, 1 A. 549=2 Ind. Jur. 834 ... 379

——— **11.—Partition.**

(1) *Joint and undivided ancestral property—Definement of shares—Insufficient evidence of partition—Enjoyment of profits.*—Definement of shares in joint ancestral property recorded as separate estate in the revenue records in pursuance of an alleged intended separation between the members of a joint and undivided Hindu family does not necessarily amount to such separation, which must be shown by the best evidence, *viz.*, separate

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enjoyment of profits, or an unmistakable intention to separate interests which was carried into effect. AMBIKA DAT v. SUKHMANI KUAR, 1 A. 437=2 Ind. Jur. 179 ... 299

(2) See HINDU LAW (JOINT FAMILY), 1 A. 159, 651.

———**12.—Reversioner.**

(1) *Declaratory Decree—Suit by reversioner.*—The plaintiff's mother was entitled to certain property for her life under an award, under which the plaintiff was entitled to succeed to the property after her mother's death. The plaintiff sued her mother and the holder of a decree in execution of which the property had been sold, praying for a declaration of her right to succeed to the property and that the said decree and sale might be declared void against her, alleging that the decree had been obtained and executed by collusion between the defendants. *Held* that the suit could be maintained under the exception in the judgment of the Privy Council in *Kattamma Natchiar* v. *Dorasinga Tevar.* MUSSAMAT JAGESRI KUAR v. RAM NATH BHAGAT, 1 A 371=1 Ind. Jur. 742 ... 254

(2) See HINDU LAW (ALIENATION), 2 A. 41.
(3) See HINDU LAW (GIFT), 1 A. 734.
(4) See HINDU LAW (INHERITANCE) 1 A. 608.
(5) See HINDU LAW (WIDOW). 1 A. 503.
(6) See RES JUDICATA, 1 A. 282.

———**13.—Self-Acquisition.**

Acts done not void—Exclusive gift—Father's powers—Mitakshara—Implied prohibition—Self acquired immoveable property—Son's right—Smriti Chandrika—Spiritual responsibility.—A Hindu son, subject to the Mitakshara law of inheritance, sued to obtain a declaratory decree for a moiety of a house which the father had conveyed by deed of gift to plaintiff's brother, being the self-acquired immoveable property of his father, on the ground that under the Hindu law a father is not permitted to make a gift of immoveable property to one son, to the injury of the other. *Held* (reviewing all the authorities and precedents on the subject), that although prohibition of such a gift, on moral or spiritual grounds, may be implied by the texts of Hindu law, yet, where it is not declared that there is absolutely no power to do such acts, those acts, if done, are not necessarily void, and that therefore an exclusive gift to one son by the father of self-acquired immoveable property is not illegal. SITAL v. MADHO, 1 A. 394 270

———**14.—Stridhan.**

(1) *Mitakshara—Inheritance.*—Immoveable property inherited by the paternal grandmother from the grandson does not rank as *stridhan* and on her death devolve as such on her heirs, but devolves on her death on the heirs of the grandson. PHUKAR SINGH v. RANJIT SINGH, 1 A. 661=3 Ind. Jur. 33 ... 461

(2) See HINDU LAW (GIFT), 1 A. 734.
(3) See HINDU LAW (INHERITANCE), 1 A. 46.

———**15.—Succession.**

(1) *Right of succession of daughters to father's estate.*—*Held* that comparative poverty is the only criterion for settling the claims of daughters on their father's estate.

Where, therefore, two of four daughters brought suits claiming each a moiety of their father's estate, to the exclusion of the two remaining daughters, and such remaining daughters resisted such suits on the ground that they were entitled to the whole estate, being poor and needy, while their sisters were rich, and it was found that such remaining daughters were, as compared with their sisters, poor and needy, the Court dismissed such suits. AUDH KUMARI v. CHANDRA DAI, 2 A. 561 ... 932

(2) See ACT XXVII OF 1860 (COLLECTION OF DEBTS ON SUCCESSION), 2 A. 513.
(3) See HINDU LAW (INHERITANCE), 1 A. 608.

———**16.—Widow.**

(1) *Family dwelling house—Right of residence.*—A Hindu widow, who resides with her husband and the members of his family in the family dwelling house while he is alive, is entitled to reside therein after his death, and

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cannot be ousted by the auction-purchaser of the rights and interests in the house of her husband's nephew. GAURI v. CHANDRAMANI, 1 A. 262 ... 177

(2) *Forfeiture—Reversioner.*—A Hindu widow does not forfeit her interest in her deceased husband's separate estate merely by divesting herself of such interest. Such an act does not entitle the person claiming to be the next reversioner to sue for possession of the estate, or for a declaration of his right as such reversioner to succeed to the estate after the widow's death. PRAG DAS v. HARI KISHN, 1 A. 503=2 Ind. Jur. 465 ... 346

(3) *Maintenance.*—*Held* by the Full Bench that a Hindu widow is not entitled, under the Mitakshara, to be maintained by her husband's relatives merely because of the relationship between them and her husband. Her right depends upon the existence in their hands of ancestral property.

Held, on the case being returned to the Division Bench, that the fact that the defendant in this case was in possession of ancestral immoveable property at the death of his son and had subsequently sold such property to pay his own debts did not give the son's widow any claim to be maintained by him. GANGA BAI v. SITA RAM, 1 A. 170 (F.B.) ... 115

(4) *Widow's estate, Forfeiture of—Unchastity during widowhood.*—*Held*, under the Mitakshara law, that a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. The ruling of the majority of the Full Bench of the Calcutta High Court in 13 B.L.R. 1=19 W.R. 367, followed. NEHALO v. KISHEN LAL, 2 A. 150 (F.B.) ... 647

(5) *Widow's estate, Forfeiture of—Unchastity during widowhood.*—It is sufficient for the protection of a Hindu widow's right to her husband's estate from forfeiture by reason of unchastity that such right has vested in her before her misconduct. It is not necessary for such protection that she should have acquired possession of the estate before her misconduct. BHAWANY v. MAHTAB KUAR, 2 A. 171 ... 661

(6) See HINDU LAW (GIFT), 1 A. 734.

(7) See HINDU LAW (MAINTENANCE), 2 A. 315, 407, 777.

(8) See PRE-EMPTION, 1 A. 452.

(9) See RES JUDICATA, 1 A. 282.

Hindu Vendor.

See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 564.

House-Trespass.

See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

Hundi.

Act XXIII of 1861, s. 4—Defendants not all within jurisdiction—Bankruptcy of acceptor of hundi—Holder's option.—In a suit on a hundi payable at Calcutta, the acceptor there having become bankrupt before the hundi reached maturity, brought by the holder in the place where the hundi was drawn against the two partners of the firm that drew the hundi, and also the acceptor who resided at the time of suit beyond the local jurisdiction of the Court passing the decree, the lower appellate Court having dismissed the suit on the ground that the Court of first instance could not without the sanction provided by s. 4 of Act XXIII of 1861, pass a decree against the defendant who resided beyond its jurisdiction, *held*, following the English law, that it was not necessary to sue the bankrupt defendant, and that the holder of a hundi is not bound, in the event of its dishonour, to sue all the parties liable under it, but may select any one or more of them. BASANT RAM v. KOLAHAL, 1 A. 392 ... 269

Hurr.

See PENAL CODE (ACT XLV OF 1860), 2 A. 139.

Husband and Wife.

(1) See LEGACY, 1 A. 762, 772.

(2) See MUHAMMADAN LAW (DIVORCE), 2 A. 71.

Hypothecation.

(1) See MONEY DECREE, 1 A. 240.

(2) See MORTGAGE (SIMPLE), 2 A. 527.

Illegal Consideration.

See HINDU LAW (GIFT), 2 A. 433.

Illegal Gratification. PAGE

See PENAL CODE (ACT XLV OF 1860), 1 A. 530.

Illegitimate Son.

See DECLARATORY DECREE, 2 A. 134.

Illicit Sale.

Of liquor—See ACT X OF 1871 (EXCISE), 1 A. 630, 635, 638.

Illustrations.

Legal character of, to sections—See SURETY, 1 A. 487.

Immoral Consideration.

(1) See CONTRACT ACT (IX OF 1872), 1 A. 476.
(2) See HINDU LAW (GIFT), 2 A. 433.

Immoveable Property.

(1) Suit for money charged on—See MORTGAGE (SIMPLE), 1 A. 611.
(2) See DECREE, 1 A. 348.
(3) See SMALL CAUSE COURT, 1 A. 624.

Implied Contract.

See CONTRACT ACT (IX OF 1872), 2 A. 671.

Impotence.

See HINDU LAW (MINORITY AND GUARDIANSHIP), 1 A. 549.

In Forma Pauperis.

Application to sue—See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 745.

Insolvent.

(1) See ARBITRATION, 2 A. 173.
(2) See STATUTE 11 AND 12 VIC., CAP. 21 (INSOLVENT ACT), 2 A. 474.

Instalment Bond.

See LIMITATION ACT (XV OF 1877), 2 A. 322.

Interest.

(1) *Mortgage—Interest under Regs.* XV *of* 1793 *and* XVII *of* 1806—*Conditional decree for redemption.*—Under s. 6, Reg. XV of 1793, interest claimable under a bond must not exceed the amount of the principal. S. 3, Reg. XVII of 1806, is not inconsistent with the application of Reg. XV of 1793, inasmuch as the Regulation of 1806 refers to *rates* of interest and the Regulation of 1793 to accumulations of interest irrespective of rate.

A conditional decree fixing a period for payment of money found to be due on mortgage-bonds entitling the mortgagor to redemption, though not claimable as of right by the mortgagor, who ordinarily should be ready at once with his money, is a proper and judicious order passed by an appellate Court, where the Court of first instance determined the amount payable under the mortgage but failed to fix any time in its decree for the payment of such amount. RAJA BARDA KANT RAI *v.* BHAGWAN DAS, 1 A. 314 ... 235

(2) See ACT XVIII OF 1873 (N.-W.P. RENT), 1 A. 261.
(3) See CAUSE OF ACTION, 1 A. 325.
(4) See PENALTY, 2 A. 621, 639, 715, 769.

Interlocutory Order.

(1) Of High Court—See HIGH COURT, 1 A. 726.
(2) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 65.

Irregularity.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 400.
(2) See EXECUTION OF DECREE, 1 A. 212.
(3) See PARTIES, 2 A. 107.

Issues.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 480.

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(1) See HINDU LAW (ADOPTION), 1 A. 288.
(2) See PRIVY COUNCIL, 1 A. 688.

Joint Decree.

See CONTRIBUTION, 1 A. 455.

Judgment.

(1) Note to—See PENAL CODE (ACT XLV OF 1860), 2 A. 33.
(2) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 497.

Judicial Officer.

See ACT XVIII OF 1850 (JUDICIAL OFFICERS' PROTECTION), 1 A. 280.

Judicial Proceeding.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 1; 2 A. 276.

Jurisdiction.

1.—GENERAL.
2.—OF CIVIL COURT.
3.—OF REVENUE COURT.

———1.—General.

(1) In a suit for money charged upon immoveable property—See CHARGE, 2 A. 698.
(2) Of British Indian Courts over Ceded Territory—See CROWN, 2 A. 1.
(3) Of Magistrate—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 121, 625.
(4) Of Superior Courts—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 17.
(5) *Suit to establish right to attached property.*—*Held* that, in the case where a person has preferred a claim to property attached in the execution of a decree, on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property, the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree. Second Appeal No. 320 of 1876, decided the 16th May, 1876 followed. GULZARI LAL v. JADAUN RAI 2 A. 799 ... 1094
(6) To entertain a suit to recover an excess payment made by mistake in execution of a decree—See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 388.
(7) Valuation for purposes of—See MORTGAGE (REDEMPTION), 2 A. 778.
(8) See ACT XI OF 1865 (MOFUSSIL SMALL CAUSE COURTS), 1 A. 87.
(9) See APPEAL (GENERAL), 1 A. 620.
(10) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 51.
(11) See LIMITATION ACT (IX OF 1871), 1 A. 34.

———2.—Of Civil Court.

(1) A Civil Court has no—in the matter of the formation of the record of right—See ACT XIX OF 1873 (N.W P. LAND REVENUE), 1 A. 613.
(2) *Act XVIII of 1873, ss 7, 95—Sir land—Ex-proprietary tenant—Mortgage of proprietary rights in a mahal followed by sale—Ejectment—Mesne profits—Trespasser—Jurisdiction—Civil Court—Revenue Court.*—A suit to eject a person from land as a trespasser, a person who has entered upon such land asserting his claim to the status of an ex-proprietary tenant, and to recover from him mesne profits, is a suit cognisable by the Civil Court.

The possession of sir-land by conditional mortgagees must be treated as the possession of the mortgagors; *held* accordingly that where the mortgagees of certain proprietary rights in a mahal, being in possession of such rights, purchased the same at an auction-sale, the sir-land included in the proprietary rights was held by the mortgagors at the time of the auction-sale, within the meaning of s. 7 of Act XVIII of 1873, and that after the sale, in virtue of the provision of that section, they became entitled to a right of occupancy in the sir-land.

Inasmuch as the mortgagors had a right of occupancy in the sir-land they could not be treated as trespassers for ejecting the mortgagees' tenant and taking possession; but inasmuch as instead of giving notice to the mortgagees of their intention to avail themselves of such rights and to enter on the sir-land as tenants at the same time offering to pay such rent as might, having regard to the provisions of s. 7, be properly payable by

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them, they entered on the sir-land and ousted the mortgagees' tenant, they rendered themselves liable for mesne profits. BAKHAT RAM v. WAZIR ALI, 1 A. 448 = 2 Ind. Jur. 320 ... 307

(3) *Act* XVIII *of* 1873. *s.* 95. *cl* (*m*) *and* (*n*)—*Wrongful dispossession of land—Compensation for wrongful dispossession.*—In an estate held by *S* as a Sub proprietor he held certain land with a right of occupancy. *G*, the zemindar, obtained a decree against *S* in a Civil Court for the possession of the estate, in execution of which he ousted *S* from the estate including the land held by him with a right of occupancy. This decree having been set aside, *S* recovered the possession of the estate including such land, and sued *G* in the Civil Court for the value of the crops standing on such land at the time he was ousted from it by *G*, and for the rents of a portion of such land which *G* had let to tenants while in possession of it. *Held* that the suit was cognizable by the Civil Courts and that *G* was liable for such rents. SAWAI RAM v. GIR PRASAD SINGH, 2 A 707 ... 1031

(4) A suit for a declaration of liability for revenue as between the parties only, without prejudice to the Government Revenue is not barred by s. 241, cl. (*b*) of Act XIX of 1873, and is cognizable by the Civil Courts—See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 415.

(5) In a suit for compensation for wrongful dispossession of lessee by lessor—See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 338.

(6) In a suit for declaration of Zamindari right to cesses—See REGULATION VII OF 1822 (BENGAL LAND REVENUE SETTLEMENT), 1 A. 373.

(7) See ACT XVIII OF 1850 (JUDICIAL OFFICERS' PROTECTION), 1 A. 280.

(8) See ACT XVIII OF 1873 (N.W.P. RENT), 2 A. 137, 429.

(9) See ASSIGNMENT, 2 A. 732.

(10) See CONTRIBUTION, 1 A. 26.

(11) See ENCROACHMENT, 1 A. 249.

(12) See GRANT, 2 A. 545.

(13) See HIGH COURT, 1 A. 101.

———3.—Of Revenue Court.

(1) To entertain a suit by co-sharer against Lambardar's representative for share of profits—See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 512.

(2) To entertain a suit for the money equivalent of arrears of rent payable in kind—See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 217.

(3) See ACT XVIII OF 1873 (N.W P. RENT), 2 A. 137, 429.

(4) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 1 A. 613.

(5) See SURETY, 2 A. 582.

Justice.

Equity, and good conscience—See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 533.

Khalisa Mahal.

See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 400.

Laches.

See ESTOPPEL IN PAIS, 1 A. 82.

Lambardar.

(1) *Profits—Co-sharer—Revenue—Set-off.*—*Held* (Spankie, J., dissenting) that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharers, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment. UDAI SINGH v. JAGAN NATH, 1 A. 135 ... 91

(2) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 512; 2 A. 239.

Landlord and Tenant.

(1) *Non-payment of rent—Adverse possession—Limitation*—The plaintiffs in this suit, alleging that *S*, through whom they claimed, had given *B*. who was represented by the defendants, in July 1828, the lease of a certain house on the condition that *B* should pay a certain annual rent for such house and if he failed to pay such rent that he should vacate the house, such condition being contained in a *keraia-nama* executed by *B* in *S*'s favour, sued the defendants for the rent of such house for two years, and for possession of the same alleging the breach of such condition.

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Held (Spankie, J., dissenting) that, supposing that a tenancy had arisen in the manner alleged, the mere non-payment of rent by the defendants for twelve years prior to the institution of the suit would not suffice to establish that the tenancy had determined, and that the defendants had obtained a title by adverse possession, so as to defeat the claim; for if once the relation of landlord and tenant were established, it was for defendants to establish its determination by affirmative proof, over and above the mere failure to pay rent. PREM SUKH DAS v. BHUPIA, 2 A. 517 (F.B.) = 4 Ind. Jur. 650 ... 901

(2) Res judicata—*Land-holder and Tenant—Determination of title under a lease by a Revenue Court on an application under s. 39 of Act* XVIII *of* 1873.—The plaintiffs in this suit, land-holders, had caused a notice of ejectment to be served on the defendants, their tenants under a lease, on the ground that the tenancy had expired. The defendants applied to the Revenue Court, under s. 39 of Act XVIII of 1873, contesting their liability to be ejected on the ground that the lease was a perpetual lease. The Revenue Court held, with reference to the word "*istimrari*" contained in the lease, that the lease was perpetual, and the defendants were not liable to be ejected. The plaintiffs thereupon sued in the Civil Court for the cancelment of the word "*istimrari*" in the lease, on the ground that it had been inserted fraudulently. *Held*, on appeal from the decree of the lower appellate Court dismissing the suit as barred by the decision of the Revenue Court, that it was not so barred the matter in dispute being peculiarly within the jurisdiction of the Civil Court, and not one which a Revenue Court was competent finally to determine on an application under s. 39 of Act XVIII of 1873. HUSAIN SHAH v. GOPAL RAI, 2 A. 428 ... 839

(3) *Trees.*—*Held* that trees accede to the soil and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, of removing the trees, he cannot do so afterwards; he would then be deemed a trespasser.

Held also that, where a tenant has been ejected in the execution of the decree of a Revenue Court for arrears of rent from the land forming his holding, his tenancy then terminates, and with it all right in the trees standing on such land or power of dealing with them. A person, therefore, who purchases the rights and interests of a tenant after his ejectment in the execution of a such decree, cannot maintain a suit for the possession of the trees standing on the tenant's holding. RAM BARAN RAM v. SALIG RAM SINGH, 2 A. 896 ... 1163

Lease.

(1) *Act* XVIII *of* 1873, *s.* 93 *(c)*—*Suit for cancelment of lease—Breach of conditions involving forfeiture.*—The plaintiff, the representative in title of a lessor, sued under cl. *(c)*, s. 93 of Act XVIII of 1873, for the cancelment of a lease on three grounds, *viz.*, on the ground that the lessees had paid the rent to the Collector, on account of the revenue due in respect of the estate instead of to him; secondly on the ground that they had failed to pay certain instalments of rent on the due dates; and thirdly, on the ground that they had planted trees and sunk wells, and allowed their tenants to do the same, without the lessor's consent; thereby committing breaches of the conditions of the lease involving its forfeiture. *Held*, on the construction of the lease, with reference to the first ground, that as the lease was intended to be perpetual, and as the rent had been paid to the Collector for many years under an arrangement effected between the parties to the lease, and it was not shown that the plaintiff had repudiated this arrangement (even if he had the power of so doing) or demanded payment of the rent directly to himself, payment of rent by the lessees to the Collector did not amount to a breach of the conditions of the lease: with reference to the second ground, that the lease being intended to be perpetual, and no arrears of rent being due, irregularity and unpunctuality in the payment of the instalments of rent in question were not breaches of the conditions of the lease involving its forfeiture: and, with reference to the third ground, that the condition as to the planting of trees and sinking wells being merely a prohibition, and not a condition, the breach of which involved the forefeiture of the lease, the lease could not be cancelled because the lessees had planted trees or sunk wells, and allowed their tenants to do the same, without the lessor's consent.

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Held also that, assuming that the lessor was entitled on the third ground, to the cancelment of the lease, cancelment was not to be deemed the invariable penalty for the breach of such a condition as that mentioned in that ground. ABLAKH REI v. SALIM AHMAD KHAN, 2 A. 437 ... 846

(2) Of Government ferry—See CONTRACT ACT (IX OF 1872), 2 A. 411.

(3) Of zamindari rights—Wrongful dispossession of lessee by lessor—See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 338.

(4) See CHARGE, 1 A. 433.

Legacy.

(1) *Husband and wife.*—*C*, a married woman, was entitled, under her father's will to certain money "absolutely, for her sole use and benefit, free from the control, debts, and liabilities of her husband." and under such will such money was payable to her "on her sole and personal receipt." While so entitled *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C* but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. *C* and her husband were married before Act X of 1865 came into force, and had acquired an Indian domicile. *Held* that, even if English law were applicable in the case, and any interest in the property purchased passed to *C*'s husband, it passed, in view of the agreement between her and her husband, on an implied contract that he would hold the property in trust for her, and that, where such property was purchased at a sale in the execution of a decree against *J* as his property, with notice that such property was claimed by *C* as her separate property, such purchase did not defeat the title of *C*. BERESFORD v. CHARLOTTE HURST, 1 A. 772 ... 539

(2) *Husband and wife—Real property.*—*C*, a married woman, was entitled, under her father's will, to certain money "absolutely for her sole use and benefit, free from the control, debts, and liabilities of her husband," and under such will such money was payable to her "on her sole and personal receipt." While so entitled *C* borrowed from her husband the purchase-money of certain real property, on the understanding that she would pay him back such money when she obtained her legacy. The conveyance of such property was made to *C*, but not to her separate use. *C* subsequently assigned her legacy by sale, and out of the money obtained by such assignment repaid her husband the purchase-money of the property purchased. *Held* that the conversion by *C* of her legacy did not alter its character and conditions, and that the property purchased was her own separate property and was not subject to the debts or liabilities of her husband. HURST v. THE MUSSOORIE BANK, 1 A. 762 ... 532

(3) *Will—Devise of immoveable property subject to its being charged in a particular manner by the Devisee—Property not charged in accordance with the Will—Suit to enforce Charge—Assignment by a Legatee to Executor of Legacy.*—Certain immoveable property was devised by will upon condition that the devisee, who was also an executor of such will, should execute a mortgage of such property to the Official Trustee of Bengal for the time being to secure the payment of a certain legacy. The devisee, with the intention of giving effect to such condition, mortgaged such property to his co-executors. *Held*, in a suit by one of such co-executors to enforce the mortgage, that the mortgage, not being executed in accordance with the terms of the will, was invalid, and the suit was not maintainable.

Semble that an assignment by a legatee to an executor of a legacy is void VAUGHAN v. HESELTINE, 1 A. 753 ... 526

Legal Disability.

See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 207.

Letters Patent.

(1) Cl. 10—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 181.

(2) Cl. 10, Appeal under—See LIMITATION, 2 A. 192.

(3) *Cl. 10—Appellate Civil Jurisdiction—Appeal from Judgment of Division Court.*—To allow of an appeal to the High Court against the judgment of a Division Court, under the provisions of cl. 10 of its Letters Patent, there

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must be such a judgment on the part of all the Judges who may compose the Division Court as disposes of the suit on appeal before it. GHASI RAM v. MUSSAMAT NURAJ BEGAM, 1 A. 31=11 Mad. Jur. 221 ... 21

(4) Cl. 31—See HIGH COURT, 1 A. 726.

License.

See ACT X OF 1871 (EXCISE), 1 A. 630, 635, 638.

Lien.

See EXECUTION OF DECREE, 1 A. 727.

Limitation.

(1) *Act IX of* 1871, s. 20—*Acknowledgment in respect of a Debt—Signature.*—*B*'s agent, under the orders of *B*, wrote a letter to *S* containing an acknowledgment in respect of a debt. This letter was headed as follows: "Written by *B* to *S*." The concluding portion of the letter was written by *B* in his own handwriting.

Held that, under these circumstances, there was sufficient evidence that the heading of the letter was written by an agent duly authorised.

Held also, looking at the heading of the letter, that the letter was "signed" by *B* within the meaning of s. 20 of Act IX of 1871. MATHURA DAS v. BABU LAL, 1 A. 683 ... 477

(2) *Act* IX *of* 1871, *art.* 148—*Acknowledgment of subsisting right—Act* XIV *of* 1859, *s.* 1, *cl.* 15—*Mortgagor—Mortgagee—Suit for redemption*—Onus probandi—*Unnecessary proof of mortgage where acknowledgment was made prior to* 1859.—In a suit for redemption of landed property the plaintiffs, representatives of the mortgagors, relied on an acknowledgment of the mortgagors' title contained in an entry in the settlement records of the year 1841, which was attested by the representatives of the mortgagees, defendants in the suit, and the lower Courts having differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from date of the alleged mortgage, *held*, that inasmuch as there was no limitation to suits for redemption of mortgage of landed property prior to Act XIV of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841, being an acknowledgment of a right still subsisting, and one which fulfilled the requirements of art. 148, sch. II, Act IX of 1871. DAIA CHAND v. SARFRAZ ALI, 1 A. 425=2 Ind. Jur. 115 ... 291

(3) *Act* IX *of* 1871, *sch.* II, *art.* 167—*Execution of decree—Act* VIII *of* 1859, *ss.* 212, 216—*Application to enforce or keep in force a decree*—On the 3rd March 1875 an application was made by a decree holder to the Court executing the decree which did not, as required by s. 212 of Act VIII of 1859, state the mode in which the assistance of the Court was required, whether by the arrest and imprisonment of the judgment-debtor or attachment of his property, but prayed that the Court would, under s 216 of that Act, issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. Under this application notice was issued to the judgment-debtor on the 28th March 1875. On the 27th April 1875 the execution case was struck off the file on the ground that the decree-holder did not desire further proceedings to be taken. *Held per* PEARSON and OLDFIELD, JJ., that for the purposes of art. 167, sch. II of Act IX of 1871, the application was one to enforce or keep in force the decree, and further that limitation should be computed from the date the notice to the judgment-debtor was issued. *Per* SPANKIE, J., *contra*. BEHARI LAL v. SALIK RAM, 1 A. 675 ... 471

(4) *Act* IX *of* 1871, *sch.* II, *art.* 167—*Execution of decree—Special appeal—"Final decree of appellate Court"—Limitation.*—The Munsif gave the plaintiffs in a suit for possession of land and for mesne profits a decree for possession but dismissed the claim for mesne profits. An appeal was preferred to the Judge, who affirmed the decree for possession and remanded the case to the Munsif, under s. 351 of Act VIII of 1859, to determine the mesne profits due to the plaintiffs. The Munsif gave the plaintiffs a decree for certain mesne profits. Subsequently a special appeal was preferred to the High Court against the Judge's decree. While this was pending an appeal was preferred to the Judge against the decree of the Munsif for mesne profits, and on the 7th June 1873 the plaintiff again obtained a decree for mesne profits. Finally on the 6th March 1874 the High Court modified the Judge's decree for possession but did not interfere

Limitation—(*Concluded*). PAGE

with the order of remand. *Held*, on the plaintiffs applying for execution of the Judge's decree dated the 7th June 1873, that the limitation for the execution of such decree ran not from the date of such decree but from the date of the High Court's decree, which was the "final decree of the appellate Court," and the only "final decree," within the meaning of art. 167, sch. II of Act IX of 1871. IMAM ALI v. DASAUNDHI RAM, 1 A. 508 ... 350

(5) *Act* XV *of* 1877, *s.* 19—*Decree for money payable by Instalments—Execution of decree—Acknowledgment—Limitation.*—*Held*, in the case of a decree for money payable by instalments, with a proviso that in the event of default the decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and not having applied for execution within three years from the date of the first default, the decree was barred.

Held also, the judgment-debtor having, three years after the first default, acknowledged in writing his liability under the decree, and signed such an acknowledgment, that, the decree being already barred, such acknowledgment did not create a new period of limitation. SHIB DAT v. KALKA PRASAD, 2 A. 443=4 Ind. Jur. 581 ... 851

(6) *Appeal under cl.* 10 *of the Letters Patent.*—In computing the period of limitation prescribed for an appeal under cl. 10 of the Letters Patent, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required under the rules of the Court to be presented with the memorandum of appeal. FAZAL MUHAMMAD v. PHUL KUAR, 2 A. 192 (F.B.) ... 675

(7) *Constructive trust.*—*B* and *D*, father and son, were jointly entitled to the moiety of certain property, *B*'s brother, *E* and *K*, *E*'s son, being jointly entitled to the other moiety. *B* and *D* were transported for life. Thirty years afterwards (*B* having meantime died) *D* returned from transportation, and asserted his right to a moiety against a person deriving his title from *E* and *K*, who had taken possession of the whole. *Held*, looking to all the circumstances of the case, that *E* and *K* had taken possession subject to a constructive trust in favour of *B* and *D*, and that accordingly *D* was entitled to assert his right, and no limitation could effect it. DURGA PRASAD v ASA RAM, 2 A. 361 ... 793

(8) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 254, 512.
(9) See APPEAL (GENERAL), 2 A. 772, 875.
(10) See ATTACHING-CREDITOR, 1 A. 333.
(11) See CAUSE OF ACTION, 1 A 325.
(12) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 230, 260, 350, 382, 541; 2 A. 287.
(13) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 281, 332.
(14) See COURT-FEES, 2 A. 241.
(15) See ESTOPPEL IN PAIS, 1 A. 82.
(16) See EXECUTION OF DECREE, 2 A. 284, 285.
(17) See FRAUD, 1 A. 403.
(18) See LANDLORD AND TENANT, 2 A. 517.
(19) See LIMITATION ACT (XIV OF 1859), 2 A. 792.
(20) See LIMITATION ACT (IX OF 1871), 1 A. 34, 97, 231, 250, 263, 355, 510, 525, 580, 586, 655; 2 A. 273, 641.
(21) See LIMITATION ACT (XV OF 1877), 1 A. 644; 2 A 625, 763.
(22) See MUHAMMADAN LAW (PRE EMPTION), 1 A. 207.
(23) See PRE EMPTION, 1 A. 311, 592; 2 A. 237, 409.
(24) See RECORD OF RIGHTS, 2 A. 460.

Limitation Act (XIV of 1859).

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 350.
(2) See LIMITATION ACT (IX OF 1871), 1 A. 642.
(3) S. 1, cl. 15—See LIMITATION, 1 A. 425.
(4) S. 20—See EXECUTION OF DECREE, 2 A. 285.
(5) *S.* 20—*Limitation—Proceeding to enforce decree.*—It was the object of the Legislature in Act XIV of 1859, s. 14, with regard to the limitation for the commencement of a suit to exclude the time during which a party to the suit may have been litigating, *bona fide* and with due diligence, before a Judge whom he has supposed to have had jurisdiction, but who yet may not have had it. The same principle prevails in the construction of s. 20, with regard to executions. *Held*, accordingly, that a proceeding taken

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bona fide and with due diligence, before a Judge whom the judgment-creditor believed, *bona fide*, though erroneously, to have jurisdiction,—in this case the Judge himself, also, having believed that he had jurisdiction, and having acted accordingly,—was a proceeding to enforce the decree within the meaning of s. 20. HIRA LAL v. BADRI DAS, 2 A. 792 (P.C.). =6 C.L R. 561=7 I. A. 167=4 Ind. Jur. 426=3 Suth. P.C.J. 761=4 Sar. P.C.J. 157 ... 1090

Limitation Act (IX of 1871).

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 350.

(2) *Ss. 4 and 5 (b)—Admission of Appeal after the period of limitation—Single Judge and Division Court—Jurisdiction.—Held* that the order admitting an appeal after time, made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 and 25 Vict., c 104, s 13, and the Letters Patent of the Court, s. 27, was liable to be impugned and set aside at the hearing by the Division Court, before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate. DUBEY SAHAI v. GANESHI LAL, 1 A. 34 (F.B.) ... 23

(3) *S. 5 (a)—Institution of suit—Limitation.—Held* that where the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of reopening after the vacation, on the day that it should have reopened, reopened on a later day, and the suit was instituted when it did re-open, it was instituted within time. BISHAN CHAND v. AHMAD KHAN, 1 A. 263 ... 178

(4) *S. 5 (b)—Appeal—Limitation—Sufficient cause.*—A certain suit was dismissed on the 26th July 1875, on which day the plaintiff applied for a copy for the Court's decree. She obtained the copy on the 31st July, and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The appellate Court recorded that it should excuse the delay, and admitted the appeal.

Held, that there was, under the circumstances, no sufficient cause for the delay.

An appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period. ZAIBUL-NISSA BIBI, v. KULSUM BIBI, 1 A. 250 ... 169

(5) Ss. 7 and sch. ii, 10—See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 207.

(6) S. 10—See CO-SHARERS, 2 A. 394.

(7) S. 15—See ACT XVIII OF 1873 (N.W P. RENT), 1 A. 254.

(8) *S. 15—Execution of Decree.—Held* (STUART. C.J., dissenting) that application for execution of decrees are not "suits" within the meaning of s. 15, Act IX of 1871. JIWAN SINGH v. SARNAM SINGH, 1 A. 97 (F. B.)=11 Mad. Jur. 258 ... 65

(9) *S. 29, and sch. ii, art. 148—Redemption of Mortgage—Adverse possession —Limitation.*—The mere assertion of an adverse title by a mortgagee in possession does not make his possession adverse, or enable him to abbreviate the period of 60 years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit.

Where, accordingly, certain immoveable property was mortgaged in June 1854 for a term which expired in June 1874 and in July 1863, the equity of redemption of such property was transferred by sale to the mortgagees by a person who was not competent to make such transfer and the mortgagees set up a proprietary title to such property in virtue of the sale, *held* in a suit to redeem such property instituted in March 1877, that such suit was not barred because it was not instituted within 12 years from the date of the deed of sale. ALI MUHAMMAD v. LALTA BAKHSH, 1 A. 655 ... 457

(10) Sch. II, art. 10—See PRE-EMPTION, 1 A. 311, 592.

(11) Arts. 15, 26, 61, 118—See ATTACHING-CREDITOR, 1 A. 333.

(11-a) Art. 61—See LIMITATION ACT (XV OF 1877), 2 A. 872.

(12) *No. 62—Suit for money on accounts stated—Note or memorandum whereby an account is expressed to be balanced—Act XVIII of 1869, sch. ii, No. 5 —Stamp—Limitation.*—On the 9th October 1875, the book containing the accounts between the plaintiff and the defendant, kept by the plaintiff, was examined by the parties, and a balance was struck in the plaintiff's favour

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which was orally approved and admitted by the defendant. On the 2nd April 1877, the plaintiff sued the defendant for the amount of this balance "on the basis of the account-book" *Held* that the suit was in effect one on accounts stated falling within art. 62, sch. ii of Act IX of 1871, and could be brought within three years from the 9th October 1875, for the total balance struck, and being so brought was within time.

Held also that the entry of the balance struck, not being signed by the defendant, was not a note or memorandum of the kind mentioned in No 5, sch. ii of Act XVIII of 1869, and did not therefore require to be stamped. NAND RAM v. RAM PRASAD 2 A. 641 = 5 Ind. Jur. 261 ... 987

(13) *Art. 75—Bond—Waiver—Cause of Action.*—The mere acceptance by the obligee of a bond payable by instalments, which provides that in case of failure to pay one or more instalments, the whole amount of the bond due shall become payable, of instalments after default does not constitute a "waiver," within the meaning of art. 75, sch. ii of Act IX of 1871 of the obligee's right to enforce such provision.

In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default. MUMFORD v. PEAL, 2 A. 857 ... 1136

(14) Art. 148—See LIMITATION, 1 A. 425.

(15) *Art. 148—Limitation—Redemption of Mortgage—Acknowledgment of title of mortgagor or of his right to redeem.*—Where the defendants attested as correct the record of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, *held* (SPANKIE, J., dissenting), that there was an acknowledgment of the mortgagor's right to redeem within the meaning of art. 148, sch. ii, Act IX of 1871.

Per PEARSON, J.—That there was also acknowledgment of the mortgagor's title.

Per SPANKIE, J., *contra*. DAIA CHAND v. SARFRAZ, 1 A. 117 (F B.) ... 79

(16) *Art. 148 – Redemption of Mortgage – Acknowledgment of the Mortgagor's title signed by Mortgagee's agent.*—*Held*, following the decision of the Privy Council in *Luchmee Buksh Roy* v. *Runjeet Roy Panday* under Act XIV of 1859, that an acknowledgment of the title of the mortgagor or of his right of redemption signed by the mortgagee's agent is not sufficient under art. 148, sch. ii of Act IX of 1871, to create a new period of limitation. RAHMANI BIBI v. HULASA KUAR, 1 A. 642 ... 448

(17) *Arts* 166, 167—*Act* XX *of* 1866, *ss.* 52, 53—*Execution of decree obtained on Bond specially registered.*—*Held*, that art. 167 and not art. 166, sch. ii of Act IX of 1871, applies to an application for the execution of a decree made under the provisions of s. 53 of Act XX of 1866 upon a bond specially registered under the provisions s. 52 of that Act. JAI SHANKER v. TETLEY, 1 A. 586 (F.B.) ... 407

(18) Art. 167—See EXECUTION OF DECREE, 2 A. 291.

(19) Art. 167—See LIMITATION, 1 A. 508, 675.

(20) *Art. 167—Act VIII of 1859, s 246—Execution of decree—Limitation—Proceeding to enforce—Previous application—Intermediate suit—Objector.*—*Held* by a Full Bench (PEARSON, J., dissenting) that an application to execute a decree against a judgment-debtor's property made more than three years after the last application for execution was not barred by limitation under art. 167, sch. ii, Act IX of 1871, when the last application was interrupted by a successful objector against whom the decree-holder had to bring a regular suit and succeeded in obtaining a decree, and that the renewed application to execute within three years from the date of the decree in the said suit was not a fresh application for execution against the judgment-debtor, but a continuance or revival of the previous application interrupted by the objector.

Per PEARSON, J., *contra*, that under art. 167, sch. ii, Act IX of 1871, execution of decree was barred. PARAS RAM v. GARDNER, 1 A. 355 (F B.) ... 243

(21) *Art. 167—Execution of decree—Application to enforce or keep in force the decree—Limitation—Act* VIII *of* 1859, *ss.* 212, 285 —*Held* that an application under s. 285 of Act VIII of 1859, being a necessary and decided step towards the execution of the decree, was an application to enforce or keep in force the decree, within the meaning of art. 167, sch. ii of Act IX of 1871. HUSSAIN BAKHSH v. MADGE, 1 A. 525 ... 362

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(22) *Art. 167—Execution of decree—Decree made in favour of a firm in name of agent—Applications for execution made by agent other than agent named in the decree—Effect of such applications to keep the decree in force—Limitation.*—A decree was passed in favour of a firm in the name of an agent of the firm The second and subsequent applications for execution were made by an agent of the firm other than the agent named in the decree. Certain persons, alleging that they were the proprietors of the firm, applied for execution of the decree. The application was refused on the ground that the proceedings in execution taken by the last-mentioned agent were invalid, and execution of the decree was therefore barred by limitation. *Held* that such proceedings, however irregular, were not invalid. LACHMAN BIBI v. PATNI RAM, 1 A. 510=2 Ind. Jur. 499 ... 351

(23) *Art. 167—Execution of decree—Limitation.*—An application for the partial execution of a joint decree by one of the decree-holders is not an application according to law and consequently has not the effect of keeping the decree in force.

Where a decree of the Sudder Court awarded costs in the lower Court to certain defendants separately and to eight sets of defendants collectively, and costs in the Sudder Court to three sets, and the only applications which were made for execution of the decree within the period of limitation were made by one of the defendants to recover his costs in the lower Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants, a subsequent application by him and the other defendants for execution of the decree was held to be barred by limitation. RAM AUTAR v. AJUDHIA SINGH, 1 A. 231=1 Mad. L R 309 ... 156

(24) *Art. 167—Execution of decree—Limitation—Application to enforce or keep in force a decree.*—*Held* by the Full Bench that the date on which an application for the execution of a decree is presented, and not any date on which such application may be pending, is "the date of applying" within the meaning of art. 167, sch. ii of Act IX of 1871.

Held by the Division Bench that an application by the decree-holder for the stay of execution-proceedings is not an application to enforce or keep in force the decree, within the meaning of the same law. FAKIR MUHAMMAD v GHULAM HUSSAIN 1 A. 580 (F.B.) ... 402

(25) *Art. 167, cl. 2—Execution of Decree—Limitation.*—The words "where there has been an appeal" in cl. 2, art. 167 of sch. ii of Act IX of 1871, contemplate and mean an appeal from the decree, and do not include an appeal from an order dismissing an application to set aside a decree under s. 119 of Act VIII of 1859. SHEO PRASAD v. ANRUDH SINGH, 2 A. 273=4 Ind. Jur. 304 ... 730

Limitation Act (XV of 1877).

(1) *S. 2 sch. II, art. 64—Suit for money due on accounts stated—Act IX of 1871, sch. II, art. 62—"Title" acquired under Act IX of 1871—Suit for money lent.*—The plaintiff sued the defendant for money due upon accounts stated between them in December 1874, when Act IX of 1871 was in force. Such accounts were not signed by the defendant. The suit was instituted after Act XV of 1877, which repealed Act IX of 1871, had come into force. *Held* that the plaintiff's right to sue upon such accounts within three years from the date the same were stated was not a "title" acquired under Act IX of 1871, within the meaning of s. 2 of Act XV of 1877, which, under the provisions of that section, was not affected by the repeal of Act IX of 1871 and the suit was not governed by the provisions of Act IX of 1871, but by those of Act XV of 1877, and that, therefore, the accounts not being signed by the defendant, the plaintiff could not claim the benefit of art. 64 of sch. ii of the latter Act, but must be regarded as suing merely for money lent. THAKURYA v. SHEO SINGH RAI, 2 A. 872 ... 1146

(2) S. 4—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 832.

(3) *Ss. 4, 12, and sch. ii, art. 177—Application for leave to appeal to Her Majesty in Council—Limitation—Act X of 1877, chap. xlv.*—*Held* (per STUART, C J., SPANKIE, J., dissenting) that, in computing the period of limitation prescribed by art. 177, sch. ii of Act XV of 1877, for an application for leave to appeal to Her Majesty in Council, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal is sought is founded cannot be excluded under the provisions of s. 12 of Act XV of 1877. JAWAHIR LAL v. NARAIN DAS, 1 A. 644 ... 449

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(4) *S. 14—Computation of period of Limitation.*—On the 26th August, 1878, *R* and *B* joined in instituting a suit in the Court of the Subordinate Judge the period of limitation of which expired on the 21st September 1878. This suit was transferred to the District Court, which, on the 16th September 1878, returned the plaint to the plaintiffs on the ground that they should have sued separately. On the 23rd September 1878, *R* presented a fresh plaint to the District Court, which, on the 1st October 1878 made an order rejecting it on the ground that he should have instituted the suit in the Court of the Subordinate Judge. *R* appealed from this order to the High Court, which affirmed it on the 28th January 1879, but observed that the plaint should be returned to *R*. On the 10th April 1879, *R's* plaint was returned to him and on the same day he presented it to the Subordinate Judge. *Held* that, in computing the period of limitation, *R* could not claim to exclude any other period than from the 23rd September 1878, to the 10th April 1879, for from the 26th August 1878, to the 16th September 1878, he was prosecuting his suit in a Court which had jurisdiction, and the inability of that Court to entertain it did not arise from defect of jurisdiction or any cause of the like nature, but from misjoinder of plaintiffs, a defect for which he must be held responsible, and from the 16th to the 23rd September he was not prosecuting his suit in any Court, and could not claim to have that period excluded. RAM SUBBAG DAS v. GOBIND PRASAD, 2 A. 622 ... 974

(5) S. 19—See LIMITATION, 2 A. 443.

(6) S. 22—See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITIES ACT), 2 A. 296.

(7) S. 22—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 487.

(8) S. 22—See PARTIES, 2 A. 107.

(9) Sch. II, art. 10—See PRE-EMPTION, 2 A. 237, 409.

(10) *Art. 62—Suit for damages—Suit for money received to plaintiff's use.*—The holder of a decree for money which had been sold in the execution of a decree against him sued the auction-purchaser, the sale having been set aside, for the money he had recovered under the decree. *Held* that the suit was not one for damages but for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, to which the period of limitation applicable was three years. BHAWANI KUAR v. RIKHI RAM, 2 A. 354 ... 788

(11) *Arts. 62, 120, 132—Suit for "hoq i-chaharam" based on custom.*—*C*, the proprietor of a certain "mohalla" sued *K*, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one-fourth of the purchase-money, founding his claim upon an ancient custom obtaining in the mohalla, under which the proprietor thereof received one-fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held* that the period of limitation applicable to such a suit was that prescribed by art. 120, sch. ii of Act XV of 1877, and not by art. 62 or by art. 132 of that schedule. KIRATH CHAND v. GANESH PRASAD, 2 A. 358 ... 791

(12) *Arts. 66, 67, 75, 80—Bond—Cause of Action—Instalment bond.*—*B* and *S* executed a bond, dated the 15th August 1874, in favour of plaintiff in consideration of a loan of Rs. 15,000, agreeing to repay the same within three years from the above date, and covenanting to pay every half year interest on the same, at the rate of 8 per cent. per annum; and also to pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim and if necessary to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years.

Held that the bond was not an instalment bond, and therefore art. 75, sch. ii of Act XV of 1877, was inapplicable.

Held by STUART, C. J., that limitation commenced after the expiration of the three years allowed by the bond for payment of the debt.

Held by SPANKIE, J.—Art 80, sch. ii of Act XV of 1877, applies to the suit, and limitation would run from the date when the bond became due; that according to the stipulation in the bond it would become due on

Limitation Act (XV of 1877)—(*Concluded*). PAGE

failure on date of both the interest and premia and not on failure in payment of either of them only.

Held further that arts. 67 and 68, sch. ii of Act XV of 1877 were not applicable to the suit BALL v. STOWELL. 2 A. 322=4 Ind. Jur. 461 ... 765

(13) *Arts.* 113, 136, 144—*Vendor and purchaser—Transfer of immoveable property—Specific performance of contract.*—On the 27th October, 1865, the vendor of certain immoveable property executed a conveyance of such property to the purchasers. On that date the vendor was not in possession of the property, although his title to it had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express promise or undertaking on the vendor's part to put the purchasers into possession. On the 24th February, 1870, the vendor obtained possession of the larger portion of the property, and on the 23rd August, 1872, of the remainder. On the 5th October 1877, the purchasers sued the vendor for the possession of the property, stating that "possession was agreed to be delivered on the receipt of possession by the vendor," and that the cause of action was that the vendor had not put them into possession. *Held* that the suit was not one for the specific performance of a contract to deliver possession to which art. 113 of sch. ii of Act XV of 1877 was applicable, but one to obtain possession in virtue of the right and title conveyed to the purchasers to which either art. 136 or 144 of sch ii, of that Act was applicable, and that, whichever of them was applicable, the suit was within time. SHEO PRASAD v. UDAI SINGH, 2 A. 718 ... 1039

(14) Arts. 177, 179 (2), 180—*Execution of decree—Limitation.*—*Held* that the words "appeal" and "Appellate Court" in art. 179 (2), sch. ii of Act XV of 1877, include an appeal to Her Majesty in Council.

Held, therefore, where an appeal had been preferred to Her Majesty in Council from a decree of the High Court dated the 18th August 1871, and the High Court's decree was affirmed by an order of Her Majesty in Council dated the 12th August, 1876, and an application for execution of the High Court's decree was made on the 15th July 1879, that, under art. 179 (2), sch. ii of Act XV of 1877, the limitation of such application must be computed from the date of the order of Her Majesty in Council. NARSINGH DAS v. NARAIN DAS, 2 A. 763=5 Ind. Jur. 269. ... 107

Lis Pendens.

(1) *Mortgage—Condition against alienation.*—The proprietor of certain immoveable property mortgaged it in July 1875 to *K* and in September 1875 to *L*. In October 1878 he sold the property to *K*. In November 1878, *L* obtained a decree on his mortgage bond for the sale of the property. The suit in which *L* obtained this decree was pending when the property was sold to *K*. *K* sued *L* to have the property declared exempt from liability to sale in the execution of *L*'s decree on the ground that the mortgage to *L* was invalid, it having been made in breach of a condition contained in *K*'s mortgage-bond that the mortgagor would not alienate the property until the mortgage-debt had been paid.

Held that the purchase by *K* of the equity of redemption did not extinguish his security, it being his intention to keep it alive, and that the purchase of the property by *K* while *L*'s suit was pending did not prevent *K* from contesting the validity of *L*'s mortgage, so far as it affected him, on the ground that it was an infringement of the stipulation in the contract between him and the mortgagor. LACHMIN NARAIN v. KOTESHAR NATH, 2 A. 826 ... 1113

(2) Res judicata—*Sale in execution of decree—Auction-purchaser—Act* VIII *of* 1859. *s.* 2.—*A*, the auction-purchaser of certain immoveable property at a sale in execution of a decree, purchased with notice that a suit by *H* and *M* against the judgment-debtor and the decree-holder for a share in such property was pending, but did not intervene in such suit. Before the sale to *A* was made absolute *H* and *M* obtained a decree in the suit for a moiety of the share claimed by them. *A* took no steps to get such decree set aside, but sued them to establish his right to such moiety in virtue of his auction-purchase. It appeared that the Court which passed the decree in favour of *H* and *M* did so without jurisdiction. *Held* that, inasmuch as the suit in which such decree was made was tried and determined by a Court having no jurisdiction, it could not be held that *A* was bound to intervene in it and dispute the claim preferred therein,

Lis Pendens—(*Concluded*). PAGE

or that he was bound by such decree, and that it could not be said that *A* was bound to take steps to get such decree set aside by means of appeal, or that because he had omitted to do so, it had become binding on him, and his suit was precluded.

Quære, whether the doctrine of *lis pendens* applies in the case of a purchase in execution of decree. ALI SHAH v. HUSAIN BAKHSH, 1 A. 588 ... 408

Local Government.

See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITIES), 1 A. 269.

Lunatic.

See ACT XXXV OF 1858 (LUNACY DISTRICT COURTS), 1 A. 476.

Master and Servant.

See CONTRIBUTORY NEGLIGENCE, 2 A. 756.

Maxims.

"In pari delicto potior est conditio possidentis"—See FRAUD, 1 A. 403.

Measure of Damages.

See ACT XV OF 1859 (PATENTS), 2 A. 368.

Medical Examination.

See HINDU LAW (MINORITY AND GUARDIANSHIP), 1 A. 549.

Memorandum of Appeal.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 260.
(2) See COURT FEES ACT (VII OF 1870), 1 A. 552.

Mesne Profits.

(1) *Trespass on land.*—*Held* by the majority of the Full Bench, that a trespasser on the land of another should, in estimating the mesne profits which the owner of the land is entitled to recover from him, be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered or continued on the land in the exercise of a *bona fide* claim of right, but where he has entered or continued on the land without any *bona fide* belief that he was entitled so to do, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground rent.

Per STUART, C.J.—Whether such trespasser is a trespasser *bona fide* or not, he should be allowed such costs. ALTAF ALI v. LALJI MAL, 1 A. 518 (F.B.) = 2 Ind.Jur. 500 ... 357

(2) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 651.
(3) See JURISDICTION (OF CIVIL COURT), 1 A. 448.
(4) See REGULATION XXXIV OF 1803 (INTEREST, CEDED PROVINCES), 2 A. 593.

Military Officer.

See STATUTE, 40 VICT., C. 7 (MUTINY ACT), 1 A. 730.

Minor.

(1) See ACT IX OF 1861 (MINOR), 1 A. 428.
(2) See EXECUTION OF DECREE, 1 A. 568.
(3) See HINDU LAW (MINORITY AND GUARDIANSHIP), 1 A. 549.
(4) See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 533, 598.
(5) See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 207.

Miscellaneous Proceedings.

See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 178, 180.

Mischief.

See PENAL CODE (ACT XLV OF 1860), 2 A. 101.

Misjoinder.

(1) See CESS, 1 A. 444.
(2) See CONTRIBUTION, 1 A. 455.
(3) See SPECIFIC RELIEF ACT (I OF 1877), 1 A. 555.

Missing Person. PAGE

See EVIDENCE ACT (I OF 1872), 1 A. 53; 2 A. 625.

Mistake.

(1) See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 388.
(2) See CONTRACT (ACT IX OF 1872), 1 A. 79; 2 A. 671.

Mitakshara.

See HINDU LAW (STRIDHAN), 1 A. 661.

Money Decree.

(1) *Mortgage-rights not conveyed by sale of money-decree.*—The purchaser of a single money-decree passed on a bond hypothecating property does not merely by his purchase acquire a lien upon the property. GANPAT RAI v. SARUPI, 1 A. 446 ... 306

(2) *Sale in execution—Bond—Mortgage—Money-decree—Condition against alienation.*—Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment debtor at the time of the sale.

Where, therefore, the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The view of the Full Bench of the Calcutta High Court in *Momtazooddeen Mahomed* v. *Rajcoomar Dass* and the decision in *Ramu Naikan* v. *Subbaraya Mudali* dissented from.

Held further that the holder of the money-decree in this case could not avail himself of a condition against alienation contained in his bond to resist the foreclosure. KHUB CHAND v. KALIAN DAS, 1 A. 240 (F.B.) ... 162

(3) See CHARGE, 1 A. 433.
(4) See REGISTRATION ACT (XX of 1866), 1 A. 236.

Mortgage.

1.—GENERAL.
2.—BY CONDITIONAL SALE.
3.—CONTRIBUTION.
4.—FORECLOSURE.
5.—REDEMPTION.
6.—SIMPLE.
7.—USUFRUCTUARY.

——1.—General.

(1) *Condition against alienation.*—*J* gave *B* a bond for the payment of money in which he hypothecated certain immoveable property as security for such payment, covenanting not to sell or transfer such property until the mortgage-debt had been paid. In breach of this condition he granted *M* a lease of his rights and interests in such property for a term of twelve and a half years. *B*, having sued on such bond and obtained a decree charging such property with the satisfaction of the decree, sued *M* and *J* for the cancelment of the lease and a declaration that it would not be binding on the purchaser at a sale in the execution of the decree, alleging that the lease had been granted to defeat the execution of the decree. The High Court refused, in view of its decision in *Chunni* v. *Thakur Das*, to interfere with the decree of the lower Court giving *B* such a declaration. MUL CHAND v. BALGOBIND, 1 A. 610 ... 424

(2) *Condition against alienation—Auction-purchaser.*—A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defeasance of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance. CHUNI v. THAKUR DAS, 1 A. 126 ... 85

Mortgage—1.—General—(*Concluded*). PAGE

(3) *First and second mortgages—Assignment by mortgagee—Rights of assignees.*—In March, 1865, the proprietors of a certain share in a certain village mortgaged the share to *R*, giving him possession of the share, and stipulating that the mortgagee should take the profits of the share in lieu of interest and that the mortgage should be redeemed on payment of the principal sum without interest. In April 1865, *R* mortgaged his rights and interests under the mortgage of March 1865, to *S*, retaining possession of the share. In February 1869, the proprietors of the share again mortgaged it to *R* for a further loan. Under this mortgage *R* was entitled to take the profits of the share in lieu of interest, and the mortgage was redeemable on payment both of the principal sum due thereunder and of that due under the mortgage of March 1865, without interest, or the mortgagors were entitled to redeem a certain portion of the share on payment of a proportionate amount of such sums, without interest, on a particular day in any year. In August, 1872, *S* obtained a decree on the mortgage of April 1865, directing the sale of *R*'s rights and interests under the mortgage of March 1865, in satisfaction of such decree. In May 1874, *R* assigned by sale to *N* his rights and interests under the mortgage of February 1869, retaining possession of the share. In April 1877, *R*'s rights and interests under the mortgage of March 1865, were sold in execution of the decree of August 1872, and were purchased by *S* who obtained possession of the share. *Held* in a suit by *N* against *S* to obtain possession of the share in virtue of the assignment of May 1874, that, under the circumstances of the case, *S* was entitled as against *N* to the possession of the share as first mortgagee. SAHAI PANDEY v. SHAM NARAIN, 1 A. 142 ... 641

(4) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 459.

(5) See CAUSE OF ACTION, 1 A. 325.

(6) See CHARGE, 2 A. 449.

(7) See HINDU LAW (ALIENATION), 2 A. 141.

(8) See MONEY DECREE, 1 A. 240.

(9) See REGISTRATION, 2 A. 392, 481.

(10) See REGISTRATION ACT (XX OF 1866), 1 A. 236.

(11) See REGISTRATION (ACT VIII OF 1871), 1 A. 274, 442, 2 A. 40, 216.

(12) See REGULATION XXXIV OF 1803 (INTEREST, CEDED PROVINCES, 2 A. 593.

(13) See RELEASE, 2 A. 554.

(14) See SUCCESSION ACT X OF 1865, 1 A. 710.

——2.—By conditional Sale.

See REGULATION XVII OF 1806 (THE BENGAL LAND REDEMPTION AND FORECLOSURE), 1 A. 499.

——3.—Contribution.

(1) *Suit for contribution—Misjoinder.*—The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt, in order to save the estate from foreclosure, can claim from each of the mortgagors a contribution proportionate to his interest in the property, but he cannot claim from the other mortgagors collectively the whole amount paid by him. HIRA CHAND v. ABDAL, 1 A. 455 ... 312

(2) In March 1864, the owner of an estate mortgaged it as security for the payment of certain moneys. Subsequently portions of such estate were purchased by the plaintiff and the defendants at an execution sale. Subsequently again the mortgagee sued the mortgagor and the plaintiff for the mortgage-money, claiming to recover it by the sale of the portion of such estate purchased by the plaintiff. Having obtained a decree, the mortgagee caused a portion of such portion to be sold in the execution of the decree. In order to save the remainder of such portion from sale in the execution of the decree, the plaintiff satisfied the judgment-debt. The plaintiff then sued the defendants for contribution. *Held* that, assuming that the mortgagee, by not including the defendants in his suit upon the mortgage-bond, had put it out of his power to proceed at law by another suit on the basis of the same bond against the properties in the possession of the defendants as purchasers, it did not follow that the plaintiff's equitable right to recover a fair contribution from the defendants on the ground of his having paid the whole debt due to the mortgagee was thereby invalidated. JAGAT NARAIN v. QUTUB HUSAIN, 2 A. 807 ... 1101

Mortgage—3.—Contribution—(*Concluded*). PAGE

(3) *M*, *B*, and *N* held mauza in *D* equal one-third shares, and *M* also held a share in mouza *A*. On the 3rd January 1863, *M* and *B* mortgaged their shares in mauza *D* to *L* to secure a loan of certain moneys. On the 16th March 1870, *M*, *B*, and *N* mortgaged mauza *D* to *R* to secure a loan of Rs. 600, and on the same day, by a separate deed, they mortgaged mauza *D*, and *M* mortgaged his share in mauza *A* to *R* to secure a loan of Rs. 1,600. On the 8th December 1875, *L* obtained a decree for the sale of the shares of *M* and *B* in mauza *D* for the satisfaction of the mortgage-debt due to her. On the 18th April 1876, *R* obtained a decree for the realization of the mortgage-debts due to him by the sale of mauza *D* and *M*'s share in mauza *A*. On the 23rd October 1876, the shares of *M* and *B* in mauza *D* were sold in execution of *L's* decree, and were purchased by *R*. A portion of the purchase-money was applied to satisfy *L's* decree, and the balance of it was deposited in Court. Instead of applying to the Court to pay him this balance in execution of his decree, dated the 18th April 1876, *R* attached and obtained payment of such balance in execution of a decree for money which he held against *M* and *B*. On the 20th June 1877, *R*, in execution of his decree, dated the 18th April, 1876, brought to sale *N's* one-third share in mauza *D*, and became its purchaser. On the 20th July 1877, *R*, in execution of a decree for money against *M*, brought to sale his share in mauza A, and became its purchaser. *Held*, in a suit by *N* against *R* in which he claimed that the sum due by him under the two mortgages, dated the 16th March 1870, and the decree dated the 18th April, 1876, might be ascertained, and that, on payment of the amount so ascertained, the sale of his one-third share in mauza *D* might be set aside, and such share declared redeemed. *Held* that the sale of *N's* share in mauza *D* could not be set aside.

Held also that, if it were shown that the sum realized by the sale of his one-third share in mauza *D* exceeded the proportionate share of his liability on the two mortgages, he was entitled to recover one moiety of such excess as a contribution from mauza *A*.

As it appeared that there was such an excess the Court gave *N* a decree for a moiety of such excess together with interest on the same from the date of the sale of *N's* share at the rate of 12 per cent. per mensem, and further directed that, if such moiety together with interest were not paid within a certain fixed period, *N* would be at liberty to recover it by the sale of the share in mauza *A* or so much thereof as might be necessary to satisfy the debt. BHAGIRATH v. NAUBAT SINGH, 2 A. 115 ... 623

———4.—Foreclosure.

(1) *Joint-mortgage.*—Where a mortgage of an estate is a joint one and there is no specification in it that any individual share or portion of a share of such estate is charged with the repayment of any defined proportion of the mortgage-money, but the whole estate is made responsible for the mortgage-money, it is not competent for the mortgagee to treat a sum paid by one of the mortgagors as made on such mortgagor's own account in respect of what might be calculated as his reasonable share of the joint debt and to release his share from further liability. Where therefore in the case of such a mortgage, the mortgagee, in taking foreclosure proceedings, exempted the person and share of the mortgagor so paying and proceeded only against the other mortgagors, and the mortgage having been foreclosed sued the other mortgagors for the possession of their shares of such estate, *held* that, the foreclosure proceedings being irregular, the suit was not maintainable. CHANDIKA SINGH v. POHKAR SINGH, 2 A. 906. ... 1170

(2) *Reg.* XVII *of* 1806.—Where the whole of a mortgage-debt was due to the persons claiming under the mortgage jointly and not severally, and a person, entitled only to one moiety of the debt, foreclosed the mortgage as to that moiety, and sued the different mortgagors for possession of a moiety of their interests in the mortgaged property, in virtue of the mortgage and foreclosure, *held*, that the foreclosure was invalid and the suits were not maintainable. BISHAN DIAL v. MANNI RAM, 1 A. 297=1 Ind. Jur. 411 ... 203

(3) Subsequent mortgagee, entitled to notice of foreclosure—See Regulation XVII of 1806 (The Bengal Land Redemption and Foreclosure), I.A. 499.

(4) See MORTGAGE (CONTRIBUTION), I.A. 455.

(5) See REGULATION XVII of 1806 (BENGAL LAND REDEMPTION AND FORECLOSURE), 2 A. 313.

Mortgage—5.—Redemption. PAGE

(1) *Burden of proof as to ownership—Act* I *of* 1872, s. 113—*Partial Relief.*—The plaintiffs, averring that their ancestor had mortgaged three villages to the ancestors of the defendants in 1842 for Rs. 2,500, putting the mortgagees into possession, sued to recover possession of 15 biswas of each village, asserting that the mortgage-debt had been redeemed from the usufruct. The defendants, admitting the proprietary title of the ancestor of the plaintiffs to the villages, alleged as to 10 biswas of each village that they were sold to their ancestors in 1842 by him for Rs. 1,250, and as to the other 10 biswas of each village, that they were subsequently mortgaged to their ancestors by him for Rs. 14,000, borrowed by him from them for the purpose of defending a suit arising out of the previous sale, which sum had not been satisfied from the usufruct.

Held (STUART, C.J., dissenting), that the burden of proving the mortgage of the 10 biswas of each village of which the defendants alleged the sale lay on the plaintiffs.

Per STUART, C.J. *contra*.

Held also (STUART, C.J., and TURNER, J. dissenting) that the plaintiffs' having failed to prove the averments on which their suit was based, were not entitled to any relief in respect of that portion of the property in suit of which the defendants admitted their possession as mortgagees.

Per STUART. C.J. and TURNER, J., *contra*. RATAN KUAR v. JIWAN SINGH, 1 A. 194 (F.B.) ... 131

(2) *Joint mortgage—Purchase by mortgagee of a share in mortgaged property—Redemption of mortgage.*—Where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share in such estate of one of the mortgagors thereby breaking the joint character of the mortgage, and one of the mortgagors sued to redeem his own share and also the share of *B*, another of the mortgagors, *held* that he was entitled to redeem his own share, but he could not redeem *B's* share against the will of the mortgagee. KURAY MAL v. PURAN MAL, 2 A. 565 =4 Ind. Jur. 653 ... 935

(3) *Jurisdiction—Suit for redemption of usufructuary mortgage—Valuation of suit—Act* VI *of* 1871, s. 22.—The plaintiffs sued for the possession of certain immoveable property, alleging that they had mortgaged such property to the defendants, and that the mortgage debt had been satisfied out of the profits of the property. The defendants set up a defence to the suit which raised the question of the proprietary right of the plaintiffs to the property. The value of the mortgagees' interest in the property was below Rs. 5,000, the value of the mortgaged property exceeded that amount. On appeal to the High Court from the original decree of the Subordinate Judge in the suit it was contended that the appeal from that decree lay to the District Court and not to the High Court. *Held* that the "subject-matter in dispute," within the meaning of s. 22 of Act VI of 1871, was the mortgage and mortgagee's rights under it, and that, the value of this being only Rs. 2,000, the appeal should have been preferred to the District Court. Second Appeal No. 1039 of 1877 dissented from. GOBIND SINGH v. KALLU, 2 A. 778 ... 1080

(4) See APPEAL (GENERAL), 1 A. 620.

(5) See INTEREST, 1 A. 344.

(6) See LIMITATION, 1 A. 425.

(7) See LIMITATION ACT (IX OF 1871), 1 A. 117, 642, 655.

(8) See MORTGAGE (USUFRUCTUARY), 1 A. 524; 2 A. 455.

(9) See REGULATION VII OF 1825 (BENGAL, EXECUTION OF DECREES), 1 A. 431.

(10) See SURETY, 2 A. 582.

———6.—**Simple.**

(1) *Suit for money charged on immoveable property.*—The obligor of a bond for the payment of money gave the obligee a moiety of the profits of a certain mauza up to the end of the current settlement and charged the other moiety of such profits with the payment of such money. It was also stipulated in such bond that the obligee should take the management of such mauza, rendering accounts to the obligor, and that if the obligor failed to pay such money when due, the obligee should remain in possession of the entire mauza until payment of all that was due. The original obligor having died, his heir gave the obligee a second bond, in which he

Mortgage—6.—Simple—(*Concluded*). PAGE

admitted the creation of the original charge and a certain further debt. A portion of such further debt he undertook to pay on a certain date, and he agreed that the balance due should be realized by the obligee from a moiety of the profits of the mauza, according to the terms of the first bond, and that the mauza should remain in the obligee's possession until the amounts due under both bonds were realized by him, and that he, the obligor, should have no power to sell, mortgage, or alienate the mauza. *Held* in a suit by the obligee on the bonds that the bonds created a mortgage only of the profits of the mauza and not of the mauza itself, and accordingly that they did not entitle the obligee to a decree for the sale of the mauza. GANGA PRASHAD v. KUSYARI DIN, 1 A. 611 ... 425

(2) *Usufructuary mortgage—Hypothecation—Suit for money charged on immoveable property.—M* and *S* executed an instrument in favour of *K* and *G* in the following terms : " We, *M* and *S*, declare that we have mortgaged a house situated in Ghaziabad, owned and possessed by us, for Rs. 300, to *K* and *G*, for two years : that we have received the mortgage-money, and nothing is due to us : that we have put the mortgagees in possession of the mortgaged property : that eight annas has been fixed as the monthly interest, in addition to the rent of the house, which we shall pay from our own pocket : that we promise to pay the aforesaid sum to the mortgagees within two years, and redeem the mortgaged property, that if we fail to pay the mortgage-money within two years, the mortgagees shall be at liberty to recover the mortgage-money in any manner they please."
Held per STUART, C. J. OLDFIELD, J., and STRAIGHT, J. (SPANKIE, J. dissenting) in a suit upon this instrument to recover the principal sum advanced by the sale of the house, that the instrument created a mortgage of the house as security for the payment of such principal sum. PHUL KUAR v. MURLI DHAR, 2 A. 527 ... 909

(3) See CHARGE, 1 A. 433.
(4) See CONTRACT ACT (IX OF 1872), 1 A. 275.
(5) See MONEY-DECREE, 1 A. 446.
(6) See REGISTRATION ACT (VIII OF 1871), 2 A. 96.

————7.—Usufructuary.

(1) *Redemption of mortgage - Conditional decree.*—In a suit to recover possession of certain lands founded on the allegation that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees, and that the mortgage debt had been satisfied from the usufruct of the lands, the lower Court, although it found that the mortgage-debt had not been satisfied as alleged, gave the plaintiffs a decree for possession conditional on the payment of the balance of the mortgage-debt. *Held* that, inasmuch as the defendants never rendered any accounts, and inasmuch as no agreement had been made between the parties as to the amount at which the profits of the land should be estimated, it was impossible for the plaintiffs to have ascertained before suit what sum, if any, was due by them, and seeing that, whether such decree was altered or not, the plaintiffs might immediately pay the balance of the mortgage-debt and demand possession, it was unnecessary to interfere with such decree. SAHIB ZADAH v. PARMESHAR DAS, 1 A. 524 ... 361

(2) *Usufructuary mortgage followed by sale— Revival of mortgage by cancelment of sale—Redemption of mortgage—Attachment in the execution of decree—Claim to attached property—Effect of order under Act* VIII *of* 1859, *s.* 246. —*Z* mortgaged in 1859 certain immoveable property, being joint ancestral property, for a term of five years, giving the mortgagee possession of the mortgaged property. In 1861 *Z* sold this property to the mortgagee, whereupon the sons of *Z* sued their father and the mortgagee-purchaser, to have the sale set aside as invalid under Hindu law, and in August 1864, obtained a decree in the Sudder Court setting aside the sale. The mortgagee-purchaser, remained, however, in possession of the property as mortgagee. In May 1867, *Z* having sued the mortgagee for possession of the property on the ground that the sale had been set aside as invalid, the High Court held that *Z* could not be allowed to retain the purchase-money and to eject the mortgagee-purchaser, but must be held estopped from pleading that the sale was invalid. In November 1867, one *K* having caused the property to be attached and advertised for sale in the execution of a decree which he held against *Z* and his sons, the mortgagee objected

Mortgage—7.—Usufructuary—(*Concluded*). PAGE

to the sale of the property on the ground that *Z* and his sons had no saleable interest in the property. This objection was disallowed by the Court executing the decree, and the rights and interests of *Z* and his sons were sold in the execution of the decree, *K* purchasing them. In 1878 *K* sued, as the purchaser of the equity of redemption, for the redemption of the mortgage of 1859. *Held* that *K* was entitled to redeem the property. *Held* also that the mortgagee not having contested in a suit the order dismissing his objection to the sale of the property in execution of *K*'s decree, he could not deny that *K* had purchased the rights and interests remaining in the property to *Z* and his sons. *Held* also that the mortgagee had no lien on the property in respect of his purchase-money. *Held* also that, it being stipulated in the deed of mortgage that the mortgagee should pay the mortgagor a certain sum annually as "*malikana*," and the mortgagee not having paid such allowance since the date of the sale the plaintiff was entitled to a deduction from the mortgage-money of the sum to which such allowance amounted. BASANT RAI v. KANANJI LAL, 2 A. 455=4 Ind. Jur. 583 ... 859

(3) By the terms of a deed of usufructuary mortgage the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. During the currency of the mortgage tenure the mortgagees, averring that they had to pay a certain sum in excess of the amount of Government revenue entered in the deed of mortgage from 1279 to 1281 Fasli, sued the mortgagor to recover such excess. *Held* that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage tenure should be brought to an end, the suit was not premature and could be entertained. NIKKA MAL v. SULAIMAN SHIKOH GARDNER, 2 A. 193 ... 676

(4) See APPEAL (GENERAL), 1 A. 620.
(5) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 252.
(6) See MORTGAGE (REDEMPTION), 2 A. 778.
(7) See MORTGAGE (SIMPLE), 2 A. 527.

Mortgagor and Mortgagee.

Estoppel—Constructive Fraud.—Mere silence on the part of a prior mortgagee on hearing that the mortgagor is mortgaging the property a second time is not such conduct as will amount to constructive fraud, and deprive him of his right to priority as against the second mortgagee.

Neither does the mere fact that, being aware of the second mortgage, he attests the execution of the mortgage-deed, amount to such conduct, where his knowledge of the contents of the deed is not shown.

Where a prior mortgagee, however, attested the execution of the deed mortgaging the property a second time, and being aware of the contents of the deed, kept silence, and thus led the second mortgagee to think that the property was not encumbered and to advance his money on the security of it, which the second mortgagee would not have done had he been aware of the existence of the prior mortgage, such silence was held to be conduct which amounted to constructive fraud on the part of the prior mortgagee and deprived him of his right to priority. SALAMAT ALI v. BUDH SINGH, 1 A. 303=1 Ind. Jur. 314 & 385 ... 207

Muhammadan Law.

1.—CUSTOM.
2.—DIVORCE.
3.—DOWER.
4.—GIFT.
5.—INHERITANCE.
6.—MINORITY AND GUARDIANSHIP.
7.—PRE-EMPTION.
8.—WIDOW.

———I.—Custom.

See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 567.

Muhammadan Law — 2.—Divorce. PAGE

Husband and wife—Repudiation by ambiguous expression—Custody of minor children.—Where a Muhammadan said to his wife, when she insisted against his wish on leaving his house and going to that of her father, that if she went she was his paternal uncle's daughter, meaning thereby that he would not regard her in any other relationship and would not receive her back as his wife, *held* that the expression used by the husband to the wife, being used with intention, constituted, under Muhammadan law, a divorce which became absolute if not revoked within the time allowed by that law.

Held also, the divorce having become absolute, the parties being *Sunnis*, that the husband was not entitled to the custody of his infant daughter until she had attained the age of puberty. HAMID ALI v. IMTIAZAN, 2 A. 71 ... 593

———3.—Dower.

(1) *Conjugal rights—Act* VI *of* 1871, *s.* 24.—When a Muhammadan sues his wife for restitution of conjugal rights, such suit is to be determined with reference to Muhammadan law and not with reference to the general law of contract. Under Muhammadan law, if a wife's dower is "prompt," she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already cohabited with consent since their marriage.

When at the time of marriage the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.

Where a Court following this rule determined that one-fifth only of a dower of Rs. 5,000 not stipulated to be "deferred" must be considered "prompt," inasmuch as the wife had been a prostitute and came of a family of prostitutes, it exercised its discretion soundly. EIDAN v. MAZHAR HUSAIN, 1 A. 483=2 Ind. Jur. 389 ... 332

(2) *Restitution of Conjugal rights.*— A Muhammadan cannot, according to Muhammadan law, maintain a suit against his wife for restitution of conjugal rights, even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is "prompt" and has not been paid. WILAYAT HUSSAIN v. ALLAH RAKHI, 2 A. 831 ... 1117

(3) Under Muhammadan law, when on marriage it is not specified whether a wife's dower is prompt or deferred, the nature of the dower is not to be determined with reference to custom, but a portion of it must be considered prompt. The amount to be considered prompt must be determined with reference to the position of the wife and the amount of the dower, what is customary being at the same time taken into consideration. TAUFIK-UN-NISSA v. GHULAM KAMBAR, 1 A. 506 ... 348

(4) Where a Muhammadan (Shia), on his marriage, being in poor circumstances, fixed a "deferred" dower of Rs. 51,000 upon his wife, and died without leaving sufficient assets to pay such dower, and his wife sued to recover the amount of such dower from his estate *held* by STUART, C.J., (PEARSON, J., dissenting) that, it being nowhere laid down absolutely and expressly by any authority on the Muhammadan law that, however large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate, without reference to his circumstances at the time of marriage or the value of his estate at his death, the plaintiff was only entitled, under the circumstances, to a reasonable amount of dower.

Held by the Full Bench, on appeal from the decision of STUART, C.J., that a Muhammadan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower-debt. SUGRA BIBI v. MASUMA BIBI, 2 A. 573=5 Ind. Jur. 95 ... 940

(5) See MUHAMMADAN LAW (GIFT), 2 A. 854.

Muhammedan Law—4.—Gift. PAGE

(1) *Dower.—Held* that the provisions of the Muhammadan law applicable to gifts made by persons labouring under a fatal disease do not apply to a so-called gift made in lieu of a dower-debt, which is really of the nature of a sale. GHULAM MUSTAFA v. HURMAT, 2 A. 854 ... 1134

(2) A defined share in a landed estate is a separate property, to the gift of which the objection which attaches under Muhammadan Law to the gift of joint and undivided property is inapplicable. JIWAN BAKHSH v. IMTIAZ BEGAM, 2 A. 93 ... 608

———5.—Inheritance.

(1) See EVIDENCE ACT (I OF 1872), 2 A. 625.

(2) See MUHAMMADAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 57, 533.

———6.—Minority and Guardianship.

(1) *Custody of Minor—Guardian.—Held* where the plaintiff sued for the custody of her minor sister, as her legal guardian under Muhammadan Law, that the fact of the plaintiff being a prostitute was, although she was legally entitled to the custody of such minor, a sufficient reason for dismissing the suit in the interests of such minor. ABASI v. DUNNE, 1 A. 598 ... 414

(2) *Inheritance—Minor—Justice, equity, and good conscience—Act* VI *of* 1871, *s.* 24.—*H*, being in possession of certain real property on her own account, and on account of her nephew and niece, minors, of whose persons and property she had assumed charge in the capacity of guardian, sold the property, in good faith, and for valuable consideration, in order to liquidate ancestral debts and for other necessary purposes and wants of herself and the minors. *Held* that under Muhammadan Law and according to justice, equity, and good conscience, the sales were binding on the minors. HASAN ALI v. MEHDI HUSAIN, 1 A. 533 ... 368

(3) *Inheritance—Minor.*—Two of the widows of a deceased Muhammadan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians.

Held, if the plaintiff was in possession, and was not a party to or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected. HAMIR SINGH v. ZAKIA, 1 A. 57 (F.B.) ... 38

(4) See MUHAMMADAN LAW (DIVORCE), 2 A. 71.

———7.—Pre-emption.

(1) *Act* VI *of* 1871, *s.* 24.—The right of pre-emption being a right weak in its nature, where such right is claimed under Muhammadan law, it should not be enforced except upon strict compliance with all the formalities which are prescribed by that law

Under Muhammadan law the "*talab-i-mawasabat*" or immediate claim to the right of pre-emption should be made as soon as the fact of the sale is known to the claimant, otherwise the right is lost, and it was consequently held that the plaintiff, having failed to make the "*talab-i-mawasabat*" until twelve hours after the fact of the sale became known to him, had lost his right of pre-emption. ALI MUHAMMAD v. TAJ MUHAMMAD, 1 A. 283. 192

(2) *Contract - Custom - Wajib-ul-arz—Special Appeal.*—Where the existence in a certain village of the right of pre-emption was recorded in the village administration-paper as a matter of agreement and not of custom, and a suit was brought to enforce such right founded on the agreement, and was tried and determined in the lower Court as so founded, the plaintiff could not in special appeal claim such right as a matter of custom in virtue of the entry.

A claim to the right of pre-emption founded on a special agreement does not exclude a claim to such right founded on Muhammadan law. MARATIB ALI v. ABDUL HAKIM, 1 A. 567 ... 393

(3) *Hindu vendor—Act* VI *of* 1871, *s.* 24.—*Held* (STUART, C. J., and PEARSON, J., dissenting) that where the vendor is a Hindu a suit to enforce a right of pre-emption founded upon Muhammadan law is not maintainable. *Per* STUART, C.J., and PEARSON, J., *contra*. DWARKA DAS v. HUSAIN BAKHSH, 1 A. 564 (F.B.) ... 391

Muhammedan Law—7.—Pre-emption—(*Concluded*). PAGE

(4) *Minor—Legal disability—Limitation—Act* IX *of* 1871, *s.* 7 *and sch. ii, cl.* 10. —The provisions of s. 7 of Act IX of 1871 are applicable in computing the period of limitation in suits to enforce a right of pre-emption.

Where a condition for pre-emption contained in a record-of-rights was intended to take effect at the time of a sale and its language implied that the co-sharers in whose favour it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of a sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage. RAJA RAM v. BANSI, 1 A. 207 ... 140

(5) Under Muhammadan law the legal forms to be observed under that law by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person.

The right of pre-emption may be claimed after a sale notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has been made simply in consequence of a dispute as to the actual price of the property. ABADI BEGAM v. IMAM BEGAM, 1 A. 521 ... 360

(6) Where a dwelling-house was sold as a house to be inhabited as it stood with the same right of occupation as the vendor had enjoyed, but without the ownership of the site, *held* that a right of pre-emption under Muhammadan law attached to such house. ZAHUR v. NUR ALI, 2 A. 99 ... 612

————8.—Widow.

See MAHOMEDAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 57.

Multifarious Suit.

See COURT FEES ACT (VII OF 1870), 1 A. 552 ; 2 A. 676, 682.

Municipal Committee.

See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITY), 1 A. 557 ; 2 A. 96.

Murder.

See PENAL CODE (ACT XLV OF 1860), 2 A. 33.

Native Indian British Subjects.

See ACT XI OF 1872 (FOREIGN JURISDICTION AND EXTRADITION), 2 A. 218.

Negligence.

(1) Causing death by—See PENAL CODE (ACT XLV OF 1860), 2 A. 766.
(2) See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Non-appearance.

Of defendant—See COURT FEE, 2 A. 318.

Note or Memorandum.

See LIMITATION ACT (IX OF 1871), 2 A. 641.

Notice.

(1) Of suit—See ACT XV OF 1873 (N. W. P. AND OUDH MUNICIPALITIES), 1 A. 269.
(2) See RAILWAYS ACT (XVIII OF 1854), 1 A. 60.

Nuncupative Will.

See PRIVY COUNCIL, 1 A. 688.

Obstruction.

See ENCROACHMENT, 1 A. 249.

Occupancy Right.

Act XVIII *of* 1873, *ss.* 7, 9—*Sale of proprietary rights in a mahal—Right of occupancy—Ex-proprietary tenant.*—The right of occupancy which a person losing or parting with the proprietary rights in a mahal acquires, under s. 7 of Act XVIII of 1873, in the land held by him as sir in such mahal at the date of such loss or parting is a saleable interest.

Held, where such a right was sold by private sale, that it was transferable, s. 9 of Act XVIII of 1873 notwithstanding. A deed executed by a village

Occupancy Right—(*Concluded*). PAGE

proprietor purporting to transfer his share in the village including his sir-land and ex-proprietary right divests such proprietor of the ex-proprietary right conferred by s. 7 of Act XVIII of 1873. MARKUNDI DIAL v. RAM BARAN RAI, 2 A. 735 ... 1051

Occupancy-tenant.

(1) Right of—See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 353.
(2) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 547; 2 A. 145.

Offence.

(1) Against public justice—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 129, 162, 625.
(2) In contempt of Court—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 129, 162, 625.

Oral Evidence.

See REGISTRATION ACT (VIII OF 1871), 1 A. 442.

Pardon.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 260.

Parol Evidence.

(1) See CLAIM, 1 A. 440.
(2) See REGISTRATION ACT (VIII OF 1871), 1 A. 442.

Partial Relief.

See MORTGAGE (REDEMPTION), 1 A. 194.

Particulars.

See ACT XV OF 1859 (PATENTS), 2 A. 368.

Parties.

(1) *Act* VIII *of* 1859, *ss.* 256, 257—*Act* XV *of* 1877, *s.* 22—*Substitution or addition of new appellant or respondent—Appellate Court, powers of— State in execution of decree—Suit for recovery of purchase-money*—Caveat emptor —*Irregularity*.—An appellate Court has a discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal.

The right, title and interest of *G* in certain immoveable property was attached and notified for sale in the execution of a money-decree held by *T*. It was also attached and notified for sale in the execution of a money-decree held by *S* and *R*. The same date was fixed for both sales. The officer conducting sales first sold the property in execution of *T*'s decree and *T* purchased the property. He then sold the property in execution of the decree held by *S* and *R*, and *K* purchased the property. The Court executing the decrees confirmed the sale to *T*, granting him a sale certificate, and disallowing *K*'s objection to the confirmation. It also confirmed the sale to *K*, ordering the purchase-money to be paid to *S* and *R*, and disallowing *K*'s objection to the confirmation; but it refused to grant *K* a sale certificate on the ground that, as the sale to *T* had been confirmed and a sale certificate granted to him, it could not give *K* possession of the property. In a suit by *K* against *S* and *R* to recover his purchase-money, *held*, distinguishing the suit from the cases in which it had been held that, when the right, title and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title, or interest, and therefore the auction-purchaser cannot recover his purchase-money, if it turns out that the judgment-debtor had no interest in the property, that the rule of *caveat emptor* did not apply, and the suit was maintainable.

The provisions of s. 257 of Act VIII of 1859 apply to applications made under s. 256 of that Act and to those only.

Held, therefore, that, inasmuch as *K* objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in s. 256 of Act VIII of 1859, *K* was not precluded by the terms of s. 257 of that Act from maintaining his suit.

Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting sales was not bound to sell such property

Parties—(*Concluded*). PAGE

once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in conduct of the sales. THE COURT OF WARDS v. GAYA PRASAD, 2 A. 107 ... 618

(2) *Non-joinder of parties—Rejection of plaint.*—A suit was instituted by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. Notwithstanding that objection to the non-joinder of the other partners was duly taken, the plaintiff contended himself with putting in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the plaintiff, instead of applying to the Court to add the other partners as plaintiffs. In appeal the High Court admitted the objection, and refused, under the circumstances, to add the other partners as plaintiffs. DULAR CHAND v. BALRAM DAS, 1 A. 453 ... 311

(3) To a suit—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 264.

(4) *To a suit—Political Agent—Superintendent of Raj.*—A suit for property belonging to the Raja of Kota was brought in the name of the "Political Agent and Superintendent of the Kota State on the part of the Government of India." *Held* that if the Raja was the proprietor of the property, he should have been the plaintiff, or, if his right and interest therein had passed to Government, the Government should have been the plaintiff, but the Political Agent and Superintendent of the Kota State was not entitled to sue for the property. GIRDHARI DAS v. POWLETT, 2 A. 690 1020

(5) See CHEQUE, 2 A. 754.

(6) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 487, 738, 904.

Partition.

See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 619.

Patent.

See ACT XV OF 1859 (PATENTS), 2 A. 368.

Pattidari Estate.

See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 272, 277.

Pauper Petition.

See COURT-FEES, 2 A. 241.

Pauper Suit.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 230.
(2) See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 745.
(3) See COURT-FEES, 1 A. 596 ; 2 A. 196.

Penal Code (Act XLV of 1860).

(1) S. 20—See APPEAL (SPECIAL APPEAL), 1 A. 535.

(2) *Ss.* 59, 377—*Punishment—Transportation in lieu of imprisonment* —When an offence is punishable either with transportation for life or imprisonment for a term of years, if a sentence of transportation for a term less than life is awarded such term cannot exceed the term of imprisonment. QUEEN v. NAIADA, 1 A. 43 (F.B.) ... 29

(3) S. 65—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 461.

(4) S. 71—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 644.

(5) *Ss.* 71, 146, 147, 319, 323—*Offence made up of several offences--Rioting—Hurt.*—Rioting and causing hurt in the course of such rioting are distinct offences, and each offence is separately punishable. EMPRESS OF INDIA v. RAM ADHIN, 2 A. 139 ... 639

(6) *S.* 75—*Punishment.*—*Held* that, where a person commits an offence punishable under ch. XII or ch. XVII of the Indian Penal Code punishable with three years' imprisonment, and, previously to his being convicted of such offence, commits another such offence punishable under either of such chapters, he is not subject on being convicted of the second offence to the enhanced punishment provided in s. 75 of the Indian Penal Code. EMPRESS OF INDIA v. MEGHA, 1 A. 637 ... 444

(7) *S.* 161—*Attempt to obtain an illegal gratification—Act X of* 1872, *ss* 218, 351 —*Warrant case—Defence—Right of accused person to cross-examine the witnesses for the prosecution—Power of the Court to summon material witnesses.*—To ask for a bribe is an attempt to obtain one, and a bribe may be asked for as effectually in implicit as in explicit terms.

Where, therefore, *B*, who was employed as a clerk in the pension department,

Penal Code (Act XLV of 1860)—(*Continued*). PAGE

in an interview with *A*, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by "*karrawai*," and on the overture being rejected concluded by declaring that *A* would rue and repent the rejection of it, *held* that the offence of attempting to obtain a bribe was consummated.

The charge having been read to the accused person he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance.

The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence.

Held, per SPANKIE, J., that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused on the date fixed for the examination of the witnesses for the defence.

Held, also *per* SPANKIE, J., that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined. EMPRESS OF INDIA v. BALDEO SAHAI, 2 A. 253... 717

(8) *Ss.* 161, 165—*Public servant—Illegal gratification—Acceptance of present.*—*K*, a police-officer, employed in a Criminal Court to read the diaries of cases investigated by the police and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided by the Court in which the persons accused were convicted, and a sum of money, the proceeds of the theft, had been made over by the order of the Court to the prosecutor in the case, asked for and received from the prosecutor a portion of such money, not as a motive or reward for any of the objects described in s. 161 of the Indian Penal Code, but as "*dasturi*." *Held* that *K* was not, under these circumstances, punishable under s. 161 of the Indian Penal Code, but under s. 165 of that Code. EMPRESS OF INDIA v. KAMPTA PRASAD, 1 A. 530=2 Ind. Jur. 466 ... 366

(9) *S.* 174—*Act X of* 1872, *ss.* 471, 473—*Contempt of Court.*—Where a settlement officer, who was also a Magistrate, summoned, as a settlement officer, a person to attend his Court, and such person neglected to attend, and such officer, as Magistrate, charged him with an offence under s. 174 of the Indian Penal Code, and tried and convicted him on his own charge, *held* that such conviction was, with reference to ss. 471 and 473 of Act X of 1872, illegal. EMPRESS OF INDIA v. SUKHARI, 2 A. 405 ... 823

(10) *Ss.* 188, 441—*Public Ferry—Criminal Trespass—Regulation* VI *of* 1819, *s.* 6—*Disobedience to order duly promulgated by public servant—Act* VIII *of* 1851.—A person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit "Criminal trespass" within the meaning of that term in s. 441 of the Indian Penal Code.

If, when directed by the order of a public servant, duly promulgated to him, to abstain from plying a boat for hire at or in the immediate vicinity of a public ferry, a person disobeys such direction, he renders himself liable to punishment under the Indian Penal Code. MUTHRA v. JAWAHIR, 1 A. 527 ... 364

(11) Ss. 192, 193, 414—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 379.

(12) S. 193, Offender under, whether an offence in contempt of Court—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 625.

(13) Ss. 193, 195, 211, 218—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 398.

(14) Ss. 193, 471—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 533.

(15) *Ss.* 193, 511—*Attempt—Fabricating false evidence.*—*M* instigated *Z* to personate *C* and to purchase in *C*'s name certain stamped paper, in consequence of which the vendor of the stamped paper endorsed *C*'s name on such paper as the purchaser of it. *M* acted with the intention that such endorsement might be used against *C* in a judicial proceeding. *Held* that the offence of fabricating false evidence had been actually committed, and that *M* was properly convicted of abetting the commission of such offence. EMPRESS OF INDIA v. MULA, 2 A. 105 ... 616

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(16) Ss. 196, 271—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 129.

(17) *S.* 201.—*K* and *B*, having caused the death of *J* in a field belonging to *B*, removed *J's* dead body from that field to his own field with the intention of screening themselves from punishment. *K* was convicted on these facts of an offence under s. 201 of the Penal Code. *Held* that that section referred to persons other than the actual offenders, and *K* could not therefore properly be punished under that section for what he had done to screen himself from punishment. Also that, as a matter of fact, he did not by removing *J's* corpse from one field to another cause any evidence of *J's* murder, which that corpse afforded, to disappear, and his act, although his object may have been to divert suspicion from himself and *B*, did not constitute the offence defined in that section. EMPRESS OF INDIA *v.* KISHNA, 2 A. 713 = 5 Ind. Jur. 325 ... 1036

(18) *S.* 211—*False charge.*—To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made though no prosecution is instituted thereon. EMPRESS OF INDIA v. ABDUL HASAN, 1 A. 497 = 2 Ind. Jur. 463 ... 342

(19) *S* 211—*False Charge* —To constitute the offence of making a false charge under S. 211 of the Indian Penal Code, it is enough that the false charge is made and that the charge is not pending at the time of the offender's trial. EMPRESS OF INDIA v. SALIK, 1 A. 527 ... 364

(20) *Ss.* 299, 304, 321, 323—*Culpable homicide not amounting to murder—Voluntarily causing hurt—Spleen disease.*—Where a person hurt another, who was suffering from spleen disease, intentionally, but without the intention of causing death, or causing such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, and by his act caused the death of such other person, *held* that he was properly convicted under s. 323 of the Indian Penal Code of voluntarily causing hurt. EMPRESS OF INDIA v. FOX, 2 A. 522 ... 905

(21) S. 302—See ACT XVII OF 1862 (REPEALING ENACTMENTS RELATING TO CRIMINAL LAW), 1 A. 599.

(22) *S.* 302—*Murder—Sentence—Judgment—Reference to High Court—Act* X *of* 1872, *ss* 271, 287, 464.—*L*, *C*, *K*, and *D* conspired to kill *S*. In pursuance of such conspiracy *L* first and then *C* struck *S* on the head with a *lathi* and *S* fell to the ground. While *S* was lying on the ground *K* and *D* struck him on the head with their *lathis*. *Held* (STUART, C.J., dissenting) that, inasmuch as *K* and *D* did not commence the attack on *S* and it was doubtful whether *S* was not dead when they struck him, transportation for life was an adequate punishment for their offence.

Observations by STUART, C.J., on the impropriety of a judicial officer adding a "note" to his judgment in his criminal case impugning the correctness of the conclusion he has arrived at on the evidence in such case. EMPRESS OF INDIA v. CHATTAR SINGH, 2 A. 33 = 3 Ind. Jur. 281 566

(23) *Ss.* 304, 304 A, 322, 325—*Culpable homicide not amounting to murder—Voluntarily causing hurt – Causing death by negligence—Spleen disease.*—*B* voluntarily caused hurt to *N*, who was suffering from spleen disease, knowing himself to be likely to cause grievous hurt, but without the intention of causing death, or causing such bodily injury as was likely to cause death, or the knowledge that he was likely by his act to cause death, and caused grievous hurt to *N*, from which *N* died. *Held* that *B* ought not to be convicted under S. 304 A of the Indian Penal Code of causing death by negligence, but under s. 325 of that Code of voluntarily causing grievous hurt. EMPRESS OF INDIA v O'BRIEN, 2 A. 766 ... 1072

(24) *Ss.* 304. 317—*Exposure of child—Culpable homicide.*—Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, *held*, that she could not be convicted and punished under s. 304 and also under s. 317 of the Indian Penal Code, but s. 304 only. EMPRESS OF INDIA v. BANNI, 2 A. 349 ... 784

(25) Ss. 363, 417, 420—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A 570.

(26) *S.* 370—*Buying or disposing of a person as a slave.*—*R*, having obtained possession of *D*, a girl about eleven years of age, disposed of her to a third person, for value, with intent that such person should marry her, and such person received her with that intent. *Held* that *R* could not be convicted

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of disposing of *D* as a slave under s. 370 of the Indian Penal Code. EMPRESS OF INDIA v. RAM KUAR, 2 A. 723 (F.B.) ... 1043

(27) *Ss.* 372, 373—*Buying or selling minor for the purpose of prostitution, &c.*—Certain persons, falsely representing that a minor girl of a low caste was a member of a higher caste, induced a member of such higher caste to take her in marriage and to pay money for her in the full belief that such representation was true. *Held, per* STUART, C.J., that such persons could not be convicted, on these facts, of offences under ss. 372 and 373 of the Indian Penal Code. *Per* OLDFIELD, J., and STRAIGHT, J., that, if such girl was disposed of for the purpose of marriage, it could not be said, because the marriage might be invalid under Hindu law, that such persons acted with the intention that she should be employed or used for the purposes of prostitution or for any unlawful and immoral purpose, or that they knew it to be likely that she would be employed or used for such purpose, and consequently they could not be convicted of an offence under those sections. *Per* PEARSON, J., and SPANKIE, J., that, such girl having been disposed of for the purpose of marriage, although the marriage might be objectionable under Hindu law, it did not appear that it was wholly invalid, and therefore such intent or knowledge could not certainly be presumed, and such persons could not be convicted of offences under those sections. EMPRESS OF INDIA v. SRI LAL, 2 A. 694 (F.B.) ... 1023

(28) Ss. 378, 411—See ACT VI OF 1864 (WHIPPING), 1 A. 666.

(29) Ss. 380, 457—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 413.

(30) *Ss.* 425, 441—*Act* X *of* 1872, *s.* 454—*Criminal Trespass—Mischief.*—If a person enters on land in the possession of another in the exercise of a *bona fide* claim of right, and without any intention to intimidate, insult, or annoy such other person, or to commit an offence, then though he may have no right to the land he cannot be convicted of criminal trespass.

So also, if a person deals injuriously with property in the *bona fide* belief that it is his own, he cannot be convicted of mischief.

The mere assertion, however, in such cases of a claim of right is not in itself a sufficient answer to charges of criminal trespass and mischief. It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming that the other facts are established which constitute the offence.

Where a person committed a trespass with the intention of committing mischief, thereby committing criminal trespass, and at the same time committed mischief, *held* that such person could not, under cl. iii of s. 454 of Act X of 1872, receive a punishment more severe than might have been awarded for either of such offences. The provisions of that law do not in such a case prohibit the Court from passing sentence in respect of each offence established. EMPRESS OF INDIA v. BUDH SINGH, 2 A. 101 ... 613

(31) *S.* 441—*Criminal trespass.*—Certain immoveable property was the joint undivided property of *C*, *G* and a certain other person *R* obtained a decree against *G* for the possession of such property, and such property was delivered to him in the execution of that decree in accordance with the provisions of s. 264 of Act X of 1877. *C*, in good faith, with the intention of asserting her right, and without any intention to intimidate, insult, or annoy *R*, or to commit an offence, and *G*, in like manner, with the intention of asserting the right of his co-owners, remained in such property. *Held* that, under such circumstances, they could not be convicted of criminal trespass.

Re-entry into or remaining upon land from which a person has been ejected by civil process, or of which possession has been given to another for the purpose of asserting rights he may have solely and jointly with other persons, is not criminal trespass unless the intent to commit an offence or to intimidate, insult, or annoy is conclusively proved. *In the matter of the petition of* GOBIND PRASAD, 2 A. 465 ... 866

(32) S. 442—See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

(33) *S.* 494—*Attempt—Bigamy—Publication of the Banns of marriage.*—The act of causing the publication of banns of marriage is an act done in the preparation to marry but does not amount to an attempt to marry.

Where therefore a man, having a wife living, caused the banns of marriage between himself and a woman to be published, he could not be punished

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for an attempt to marry again during the lifetime of his wife. THE QUEEN v. PETERSON, 1 A. 316=1 Ind. Jur. 560 ... 217

(34) S. 497—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 339.

(35) Ss. 503, 506—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 351.

Penalty.

(1) *Bond—Compound interest—Penalty.—Held* that a stipulation in a bond that the interest on the principal sum lent should be paid six-monthly, and, if not paid, should be added to the principal and bear interest at the same rate was not one of a penal nature. TEJPAL, GUARDIAN OF KUNDUN LAL, MINOR v. KESRI SINGH, 2 A 621=5 Ind. Jur. 154 ... 973

(2) *Bond—Interest.—D* gave *M* a bond for the payment of certain moneys on a certain date and for the payment of interest on such moneys at Re. 1-12 per cent. per mensem, stipulating to pay the interest six-monthly, and in default " to pay compound interest in future." *Held* (i) that the stipulation to pay compound interest could not be regarded as a penal one, and (ii) that the bond contained an agreement to pay interest after the due date at the rate payable before that date, and that if it had been otherwise, the obligee was entitled to interest after that date at that rate such rate not being unreasonable. MATHURA PRASAD v. DURJAN SINGH, 2 A. 639=5 Ind. Jur. 214 ... 985

(3) *Bond—Interest.*—The defendants on the 8th May 1869, gave the plaintiff a bond for the payment of Rs. 2,000 on the 16th February 1870. This amount consisted of two items, *viz.*, Rs. 1,650, principal, and Rs. 350, interest in advance at the rate of two per cent. per mensem for the period between the date of the bond and its due date. The bond provided that, in default of payment on the due date, interest on the whole amount of Rs. 2,000 should be paid at the rate of two per cent. per mensem from the date of the bond. *Held*, in a suit on the bond in which interest was claimed at the rate of two per cent. per mensem from the date of the bond, that this provision was penal, and the penalty ought not to be enforced. MAHZAR ALI KHAN v. SARDAR MAL, 2 A. 769 ... 1074

(4) *Bond—Interest.*—The obligors of a bond agreed to pay the principal amount by instalments without interest, and in case of default to pay interest at the rate of Rs. 3-2-0 per cent. per mensem, and hypothecated immoveable property as security for the payment of the bond-debt, sufficient for the discharge of the debt, and furnished a surety. *Held* by STUART, C.J., in a suit on the bond, that the principal amount being payable in the first instance without interest, the stipulation to pay interest at the rate of Rs. 3-2-0 per cent. per mensem, in case of default, was a penal one, and reasonable interest should only be allowed. *Held* by SPANKIE, J., that looking at all the circumstances of the case, the very high rate of interest imposed in case of defualt should be regarded as penal, and should be reduced.

The Court under the circumstances allowed interest at the rate of one rupee per cent. per mensem. CHUHAR MAL v. MIR, 2 A. 715 ... 1037

Pending Proceedings.

See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.

Plaint.

(1) Amendment of—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 832.

(2) Amendment of, as to price at last stage—See PRE EMPTION, 1 A 591.

(3) Order returning, after it was admitted and posted for evidence—See APPEAL (GENERAL), 1 A. 620.

(4) Return of—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 357.

(5) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 230.

(6) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 669, 889.

(7) See CONTRACT ACT (IX OF 1872), 2 A. 671.

(8) See COURT FEES ACT (VII OF 1870), 1 A. 552 ; 2 A. 676, 682.

(9) See PARTIES, 1 A. 453.

Pleader.

(1) See ACT XX OF 1865 (PLEADERS AND MUKHTARS), 2 A. 511.

(2) See PRE EMPTION, 1 A. 709.

Political Agent.

See PARTIES, 2 A. 690.

Post diem Interest. PAGE

(1) *Bond—Interest.—G* gave *B* a bond for the payment of certain money within a certain time, with interest at the rate of 1¾ per cent. per mensem, in which he agreed that, in case of default, the obligee "should be at liberty to recover the principal money and interest from his person and property" and mortgaged "his four-anna share in mauza *K* until payment of the principal money and interest." *Held* that the bond contained an express contract for the payment of interest after due date at the rate of 1¾ per cent. per mensem, and that such contract was enforceable.

Semble that, where there is no express agreement fixing the rate of interest to be paid after the date a bond becomes due, an agreement to pay at the rate of interest agreed to be paid before such date cannot be implied, but the Court must determine what would be a reasonable rate to allow. In such a case the rate agreed to be paid before such date may ordinarily be regarded as the rate to be allowed after such date, provided that the rate agreed to be paid before such date is not excessive. BALDEO PANDAY v. GOKUL RAI, 1 A. 603=2 Ind. Jur. 725 ... 419

(2) See DAMAGES, 2 A. 617.

(3) See PENALTY, 2 A. 639.

Power.

Of sale—See SUCCESSION ACT (X OF 1865), 1 A. 710.

Practice and Procedure.

See DECREE, 1 A. 348.

Pre-emption.

(1) *Act* XX *of* 1865, *s.* 37—*Pre-emption—Pleader's Fees—Held*, in a suit for pre-emption, where it was found by the Court that the actual price of the property was less than the price stated in the deed of sale, and the Court gave the plaintiff a decree with costs, that the amount payable by the defendant in respect of the fees of the plaintiff's pleader, ought to be calculated, not on a valuation of the property which was found to be false, or on the amount on which the Court-fee on the plaint was paid, but on the real value of the property as found by the Court. DEBI SINGH v. BHUP SINGH, 1 A. 709 ... 495

(2) *Act* IX *of* 1871, *sch. II, art.* 10—*Limitation*—In 1861 *B* purchased conditionally certain immoveable property, which in 1865 was attached in execution of a decree. In 1874, the conditional sale having been foreclosed *B* obtained a decree for possession of such property. In February 1875 he obtained mutation of names in respect of such property. In November 1875, arrangements having been made by him to satisfy the decree in execution of which such property had been attached, the attachment was removed. In December 1875 he acknowledged having received possession of such property in execution of his decree. *K* sued him in November 1876 to enforce his right of pre-emption in respect of such property. *Held* that limitation ran from the date when *B* obtained such possession of the status of his conditional vendor as entitled him to mutation of names and to the exercise of the rights of an owner, and that the suit was barred by limitation. BIJAI RAM v. KALLU, 1 A 593 ... 411

(3) *Act* IX *of* 1871, *sch.* II, *art* 10—*Limitation*—"*Actual possession.*"—*Held* (STUART, C.J., dissenting) that the purchaser of the equity of redemption of immoveable property, which is at the time of the sale in the usufructuary possession of the mortgagee, takes "actual possession" of the property, within the meaning of that term in art. 10, sch. ii of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him

Per STUART, C.J.—That such a purchaser does not take "actual possession" of the property until he takes visible and tangible possession thereof or enjoys the rents and profits of the same, after redemption of mortgage. JAGESHAR SINGH v JAWAHIR SINGH, 1 A. 311 (F B). ... 213

(4) *Act* XV *of* 1877 *sch.* II *art.* 10 *Limitation*—*Held*, in a suit for pre emption, where the property had been purchased by the mortgagee in possession, that the purchaser obtained physical possession of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed. ...

Held, therefore, that the contract of sale having become completed on the payment of the purchase-money, the suit, being brought within one year

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from the date of such payment, was within time. LACHMI NARAIN LAL v. SHEOAMBAR LAL, 2 A. 409 ... 826

(5) *Act XV of 1877, sch II, art. 10—Limitation.*—On the 19th December 1876, *A* gave *T* a mortgage of his share in a certain village. The terms of the mortgage were that *A* should remain in possession of his share and pay the interest on the mortgage-money annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. On the 19th May 1877, *T's* name was substituted for that of *A* in the proprietary registers in respect of the share. On the 8th February 1878, *G* sued *T* and *A* to enforce his right of pre-emption in respect of the share, alleging that his cause of action arose on the 19th May 1877, and that *A* notwithstanding the mutation of names, was still in possession. *T* alleged that he had been in possession since the execution and registration of the deed of mortgage. *Held* that, whether *T* had been in plenary possession of the share since the date of the deed, or whether he had had only such constructive or partial possession of it as was involved in the receipt of interest on the mortgage-money, the plaintiff was equally bound to have sued within a year from the date of the deed, and was not entitled to reckon the year from the date on which the possession by the mortgage of the share was recognized by the revenue department and the suit was therefore barred by art. 10, sch. II of Act XV of 1877. GULAB SINGH v. AMAR SINGH, 2 A. 237 ... 705

(6) *Conditional decree.*—Where a share in a certain patti was sold by the holder of the share to a stranger, and three persons, holding equal shares in the patti, were equally entitled under the village administration-paper to the right of pre-emption of the share, *held*, that such persons were each entitled to have the sale made to him to the extent of one-third of the share.

The decree of the High Court in this suit specified a time within which each party to the suit should pay into Court a proportion of the purchase-money, and declared that if either failed to pay such proportion within time, the other of them making the further deposit within time should be entitled to the share of the defaulter. MAHABIR PARSHAD v. DEBI DIAL, 1 A 291=1 Ind. Jur. 409 ... 199

(7) *Conditional Decree.*—Where the plaintiff in a suit to enforce the right of pre-emption sued alleging that the actual price of the property was not the price entered in the sale deed but a smaller price, and claimed the property on payment of such smaller price, and did not allege in his plaint that he was ready and willing to pay any price which the Court might find to be the actual price, and on the day that his suit was finally disposed of presented an application to the Court stating that he was ready and willing to do so, *held* that the Court was not bound to allow him to amend his plaint and bring into Court the larger sum. DURGA PRASAD v. NAWAZISH ALI, 1 A. 591 ... 410

(8) *Conditional Decree—"Final" Judgment and Decree.*—The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period, and if the decree-holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree.

When a direction contained in a decree referred to the time at which such decree should become *final*, *held* the (case being one in which a special appeal lay) that such decree does not become final on being affirmed by the lower appellate Court, but on the expiry of the period of special appeal, or where such an appeal was instituted, when the decision of the lower appellate Court was affirmed by the High Court. SHAIKH EWAZ v. MOKUNA BIBI, 1 A 132=10 Mad. Jur. 346=11 Mad Jur. 346 ... 89

(9) *Conditional Decree—"Final" Judgment and Decree-Execution of Decree.*—Where the plaintiff in a suit for pre-emption was granted a decree subject to the payment of the purchase-money within a fixed period, and failed to comply with the condition imposed on him by the decree, *held* that he had lost the benefit of the same. When a direction contained in a decree referred to the time at which such decree should become *final*, *held* that such decree became final on being affirmed by the lower appellate Court where, although a special appeal was preferred by the plaintiff against the decree of the lower appellate Court, the same was subsequently allowed to be withdrawn. HINGAN KHAN v. GANGA PARSHAD, 1 A. 293=1 Ind. Jur. 410 ... 200

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(10) *Contract—Wajib-ul-arz — Custom — Appeal.*—The plaintiff in a suit to enforce a right of pre-emption in respect of certain shares in certain villages founded his claim on a special agreement contained in the village administration-papers, and such claim was tried and determined in the lower Court as so founded. *Held* that the plaintiff could not in appeal set up a claim to enforce such right founded on custom. CHADAMI LAL v. MUHAMMAD BAKHSH, 1 A. 563 ... 390

(11) *Hindu widow — Wajib-ul arz.*—A Hindu widow holding by inheritance deceased husband's share in a village fully represents his estate as regards such share, and is entitled to prefer a claim to pre-emption as a shareholder in such village. PHULMAN RAI v. DANI KUARI, 1 A. 452 ... 310

(12) *Wajib ul-arz* — The greater portion of the lands of a certain village were divided into "thokes," each thoke comprising a certain amount of land, and the rest of the lands were held in common according to the interests of the co-sharers in the village. The *wajib-ul-arz* contained the following provision regarding the right of pre emption : "Each sharer is by all means at liberty to transfer his right and share, but first of all the transfer should be effected by him in favour of his own brothers and nephews who may be sharers, and, in case of their refusal, in favour of the other owners of the thoke." *Held*, in a suit by a sharer in one thoke to enforce a right of pre-emption, under the *wajib ul-arz*, in respect of a share in another thoke, that the fact that plaintiff in common with all the sharers of the different thokes was a sharer in the common lands did not make her a sharer in the vendor's thoke, and she had therefore no right of pre-emption under the *wajib ul-arz*. MAYA RAM v. LACHHO, 2 A. 631 ... 980

(13) Suit for—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 744.

(14) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 876.

(15) See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 272, 277.

(16) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 850, 884.

Prerogative of the Crown.

See COURT-FEES, 1 A. 596.

Presumption.

Of death—See EVIDENCE ACT (I OF 1872), 1 A. 53.

Previous Acquittal.

See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

Principal and Surety.

See ACT XI OF 1865 (MOFUSSIL SMALL CAUSE COURTS), 1 A. 87.

Prison.

See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

Privy Council.

(1) *Adoption—Usage of Jains—Estate of sonless widow—Her power to adopt—Possession of Adopted son—Rights of widow during son's Minority—Declaratory decree, when to be given—Obstruction to Title—Nuncupative will—Special leave to appeal* —On the evidence given in this case, *held* that, according to the usage prevailing in Delhi and other towns in the North-Western Provinces, among the sect of the Jains known as Saraogi Agarwalas, a sonless widow takes an absolute interest in the self-acquired property of her husband ; has a right to adopt without permission from her husband or consent of his kinsmen ; and may adopt a daughter's son, who, on the adoption, takes the place of a son begotten.

Quære, whether on such an adoption the widow is entitled so retain possession of the estate either as proprietor, or as manager of her adopted son.

A declaratory decree ought not to be made unless there is shown to be a right to some consequential relief, which, if asked for, might have been given by the Court, or unless a declaration of right is required as a step to relief in some other Court.

A right to come to the Court to have a document or act which obstructs the title of enjoyment or property cancelled or set aside, or for an injunction against such obstruction, would be sufficient to sustain a declaratory decree.

Semble—Where a defendant sets up a nuncupative will as entitling him to property in respect of which the plaintiff asks for a declaration of his right, a right to have such will declared null and void arises in cases where ...

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property legally passes by a will of that nature, since a claim under such a will is not a bare assertion of title, but setting up of a specific act by which title to property may be conferred.

A defendant obtained special leave to appeal to Her Majesty in Council on the ground that the case involved questions of law of great importance to the Jain sect of which he was a member. On the appeal coming on for hearing he contended that the suit should have been dismissed by the Courts below as a claim for a declaration of right in respect of which no consequential relief was sought or could be given. *Held* that, considering the special grounds on which the defendants had obtained leave to appeal, the somewhat technical character of the defence he now put forward, and the general circumstances of the case, he ought not to be allowed to insist on this objection. SHEO SINGH RAI v. DAKHO AND MURARI LAL, 1 A. 688=2 C L.R 193=5 I.A. 87=3 Suth. P.C.J. 529=2 Ind. Jur. 396 =3 Sar. P.C J. 807 ... 490

(2) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 65, 604.
(3) See LIMITATION ACT (XV OF 1877), 1 A. 644.
(4) See HIGH COURT, 1 A. 726.

Procedure.

(1) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 165, 377.
(2) See CIVIL PROCEDURE CODE (ACT X OF 1877). 1 A. 687.
(3) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 1 A. 162, 193.

Profits.

(1) Suit for, or sir-land not included in Rent-roll—See SIR-LAND, 1 A. 659.
(2) See ACT XVIII OF 1873 (N W.P. RENT), 1 A. 261, 512 ; 2 A. 239.
(3) See HINDU LAW (PARTITION), 1 A. 437.
(4) See LAMBARDAR, 1 A. 135.

Promissory Note.

(1) *Chose in action—Assignment of Chose in Action—Form of Suit by Assignee—Act IX of 1872 s. 62.*—*Held*, where a promissory note made payable simply to the payee without the addition of the words order or bearer, and therefore not negotiable, was assigned to a third person, that the assignee could sue upon such note, a chose in action being by the law of India assignable, and that the assignee could sue in the Courts of India in his own name. KANHAIYA LAL v. DOMINGO, 1 A. 732 ... 511

(2) Unstamped—See EVIDENDE, 1 A. 725.

Prosecution.

(1) For offence against public justice—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 533.
(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 162, 193.

Prostitution.

(1) Buying or selling minor for the purpose of prostitution—See PENAL CODE (ACT XLV OF 1860), 2 A. 694.
(2) See MAHOMEDAN LAW (MINORITY AND GUARDIANSHIP), 1 A. 598.

Public Ferry.

See PENAL CODE (ACT XLV OF 1860), 1 A. 527.

Public or Actual User.

See ACT XV OF 1859 (PATENTS), 2 A. 368.

Public Servant.

(1) Disobedience to order duly promulgated by—See PENAL CODE (ACT XLV OF 1860), 1 A. 527.
(2) See PENAL CODE (ACT XLV OF 1860), 1 A. 530.

Public Thoroughfare.

(1) See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITIES), 1 A. 557.
(2) See ENCROACHMENT, 1 A. 249.

Railways Act (XVIII of 1854).

S. 15—*Negligence—Carrier—Duty of persons sending goods of a dangerous nature—Notice—Act XIII of 1855—Action for compensation for destruction of life.*—*Held* (PEARSON, J., dissenting) that a person who sends an article

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of a dangerous and explosive nature to a railway company to be carried by such company, without notifying to the servants of the company the dangerous nature of the article, is liable for the consequences of an explosion, whether it occurs in a manner which he could not have foreseen as probable or not.

Held also (PEARSON, J., dissenting), that such a person is liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precautions to preclude the risk of explosion. Mode of estimating damages under Act XIII of 1855 discussed. LYELL v. GANGA DAI, 1 A. 60 (F.B.) ... 41

Real Property.

See LEGACY, 1 A. 762, 772.

Reasonable Apprehension of Injury.

See DOCUMENT, 1 A. 622.

Receipt.

See REGISTRATION ACT (VIII OF 1871), 1 A. 442.

Record-of-right.

(1) *Trust—Assignment by Trustees—Limitation.*—In 1840 the purchasers and recorded proprietors of a four biswas share, of a certain village caused a statement to be recorded in the village record-of-rights to the effect that *B* claimed to be the proprietor of a moiety of such share, and that they were willing to admit his right whenever he paid them a moiety of the sum which they had paid in respect of the arrears of revenue due on such share. In 1843 *M* purchased such share and became its recorded proprietor. In 1877 *K* the son of *B*, sued the representative of *M*, for possession of a moiety of such share, alleging, with reference to the statement recorded in the record of-rights, that such moiety had vested in *M's* assignors in trust to surrender it to *B* or his heirs on payment of a moiety on the sum they had paid on account of revenue, and paying into Court a moiety of such sum. *Held* that that statement could not be regarded as evidence of the alleged trust, and that, assuming that the alleged trust existed, the suit was barred by limitation, *M* having purchased without notice of the trust and for valuable consideration. KAMAL SINGH v BATUL FATIMA, 2 A. 460 ... 863

(2) See ACT XIX OF 1873 (N.W.P LAND REVENUE), 1 A. 613.

(3) See MAHOMEDAN LAW (PRE-EMPTION), 1 A. 207.

(4) See PRE-EMPTION, 2 A. 631.

Refusal.

To register—See REGISTRATION ACT (VIII OF 1871), 1 A. 318.

Registration.

(1) *Certificate of Sale—Mortgage.*—Where the Subordinate Judge of Debra Dun made and signed the following endorsement on a deed of mortgage of immoveable property:—"This deed was purchased on the 1st December 1875, at a public sale in the Court of Debra Dun, by *N* and *K*, plaintiffs, for Rs. 2,400, under special orders passed by the Court on the 23rd November 1874, in the case of *N* and *K*, plaintiffs, against *R*, for self, and as guardian of the heir in possession of the estate left by *M*."—*held per* SPANKIE, J., that this instrument operated as a sale certificate, and consequently, as it related to immoveable property of the value of Rs. 100 and upwards, it required to be registered.

Held per OLDFIELD, J.—That as the instrument operated to assign the deed of mortgage to the auction-purchasers, is for the same reason required to be registered. KANAHIA LAL v KALI DIN, 2 A. 392 ... 814

(2) Effect of improper—See REGITRATION ACT (VIII OF 1871), 1 A. 465.

(3) *Mortgage—Suleh-nama—Agreement creating a charge on immoveable property—Stamp—Suit for money charged on immoveable property.*—Certain immoveable property having been attached in the execution of a decree held by *S*, *B* and *L* objected to the attachment. An arrangement was subsequently affected between the objectors and the parties to the decree which resulted in all parties jointly filing a "*suleh nama*" in Court, in which *B* and *L*, who had purchased the rights of the judgment-debtor in the attached property, agreed to pay the amount of the decree, which exceeded one hundred rupees, within one year, and hypothecated such

Registration—(Concluded). PAGE

property as security for the payment of such amount. S having sued upon this document claiming to recover the amount of the decree by the sale of such property, *held* that the document required to be registered, and not being registered the suit thereon was not maintainable.

Cases decided by the High Court in which the "*sulh-nama*," having been relied on, not as containing the hypothecation itself, but as evidence only of a separate parol agreement, or in which a decree having been made in accordance with the terms of the document, was held not to require registration, remarked upon and distinguished by SPANKIE, J. SURJU PRASAD v. BHAWANI SAHAI, 2 A. 481 ... 877

(4) See REGISTRATION ACT (XX OF 1866), 2 A. 688.

(5) See REGISTRATION ACT (VIII OF 1871), 1 A. 274, 318, 442; 2 A. 40, 96, 198, 216.

(6) See REGISTRATION ACT (III OF 1877), 2 A. 46, 431, 851.

(7) See RELEASE. 2 A. 554.

Registration Act (XX of 1866).

(1) *S. 17—Bond—Mortgage—Registration*—The immoveable property charged by a bond payable by instalments, dated the 17th December 1866, was charged for both principal and interest, and the first instalment was payable within three years from the date of the bond with the accumulated interest, and the amount then becoming due exceeded Rs. 100 *Held*, in a suit on the bond, that it was an instrument creating an interest in immoveable property of the value of Rs. 100 and upwards, and under s. 17 of Act XX of 1866 required registration. BANNO v. PIR MUHAMMAD, 2 A 688 ... 1019

(2) S. 52—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 377.

(3) Ss. 52, 53—See LIMITATION ACT (IX OF 1871), 1 A. 586.

(4) Ss. 52, 53, 54 and 55—See APPEAL (GENERAL), 1 A 583.

(5) *S. 53—Bond—Mortgage—Money decree Sale in execution.*—The obligee of a simple mortgage-bond was only entitled, under s. 53, Act XX of 1866, to a money-decree.

Nothing passes to the auction-purchaser at a sale in execution of a money decree but the right, title, and interest of the judgment-debtor at the time of the sale.

Where, therefore, a decree given under s. 53, Act XX of 1866, declared the right of the obligee of a simple mortgage bond to bring to sale the hypothecated property, and such property was sold in execution of the decree, the auction-purchaser could not claim in virtue of the lien created by the bond to defeat a second mortgage. AKHE RAM v. NAND KISHORE, 1 A. 236 (F.B.)=1 Ind. Jur. 100 ... 159

Registration Act (VIII of 1871).

(1) See REGISTRATION ACT (III OF 1877), 2 A. 431.

(2) *S. 17—Mortgage—Registration.* The obligors of a bond for the payment of money charging land agreed to pay the principal amount, Rs 99, within six months after the execution of the bond, and to pay interest every month on the principal amount at the rate of two per cent., and that in the event of default of payment of the interest in any month, the whole amount mentioned in the bond should become due at once. There was no stipulation preventing the obligors from repaying the loan at any time within the six months after which it was reclaimable. *Held*, that the only amount certainly secured by the bond was the principal, and the bond did not therefore need to be registered. AHMAD BAKHSH v. GOBINDI, 2 A. 215=4 Ind. Jur. 40 ... 692

(3) *S. 17, cl (2)—Registration—Mortgage.*—A bond which charged immoveable property with the payment on a day specified therein of Rs 99, the principal amount, and Rs. 6, interest thereon, should have been registered under the provisions of cl. (2), s. 17, Act VIII OF 1871. DARSHAN SINGH v. HANWANTA, 1 A. 274 ... 186

(4) *Ss. 17, 49—Act I of 1872, s. 91 (e)—Receipt for sums paid in part of mortgage-debt—Inadmissibility of unregistered receipt—Parol evidence admissible.*—A receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of s. 17 of Act VIII of 1871 to render it admissible as evidence under s. 49 of the said Act. Under illustration (*e*), s. 91 of Act I of 1872, such payments may nevertheless be proved by parol evidence, which is not

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excluded owing to the inadmissibility of the documentary evidence. DALIP SINGH v. DURGA PRASAD, 1 A. 442 ... 303

(5) *Ss.* 17, *cl.* (2) 49—*Registration—Mortgage.*—A bond for the payment of Rs. 83-8-0, on demand, together with interest thereon at the rate of two per cent. per mensem, which charges immoveable property with such payment, does not, though the amount due on it may, in time, exceed Rs. 100, purport to create an interest of the value of Rs. 100 within the meaning of the Registration Act, and its registration is therefore optional. KARAN SINGH v. RAM LAL, 2 A. 96=3 Ind. Jur. 470 ... 609

(6) *Ss.* 17. *cl.* (2), 49—*Registration—Mortgage.*—The value of the interest created by a mortgage of immoveable property is estimated, for the purposes of the Registration Act of 1871, not by the amount of the principal money thereby secured, but by the amount of such money and the interest payable thereon.

Consequently, a bond, dated the 9th August, 1873, which charged certain immoveable property with the payment on the 31st May, 1874, of Rs. 98, and interest thereon at the rate of one per cent. per mensem, should have been registered. RAJPATI SINGH v. RAM SUKHI KUAR, 2 A. 40=3 Ind. Jur. 220 ... 570

(7) *Ss.* 18, 50—*Act* III *of* 1877, *ss.* 17, 18, 50—*Registered and unregistered documents*—A document creating an interest in immoveable property the registration of which under Act VIII of 1871 was compulsory and which was registered under that Act, does not under s. 50 of that Act, take effect as regards such property against an unregistered document relating to such land, the registration of which under Act VIII of 1871 was optional.

Held that the provisions of s. 50 of Act III of 1877 did not apply to documents executed after the first day of July 1871 and before Act III or 1877 came into operation. BHOLA NATH v. BALDEO, 2 A. 198=3 Ind. Jur. 568 679

(8) S. 35—*Non-compliance with provisions of.*—The words of s. 25 of the Indian Registration Act VIII of 1871, which provide that " is all or any of the persons by whom the document (*i.e.*, the document presented for registration) purport to be executed deny its execution or if any such person appears to be a minors, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead, and his representative or assign denies its execution, the registering officer shall refuse to register the document," taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor an idiot or a lunatic. Since such a construction would cause great difficulty and injustice and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed and *quoad* such persons as appear to be under any of the disabilities mentioned.

The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the registration Act. MUHAMMAD EWAS v. BIRJ LAL, 1 A. 465 (P.C.)=4 I. A. 166=3 Sar. P.C J. 738=3 Suth. P.C.J. 438 ... 320

(9) Ss. 53, 54 and 55—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 377.

(10) *S.* 73—*Refusal to register—Petition to have Document registered—Person "claiming" under Document.*—A deed of sale, executed by the vendor alone, which recited that the vendor had received the purchase-money, and that the purchaser had been put into possession, was presented for registration by the vendor, the purchaser not being present. The Registrar refused to register the document on the ground that the deed had not been delivered and no consideration had passed, the vendor having stated that he had not received the purchase-money. In refusing to register, the Registrar believed that the deed was of the vendor's own creation. The vendor applied by petition to the High Court to establish his right to have the document registered. The alleged purchaser repudiated the sale.

Held (by the majority of the Full Bench) that as it appeared on the face of the document itself that the petitioner was not a person " claiming " under it, the petition could not be entertained under the provisions of s. 73 of the Registration Act.

Per STUART, C.J.—That the mere fact that it did not appear on the face of the deed that the petitioner could claim under it did not preclude the

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Court from entertaining the petition, but that, under the circumstances of the case, the registration of the deed should not be ordered.

Per OLDFIELD, J.—That it was the duty of the Court to order the registration of the deed, as it was duly executed and the requirements of the law fulfilled, without entering into the question whether or not the petitioner could claim under it. *In the matter of the petition of* BISH NATH, 1 A. 318 (F B.) ... 218

Registration Act (III of 1877).

(1) Ss. 17, 18, 50—See REGISTRATION ACT (VIII OF 1871), 2 A. 198.

(2) *Ss.* 36, 75, 77—*Contract of sale—Suit to enforce registration of conveyance.—Held*, where a person had agreed to sell another certain immoveable property and had conveyed the same to him by a deed of sale which under the Registration Act of 1877, required registration, and the vendor refused to register such deed, that it was not incumbent on the vendee to take steps under that Act to compel the vendor to register before he sought relief in the civil Court, but that he was at liberty without doing so to sue the vendor in the civil Court for the registration of such deed. RAM GHULAM v. CHOTEY LAL, 2 A. 46 ... 575

(3) *S.* 50—*Effect of registration and non-registration—Optional and compulsory registration - Act* VIII *of* 1871.—*Held* that under s. 50 of Act III of 1877 a document of which the registration was compulsory under that Act, and which was registered thereunder, took effect, as regards the property comprised in the document, as against another document of a prior date, relating to the same property, executed while Act VIII of 1871 was in force, and which did not require under that Act to be registered, and was not registered under it. GANGA RAM, GUARDIAN OF KUAR GIR PRASAD v. BANSI, 2 A. 431=4 Ind. Jur. 524 ... 841

(4) *S.* 50—*Optional and compulsory registration—Act* VIII *of* 1871—*Act* I *of* 1868, *s.* 6—*Registered and unregistered document —Held*, in the case of a document executed while Act VIII of 1871 was in force, the registration of which under that Act was optional, and which was not registered thereunder, and of a document executed after Act III of 1877 had come into force, the registration of which under that Act was compulsory, and which was registered thereunder, both documents relating to the same property, that under the provisions of s. 50, Act III of 1877, the registered document took effect as regards such property against the unregistered document, the provisions of s. 6 of Act I of 1868 notwithstanding. LACHMAN DAS v. DIP CHAND, 2 A. 851 (F.B.) ... 1131

Regulation XV of 1793 (Bengal interest).

See INTEREST, 1 A. 344.

Regulation XIX of 1793 [Bengal Revenue-free Lands (Non-Badshahi Grants)].

(1) S. 1—See ASSIGNMENT, 2 A. 732.

(2) S. 10—See GRANT, 2 A. 545.

Regulation XLI of 1795 (Bengal Non-Badshahi Lakhiraj).

S. 10—See GRANT, 2 A 545.

Regulation IV of 1797 (Bengal Criminal Procedure).

S. 3—See ACT XVII OF 1862 (REPEALING ENACTMENTS RELATING TO CRIMINAL LAW), 1 A. 599.

Regulation XXXIV of 1803 (Bengal interest, Ceded Provinces).

Mortgage—Usury laws under Reg. XXXIV *of* 1803—*Obligation on mortgagee to file accounts.*—In a mortgage dated in 1852 of *malikana* fixed for the period of settlement, it was agreed that the mortgagee should collect the village *jama*, pay the Government demand, and take the *malikana*, of which part was to be received by him as interest on the money lent at one per cent. per mensem, and the balance, *viz.*, Rs. 565 per annum, was to be returned by him as the costs of collection. No accounts were to be rendered of the *malikana* collected during the time of mortgagee's possession.

If this agreement had been a contrivance for securing to the mortgagee a higher rate of interest than that to which he was then by law entitled, it would have been void under the usury laws (in force under Reg. XXXIV of 1803 until the passing of Act XXVIII of 1855), and would not have prevented the accounts from being taken.

But as the Courts found that the Rs. 565 per annum constituted a fair percentage, which it had been *bona fide* agreed should be allowed to the

Regulation XXXIV of 1803 (Bengal Interest, Ceded Provinces)—(*Concluded*). PAGE

the mortgagee for the costs of collection, it was *held* that the agreement had been rightly treated as sufficient answer to a suit based on the assumption that the whole of the mortgage-money, principal and interest, would be satisfied if the accounts (contrary to the agreement) were taken on the basis of charging the mortgagee with the Rs. 65, or so much thereof as he should fail to prove had been actually expended in the collection.

If the amount received by the mortgagee had been fluctuating, production of the accounts might have been necessary for a decision on the validity of the agreement set up. But it could not be said that by no agreement could a mortgagee relieve himself from the obligation of filing accounts under the 9th and 10th sections of Reg. XXXIV of 1803; and in this case he had done so: the only sum that he was to receive beyond the interest allowed by law being an unvarying balance found to be a fair allowance for the costs of collection. BADRI PRASAD v. MURIL DHAR, 2 A. 593 (P.C.) = 6 C L.R. 257 = 7 I. A. 51 = 4 Ind. Jur. 257 = 4 Sar. P.C.J. 100 = 3 Suth. P C.J. 708 ... 954

Regulation XVII of 1806 (Bengal Land Redemption and Foreclosure).

(1) See INTEREST 1 A. 344.

(2) See MORTGAGE (FORECLOSURE). 1 A. 297.

(3) *S.* 6.—*Parol conditional mortgage.*—*K* made over to *G*, from whom he had borrowed certain moneys, certain land on the oral condition that, if such moneys were not repaid within two or three months, such land should become *G*'s absolutely. *Held* that as there was no deed of conditional mortgage, the provisions of Reg. XVII of 1806 were not applicable to *G*, and he became the owner of such land after the expiry of three months, from the date on which it was made over to him, in consequence of the amount of the loan not having been repaid to him. GOBAR DHAN DAS v. GOKAL DAS, 2 A. 633 ... 981

(4) *S.* 8—*Conditional Sale—Mortgage—Foreclosure.*—Where land which has been conditionally sold is subsequently mortgaged, the second mortgagee, being the mortgagor's "legal representative," within the meaning of that term in s. 8 of Reg. XVII of 1806, is entitled on foreclosure proceedings being taken by the conditional vendee to the notice required by that section, and cannot be deprived by the conditional vendee of the possession of the land, notwithstanding foreclosure, where no such notice has been given to him. DIRGAJ SINGH v. DEBI SINGH, 1 A. 499 = 2 Ind. Jur. 464 ... 343

(5) *S.* 8—*Mortgage—Property situated partly in Oudh and partly in the North-Western Provinces Foreclosure.*—Where a mortgage of land situated partly in the district of Shahjehanpur in the North-Western Provinces and partly in the district of Kheri in the Province of Oudh was made by conditional sale, and the mortgagee applied to the District Court of Shahjehanpur to foreclose the mortgage and render the conditional sale conclusive in respect of the whole property, and that Court granted such application, *held*, with reference to the ruling of the Privy Council in 4 M I.A. 392 that where mortgaged property is situated in two districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district, that the circumstance that Oudh was in some respects a distinct province from the North-Western Provinces did not take the case out of the operation of that ruling, inasmuch as Reg. XVII of 1806 was in force in Oudh as well as in the North Western Provinces at the time of the foreclosure proceedings. SURJAN SINGH v. JAGAN NATH SINGH, 2 A. 313 ... 758

Regulation VI of 1819 (Bengal Ferries, Police).

(1) See CONTRACT ACT (IX OF 1872), 2 A. 411.

(2) S. 6—See PENAL CODE (ACT XLV OF 1860), 1 A. 527.

Regulation VII of 1822 (Bengal Land Revenue Settlement).

S. 9, *cl.* (i)—*Act XIX of 1873, s.* 66—*Cesses—Civil Court—Suit for declaration of zemindari rights to cesses.*—Notwithstanding that zemindari cesses cannot be collected until recognised and sanctioned by the settlement authorities, there is nothing in Reg. VII of 1822 or Act XIX of 1873 to preclude civil Court from taking cognizance of suits seeking a declaration of zemindari rights to such cesses. AKBAR KHAN v. SHEORATAN, 1 A. 373 = 1 Ind. Jur. 778 ... 256

Regulation VII of 1825 (Bengal Execution of Decrees). PAGE

Mortgage—Act VIII *of* 1859, *ss.* 5, 13—*Account of sums realized on collective mortgage of lands in separate districts - Decree for redemption of lands within jurisdiction not barred by Reg.* VII *of* 1825, *because based on such account.*—In a suit for redemption of lands lying within the district of Mirzapur, but included in the same mortgage with other lands lying within the domains of the Maharaja of Benares, the Subordinate Judge of Mirzapur took an account of the sums realized by the mortgagee from all the lands mortgaged, and finding that these sums were sufficient to discharge the entire mortgage debt, gave the plaintiff the decree sought; the lower appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying *ultra vires* of the Mirzapur Court. *Held*, that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for the redemption of the property lying within the local limits of its jurisdiction, notwithstanding that in doing so it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja. GIRDHARI v. SHEO RAJ, 1 A. 431=2 Ind. Jur. 146 ... 295

Release.

Act X *of* 1877, *s.* 578—*Reception in evidence of unstamped and unregistered document—Appeal—Fraud—Act* VIII *of* 1859, *s.* 350—*Stamp—Registration—Mortgage.*—In June, 1875, *L* executed a bond in favour of *S* in which he mortgaged, amongst other property, a village called Chand Khera, as security for the payment of certain moneys. He subsequently sold such village to *A*, concealing the fact that it had been mortgaged to *S*. On this fact coming to the knowledge of *A*, he threatened *L* with a criminal prosecution, whereupon *L* proposed to *S* in writing that the security of a share in a village called Kelsa, which he alleged was his property, should be substituted for the security of Chand Khera. *S* accepted this proposal by a letter in which he referred to *L*'s proposal in terms. It subsequently appeared that the share in Kelsa did not belong to *L*, but to another person. *S* having sued upon his bond claiming to enforce thereunder a lien upon Chand Khera, *A* set up as a defence to the suit that *S* had agreed to substitute Kelsa for Chand Khera in the bond, producing *S*'s letter as evidence of the agreement. *Held* that such letter operated as a release and should therefore have been stamped and registered.

Held also that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection and may direct that the document be stamped and the penalty imposed.

Held also that *L*'s fraud vitiated *S*'s agreement to substitute the security of Kelsa for the security of Chand Khera in the bond, and *S* was entitled, notwithstanding *A* might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond. SAFDAR ALI KHAN v. LACHMAN DAS, 2 A. 554=5 Ind. Jur. 92 ... 927

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See MORTGAGE (REDEMPTION), 1 A. 194.

Remand.

(1) By appellate Court—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 669.
(2) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 165.
(3) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 908.

Rent.

(1) Res Judicata.—*Suit for rent of the nature cognizable in a Small Cause Court.—Determination of title.*—The incidental determination of an issue of title in a suit for rent of the nature cognizable in a Court of Small Causes does not finally estop the parties to such suit from raising the same issue in a suit brought to try the title. INAYAT KHAN v. RAHMAT BIBI, 2 A. 97 ... 610
(2) See ACT X OF 1859 (BENGAL RENT), 1 A. 301.
(3) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 217, 366.
(4) See LANDLORD AND TENANT, 2 A. 517.
(5) See SURETY, 2 A. 582.

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See ASSIGNMENT, 2 A. 732.

Repeal.

(1) Repealing of old Law—Effect of procedure under new law—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 94.

(2) See ACT I OF 1868 (GENERAL CLAUSES), 1 A. 668.

Res Judicata.

(1) *Act* VIII *of* 1859, *s.* 2.—When a plaintiff claims an estate, and the defendant being in possession, and knowing that he has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff.

Where, therefore, the defendants purchased an estate in the plaintiff's possession, and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that the sale to the defendants was fraudulent and without consideration, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property—a claim which he might have asserted in reply to the former suit, *held* that he was debarred from suing to enforce such a claim. JADU LAL v. RAM GHOLAM, 1 A. 316=1 Ind. Jur. 560 ... 217

(2) *Act* XVIII *of* 1873, *s.* 95—*Determination under cl.* (*n*) *of title.*—*S* applied to the Revenue Court, under cl. (*n*) of s. 95 of Act XVIII of 1873, for the recovery of the occupancy of certain land, alleging, that the occupancy of such land had devolved upon her by inheritance, and that the landholder had wrongfully dispossessed her. The landholder set up as a defence to this application that *S* was not entitled to the occupancy of the land by inheritance, but that she was a trespasser. The Revenue Court determined that *S* was entitled to the occupancy of the land by inheritance, and granted her application. The landholder then sued *S* in the Civil Court for the possession of the land.

Held, per PEARSON, J. and TURNER, J. that the question of *S*'s title to the occupancy of the land was, with reference to the decision of the Revenue Court, *res judicata* and could not again be raised in the Civil Court.

Per SPANKIE, J. and OLDFIELD, J., *contra.* SHIMBHU NARAIN SING v. BACHCHA, 2 A. 200 (F B.) ... 680

(3) *Determination of title—Act* XIX *of* 1863, *ss.* 8, 9.—Where *M* the recorded proprietor of an estate applied to have his share of such estate separated, and an objection was made to such separation by *H*, another recorded proprietor of the estate, which raised the question of *M*'s proprietary right to a portion of his share, and the Collector proceeded under s. 8, Act XIX of 1863, to enquire into the merits of such objection, and decided that *M*'s interest in such portion of his share was that of a mortgagee and not a proprietor, and *M* did not appeal against such decision and it became final, *held*, in a suit in the Civil Court by *M* against *H* in which he claimed a declaration of his proprietary right to such portion, that a fresh adjudication of his right was barred. HAR SAHAI MAL v. MAHARAJ SINGH, 2 A. 294 ... 745

(4) *Hindu widow—Reversioner.*—On her husband's death, a Hindu widow obtained possession of his estate as his heir, and, in a suit against her for possession thereof by certain persons claiming to succeed to the estate as rightful heirs, a decree was obtained by them. *Held* that such decree was a bar to a new suit against those persons by the daughter claiming the estate in succession to the widow, the decree having been fairly and properly obtained against the widow. NAND KUMAR v. RADHA KUARI, 1 A. 282 ... 191

(5) See ACT XIX OF 1873 (N.W P. LAND REVENUE), 2 A. 839.

(6) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 75, 480, 560.

(7) Seee CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 843.

(8) See HINDU LAW (GIFT), 1 A. 734.

(9) See LANDLORD AND TENANT, 2 A. 428.

(10) See LIS PENDENS, 1 A. 588.

(11) See RENT, 2 A. 97.

(12) See SURETY, 2 A. 582.

Restitution of Conjugal Rights.

See MAHOMEDAN LAW (DOWER), 1 A. 483; 2 A. 831.

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(1) Jurisdiction of—See SURETY, 2 A. 582.
(2) Power of—See CIVIL PROCEDURE CODE (ACT X OF 1877) 2 A. 264.
(3) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 217.

Review.

(1) Of judgment—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 363; 2 A. 287.
(2) Of judgment—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 686.
(3) Of judgment—See STATUTE 24 AND 25 VICT., C. 104 (HIGH COURT'S ACT), 1 A. 296.

Revision.

(1) High Court's powers of—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 1, 139.
(2) See HIGH COURT, 1 A. 101.

Right of Occupancy.

(1) See ACT XVIII OF 1873 (N.W.P. RENT), 2 A. 451.
(2) See JURISDICTION (OF CIVIL COURT), 1 A. 448.

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See PENAL CODE (ACT XLV OF 1860), 2 A. 139.

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(1) In execution of decree—See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 353.
(2) See ATTACHING CREDITOR, 1 A. 333.
(3) See CHARGE, 2 A. 698.
(4) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 181, 400.
(5) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A 299, 686, 780, 850.
(6) See CONVEYANCE, 2 A. 787.
(7) See COURT FEES, 2 A. 196.
(8) See EXECUTION OF DECREE, 1 A. 212, 727; 2 A. 828.
(9) See HINDU LAW (ALIENATION), 2 A. 141.
(10) See LIS PENDENS, 1 A. 588.
(11) See MONEY DECREE, 1 A. 240.
(12) See PARTIES, 2 A. 107.
(13) See REGISTRATION ACT (XX OF 1866), 1 A. 236.
(14) Of share of mortgage-property towards mortgage-decree—See MORTGAGE (CONTRIBUTION), 2 A. 115.
(15) *Vendor and purchaser—First and second purchaser.*—The proprietor of certain immoveable property conveyed it first to one person and then to another. The first purchaser sued the vendor and the second purchaser for the possession of the property, alleging that he had been put in possession of it but had been ousted by the second purchaser. *Held* that the first sale was not void by reason of the non-payment of the purchase-money, and that the second sale being invalid as having been made by a person who had no rights and interests remaining in the property, the second purchaser was not a representative of the vendor and entitled to receive the purchase-money found to be still due to him from the first purchaser, and to retain possession of the property until the receipt of that purchase-money. RAM LAKHAN RAI v. BANDAN RAI, 2 A. 711=5 Ind. Jur. 324. 1034
(16) See DECREE, 1 A. 348.
(17) See EXECUTION OF DECREE, 1 A. 568.

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(1) See ATTACHING CREDITOR, 1 A. 333.
(2) See COURT FEES, 1 A. 596; 2 A. 196.
(3) See EXECUTION OF DECREE, 1 A. 727.

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See CIVIL PROCEDURE CODE (ACT X OF 1877), 1 A. 687.

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(1) See ACT VI OF 1864 (WHIPPING), 1 A. 666.
(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 751 ; 2 A. 835.

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(1) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 91, 252.
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See LIMITATION, 1 A. 683.

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See LIMITATION ACT (IX OF 1871), 1 A. 34.

Sir land.

(1) *Suit for Profits—Sir land—Ex proprietary tenant — Rent —Act* XVIII *of* 1873, *ss.* 7, 14 —A certain mahal, of which the plaintiff in this suit claimed a one-third share of the profits for a certain year, belonged in equal shares to the defendant (lambardar), and *S* and *R*, his two brothers, who had certain sir-land in partnership. The plaintiff had acquired the share of *S* by auction purchase, *S* thus becoming an ex proprietary tenant. The sir-land was not included in the rent-roll of the mahal, but was admitted by the defendant to be assessable with rent at a certain rate per bigha. *Held* that, whatever might be the course proper to be taken for the purpose of assessing such sir-land or *S*'s share of it with rent, and notwithstanding that such course had not been taken, the plaintiff was entitled in this suit to claim and obtain his share in the profits of the sir-land. MUHAMMAD ALI v. KALIAN SINGH, 1 A. 659 ... 460
(2) See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 459.
(3) See JURISDICTION (OF CIVIL COURT), 1 A. 448.

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Buying or disposing of a person as a slave—See PENAL CODE (ACT XLV OF 1860), 2 A. 723.

Small Cause Court.

(1) *Act* XI *of* 1865, *Ss.* 50, 51—*Execution of the decree of a Court of Small Causes against immoveable property* —The Judge of a Court of Small Causes, who has been duly invested with the powers of a Subordinate Judge under the provisions of s. 51 of Act XI of 1865, has "general jurisdiction" within

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the meaning of s. 20 of that Act, and can consequently, under the provisions of that section, enforce a decree under that Act against the immoveable property of the judgment debtor GOPAL v NANKU 1 A. 624... 435

(2) See ACT XI OF 1865 (MOFUSSIL SMALL CAUSE COURTS), 1 A. 87.
(3) See APPEAL (SPECIAL APPEAL), 2 A. 112.
(4) See CESS. 1 A. 414.
(5) See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 383.
(6) See CONTRACT ACT (IX OF 1872), 2 A. 671.
(7) See HAQ-I-CHAHARUM, 2 A. 905.
(8) See RENT, 2 A. 97.

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See ACT XV OF 1873 (N.W.P. AND OUDH MUNICIPALITIES), 1 A. 557.

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(1) See ACT XX OF 1865 (PLEADERS AND MUKHTARS), 2 A. 511.
(2) See PRIVY COUNCIL, 1 A. 688.

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(1) Of contract—See LIMITATION ACT (XV OF 1877), 2 A. 718.
(2) See SPECIFIC RELIEF ACT (I OF 1877), 1 A. 555.

Specific Relief Act (I of 1877).

S. 27, cl. (b)—*Misjoinder—Contract—Specific performance.*—The plaintiffs sued to enforce an agreement for the execution of a conveyance of certain immoveable property, and for the possession of such property, making the party to such agreement and the persons who had, subsequently to the date of the same, purchased such property in execution of decree, defendants in the suit, on the allegation that such persons had purchased in bad faith and with notice of the agreement. *Held*, with reference to s. 27 of Act I of 1877, that, under such circumstances, there was not necessarily a misjoinder of causes of action. GUMANI v. RAM CHARAN, 1 A. 555 ... 384

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See PENAL CODE (ACT XLV OF 1860), 2 A. 522, 766.

Stamp.

(1) See LIMITATION ACT (IX OF 1871), 2 A. 641.
(2) See REGISTRATION, 2 A. 481.
(3) See RELEASE, 2 A. 551.
(4) See STAMP ACT (I OF 1879), 2 A. 654, 664.

Stamp Act (XVIII of 1869).

(1) *S. 34—Act I of 1879—Offence against the Stamp Laws.*—The Collector being primarily responsible for the prosecution of offences against Stamp Acts of 1869 and 1879 should not himself try, as a Magistrate, a person accused of an offence against either of those Acts. EMPRESS OF INDIA v. DEOKI NANDAN LAL, 2 A. 806 ... 1099

(2) Sch. II, No. 5—See LIMITATION ACT (IX OF 1871), 2 A. 641.

Stamp Act (I of 1879).

(1) See STAMP ACT (XVIII OF 1869), 2 A. 806.

(2) *Ss. 3, cl. (4), 7, and sch. i, No. 5, (c)—Stamp—Bond—Agreement.*—One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of the instrument, to pay the other party thereto a penalty of Rs. 5,000, being regarded as a "bond," within the meaning of Act I of 1879, such instrument, if that clause were not so regarded, being an agreement chargeable under that Act with a stamp duty of eight annas, *held* (STUART, C.J., dissenting) that the instrument was chargeable, under s. 7 of that Act, with the stamp-duty leviable on a bond for Rs. 5,000.

Per STUART, C.J.—That for the purposes of that Act the penal clause in the instrument should not be regarded separately as a bond, but simply as one of the several clauses making up the entire agreement, and the instrument, was only chargeable with a stamp duty of eight annas. REFERENCE BY BOARD OF REVENUE, N.W.P. UNDER ACT I OF 1879, 2 A. 654 (F.B.)=5 Ind. Jur. 264. ... 996

(3) *Ss. 3, cl. (11), 29, and sch. i, No. 37—Instrument of partition—Stamp.*—*Held* that the words "the final order" used in the definition of an

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"instrument of partition" in Act I of 1879 mean not the order authorising a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. Also that the stamp duty chargeable under that Act on an instrument of partition is chargeable in respect of the entire property sought to be divided, and not merely in respect of that portion of it allotted to the applicant for partition. Also that for the purposes of that Act the value of the property is to be computed with reference to its market value and not with reference to the Court Fees Act. 1870. REFERENCE BY BOARD OF REVENUE, N.W.P. UNDER ACT I OF 1879, 2 A. 664 (F.B.) ... 1002

Statute 11 and 12 Vict., c. 21 (Insolvent Act).

Stat. 11 *and* 12 *Vict*, c. 21, ss. 21, 24, 26, 32—"*Voluntary*" *conveyance by insolvent.*—Where two days before a person was adjudicated an insolvent and his property had by order vested in the Official Assignee, under the provisions of Stat. 11 and 12 Vict., c. 21, such person had not spontaneously, but in consequence of being pressed, assigned to a particular creditor certain property, *held* by STUART, C. J., that such assignment was not "voluntary" within the meaning of s. 24 of that Statute and was therefore not fraudulent and void under that section as against the Official Assignee. *Held* by PEARSON, J, that such assignment was not a voluntary one in the sense that it was made spontaneously without pressure, but as the vesting order was not passed on a petition by the insolvent for his discharge that section was not relevant to the case. SHEO PRASAD v. A. B. MILLER, OFFICIAL ASSIGNEE TO THE HIGH COURT, CALCUTTA, 2 A. 474 ... 872

Statute 24 and 25 Vict., c. 104 (High Court's Act).

(1) S. 15—*High Court Powers of Superintendence—Act* VIII *of* 1859, s. 378—*Review of judgment.*—Where a Court subordinate to the High Court rejected an application for a review of judgment, refusing to consider the grounds of the same because the decree of which a review was sought was given by its predecessor, the High Court, in the exercise of its powers of superintendence under s. 15 of the High Court's Act, directed such Court to consider the grounds. *In the matter of the petition of* MATHRA PERSHAD, 1 A. 296 ... 202

(2) S. 15—See HIGH COURT, 1 A. 101.

Statute 40 Vict., c. 7 (Mutiny Act).

S. 99—*Military Officer—Execution of decree.*—Where with reference to s. 99 of the Mutiny Act, a decree for money made against a military officer serving in India directed that the judgment-debt should be stopped out of a moiety of such officer's pay, *held* that the decree-holder could not obtain satisfaction of the decree by attachment of such officer's moveable property. MERCER v. NARPAT RAI, 1 A. 730=3 Ind. Jur. 120 ... 510

Stolen Property.

(1) See ACT VI OF 1864 (WHIPPING), 1 A. 666.
(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 379; 2 A. 276.

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See CIVIL PROCEDURE CODE (ACT XXIII OF 1861), 1 A. 272.

Sub-Proprietor.

See ACT XVIII OF 1873 (N.W.P. RENT), 1 A. 366.

Succession Act (X of 1865).

S. 269—*Will—Executor, Power of—Mortgage—Power of sale.*—Certain persons, being executors of the will of an Englishman domiciled in India, such will having been made after the Indian Succession Act came into operation, and charging the testator's estate with the payment of his debts, having as such executors borrowed certain moneys from a bank wherewith to discharge debts incurred by them in the administration of the estate of the testator, gave as such executors to such bank a bond for the payment of such moneys on a certain date. By a second instrument, bearing the same date as the bond, they mortgaged as such executors aforesaid to the manager of such bank all their right, title, and interest in certain real estate of the testator as security for the payment of the moneys, authorising and empowering, in default of payment of the same,

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the manager, his successors or assigns, absolutely to sell such real estate, either by private sale or public auction, for the realisation of the moneys, and to sign a conveyance or conveyances, and a receipt or receipts for the purchase-money, and declaring that such conveyance or conveyances, receipt or receipts, should be as valid as if the same were signed by them. By a third instrument, bearing the same date as the other two, they as such executors aforesaid constituted the manager of the bank for the time being their true and lawful attorney for them and in their names and as their act and deed to sell such real estate and to do all acts necessary for effecting the premises. Default having been made in payment of the moneys, by an instrument in writing which recited the instruments already mentioned the manager of the bank for the time being, described as such, in the exercise of the power of sale and for the purpose of reimbursing to the bank the moneys, granted and conveyed to *B* such real estate and all the estate and interest therein of the executors freed from the mortgage above recited, and the manager for the executors executed the usual covenants for title and further assurance. *B*, having been resisted in obtaining possession of such real estate under such conveyance by a legatee of the testator, sued the legatee and the executors for a declaration of right to, and for possession of, such real estate in virtue of such conveyance. The legatee contended that the executors had no authority to confer a power of sale.

Held (STUART, C.J., dissenting) that the executors had such authority under s. 269 of the Indian Succession Act, and that the conveyance was accordingly valid and operated to transfer the property to *B*. A. L. SEALE v. BROWN, 1 A. 710 (F.B.) = 3 Ind. Jur. 72 ... 496

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See REGISTRATION, 2 A. 481.

Summary Trial.

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 680.

Surety.

(1) *Act* IX *of* 1872, *s.* 127, *illus.* (*c*)—*Surety-bond—Void contract—Want of consideration.*—Where N advanced money to *K* on a bond hypothecating *K*'s property and mentioning *M* as surety for any balance that might remain due after realisation of *K*'s property *M* being no party to *K*'s bond but having signed a separate surety-bond two days subsequent to the advance of the money *held* that the subsequent surety-bond was void for want of consideration under s. 127 of the Indian Contract Act (IX of 1872).

Per STUART, C.J.—The legal position of the surety considered and determined.

Per STUART, C. J.—Remarks on the legal character of the "illustrations" attached to Acts of the Indian Legislature, and opinion expressed that they form no part of these Acts. NANAK RAM v. MEHIN LAL, 1 A. 487 = 2 Ind. Jur. 420 ... 335

(2) Liability of—See ACT XI OF 1865 (MOFUSSIL SMALL CAUSE COURTS), 1 A. 87.

(3) Res judicata—*Mortgage—First and second mortgagees.*—In 1870, *M* granted a certain person a lease of a certain zamindari share, for a term of years, at an annual rent, *L*, as the lessee's surety, hypothecating a mauza called *A* as security for the payment of such rent. In 1871 *L* gave *B* a bond for the payment of certain moneys, hypothecating mauza *A* as security for their payment. In 1872, and again in 1873 *M* obtained a decree in the Revenue Court against his lessee and *L* his surety for arrears of rent. In execution of the decree of 1872 *M* caused *L's* rights and interests in mauza *A* to be put up for sale, and purchased them himself. In 1874 *B* sued *L* and *M* to enforce his lien on mauza *A*. *M* defended this suit on the ground that he was the holder of a prior lien on the property. The Court gave *B* a decree in 1875, holding that he was entitled to an order for the sale of the property, but that it would be competent to *M* to sue to enforce his lien, and that, when he did so, the purchaser under *B's* decree would have the option of discharging the first incumbrance. The property was accordingly put up for sale in execution of *B*'s decree, and was purchased by *B* himself. In 1876 *M* sued *L* and *B* to enforce his lien on the property, claiming to recover by the sale thereof the amount of the arrears of rent

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awarded by the decrees of 1872 and 1872, together with the costs awarded him in the Revenue Court, and interest. *Held*, affirming the judgment of STUART, C. J., that the decree of 1875 did not preclude *M* from claiming to enforce his lien on mauza *A*, nor was his claim affected by the circumstance that he had brought to sale in execution of the decree of the Revenue Court the rights and interests of *L* in that mauza. All that was then sold was the equity of redemption, which was sold to satisfy the money-decree held by *M*. No doubt the proceeds of the sale would after satisfaction of the costs of the decree go *pro tanto* to the satisfaction of the sums secured by the first incumbrance but *M* by selling in execution the mortgagor's equity of redemption did not forego his incumbrance.

Held also that *M* could not enforce his lien for the recovery of the costs incurred by him in the Revenue Courts, as the surety-bond did not provide for the payment of such cost; that he could enforce his lien for the recovery of interest, as that bond did provide for the payment of interest; and that the moneys realized by the sale of the equity of redemption of the property in the execution of the Revenue Court's decree of 1872 must be applied, in the first place, in satisfaction of the costs of the suit in which that decree was made, and then in satisfaction of the arrear sued for in that suit, or the balance of that arrear, and of the arrear sued for in the second suit, with interest at the rate agreed upon in the surety-bond from the date of the accrual of those arrears until realization. BABU LAL v. ISHRI PARSAD NARAIN SING, 2 A. 582 (F B.) ... 947

(4) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 604.

Tenant.

(1) At a fixed rate—See ACT X OF 1859 (BENGAL RENT), 1 A. 301.
(2) At fixed rate—See ACT XVIII OF 1873 (N.W.P. RENT), 2 A. 145.

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(1) Determination of—See RES JUDICATA, 2 A. 200, 294.
(2) Determination of, under a lease by a Revenue Court on an application under s. 39 of Act XVIII of 1873—See LANDLORD AND TENANT, 2 A. 428.
(3) See ACT XIX OF 1873 (N.W.P LAND REVENUE), 2 A. 839.
(4) See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 381.
(5) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 780.
(6) See EXECUTION OF DECREE, 2 A. 828.
(7) See RENT, 2 A. 97.

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(1) See JURISDICTION (OF CIVIL COURT), 1 A. 448.
(2) See LANDLORD AND TENANT, 2 A. 896.

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(1) Of more than one offence—See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 2 A. 644.
(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1872), 1 A. 193.

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(1) *Wajib-ul-arz—Absent share-holders.—Held* that a village administration-paper which provides for the surrender to absent shareholders on their return to the village of the lands formerly held by them does not necessarily constitute a valid trust in their favour, although it may be evidence of such a trust.

Where a village administration-paper provided for the surrender to certain absent share-holders on their return to the village of the lands formerly held by them, but did not contain any declaration of a trust as existing between such absent share-holders and the occupiers of their lands at the time such administration-paper was framed, *held* that the administration-

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paper could not be regarded as evidence of a pre-existing trust between such persons, nor as an admission of such a trust by such occupiers. HARBHAJ v GUMANI, 2 A. 493 ... 555

(2) See CO SHARERS, 2 A. 394.
(3) See RECORD-OF-RIGHTS, 2 A. 460.
(4) See WILL, 2 A. 55.

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(1) Assignment by—See RECORD-OF-RIGHTS, 2 A. 460.
(2) See CO-SHARERS, 2 A. 394.
(3) See FRAUD, 1 A. 403.

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(1) Of suit—See MORTGAGE (REDEMPTION), 2 A. 778.
(2) See COURT FEES ACT (VII OF 1870), 1 A. 360.

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(1) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 415.
(2) See CONVEYANCE, 2 A. 787.
(3) See LIMITATION ACT (XV OF 1877), 2 A. 718.
(4) See SALE, 2 A. 711.

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Good Faith—Fraud—Consideration.—A decree-holder instituted a suit against his judgment-debtor and the latter's son for a declaration that a gift by the judgment-debtor to his son of certain property was fraudulent, and that such property was liable to be taken in execution of the decree. *Held* that, such gift having been made by the donor out of natural love and affection for the donee and in order to secure a provision for him and his descendants, and therefore for good consideration, and having operated, and the donor having reserved to himself sufficient property to satisfy the decree, the mere fact that the donor reserved to himself no property within the jurisdiction of the Court which made the decree was not a ground for holding that such gift was fraudulent, and not made in good faith, and for setting it aside and allowing the decree-holder to proceed against the property transferred by it. The law relating to voluntary alienations explained. NASIR HUSAIN v. MATA PRASAD, 2 A. 891 ... 1159

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(1) See ACT XIX OF 1873 (N.W.P. LAND REVENUE), 2 A. 876.
(2) See CO SHARERS, 2 A. 394.
(3) See MUHAMMADAN LAW (PRE-EMPTION), 1 A. 567.
(4) See PRE-EMPTION, 1 A. 452, 563, 631.
(5) See TRUST, 2 A. 493.

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(1) See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 780.

(2) See EXECUTION OF DECREE, 2 A. 828.

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See ACT VI OF 1864 (WHIPPING), 1 A. 666.

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(1) *Construction—Precatory Trust.—W.R.*, by his will, left to his wife, *M.A R.* the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her. *M A. R.*, by her will, left to their children certain portions of such property, leaving to their child *A.C.R* , amongst other things, certain banking shares. These shares were attached in the execution of a decree against the executors to her estate as belonging to such estate. *Held* that she took under her husband's will a life interest only in his property with a power of appointment in favour of the children, and that the shares belonged to *A.C.R* , and could not be sold in execution of the decree as part of the estate of *M.A.R.* RAYNOR v. THE MUSSOORIE BANK, 2 A. 55 ... 581

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(3) See PRIVY COUNCIL, 1 A. 688.

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(4) "Article"—See ACT XXVI OF 1870 (PRISONS), 2 A. 301.

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(6) "Date of applying"—See LIMITATION ACT (IX OF 1871), 1 A. 580.

(7) "Distinct subjects" – See COURT FEES ACT (VII OF 1870), 1 A. 552; 2 A. 676, 682.

(8) "Dwelling place"—See CIVIL PROCEDURE CODE (ACT VIII OF 1859), 1 A. 51.

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(17) "The last preceding application"—See CIVIL PROCEDURE CODE (ACT X OF 1877), 2 A. 275.

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